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OF THE

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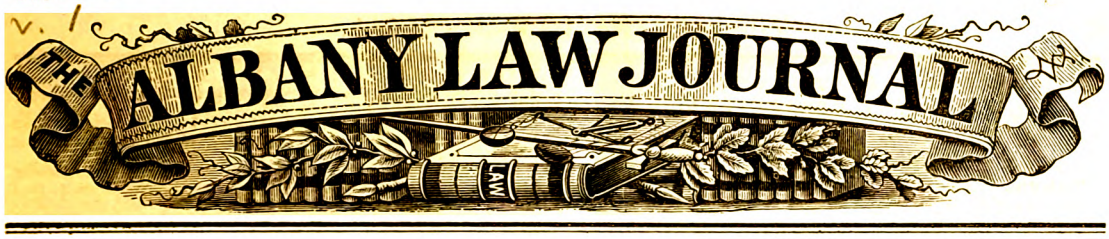

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ISAAC GRANT THOMPSON,
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The Albany Law Journal.

ALBANY, JANUARY 8, 1870.

ON THE STUDY OF FORENSIC ELOQUENCE.

There is another essential, aside from a knowledge of the law, for the successful court lawyer — that is eloquence; that sort of eloquence which Blair defines to be "the art of speaking in such a manner as to attain the end for which we speak." Most young men, who study with a view of coming to the bar, have an ambition, more or less strong, to become advocates — to be able to convince judges and persuade juries by the power of their logic and the graces of their style and utterance; but a visit to our courts is but too likely to show how lamentable the great majority of them fail of achieving their desire.

Lack of perseverance in performing the labor necessary to the student of elocution, or ignorance of the method to be pursued, or, in many cases, a notion that orators, like poets, "are born, not made," has served to make the number of eloquent advocates very small indeed.

The almost universal idea seems to prevail, that industry can effect nothing; that every one must be content to remain just what he happens to be, and that eminence is the result of accident. For the acquirement of any other art, men expect to serve long apprenticeships; to study it carefully and laboriously; to master it thoroughly. If one would learn to sing, he attends a master and is drilled in the elementary principles; and it is only after the most careful discipline that he dares to exercise his voice in public. If he would learn to play a musical instrument, how patiently and persistently does he study and practice, that he may draw out, at will, all its various combinations of harmonious sounds, and its full richness and delicacy of expression. And yet a man will fancy that the grandest, the most complex, the most expressive of all instruments, which is fashioned by the union of intellect with power of speech, may be played upon without study or practice. He comes to it a mere tyro, and thinks to manage all its stops, and command the whole compass of its varied and comprehensive power; he finds himself a mere bungler in the attempt, wonders at his failure, and settles it in his mind forever that the attempt is vain — that it can be done only by genius.

Nothing can be more mischievous and unfortunate to the student than for him to fall into such an error — to hold the opinion that excellence in speaking is a gift of nature and not the result of patient and persistent labor and study. If all men had entertained and acted upon such an opinion, those who have won fame and honor by their eloquence would have remained mute and inglorious. Never would Demosthenes have charmed an Athenian audience, nor Cicero have hurled his denunciations against Cataline. Lord Chatham would have remained simple William Pitt, and Erskine lived an ordinary English barrister; Curran would have been "Orator Mum" to the end of his days, and Choate died "unwept, unhonored, and unsung."

Men who believe that eloquence is the result of genius, and not of labor, are like the dwellers in the East, as described by Sir Joshua Reynolds in his address to the pupils of the Royal Academy. He says: "The travelers into the East tell us, that when the ignorant inhabitants of those countries are asked concerning the ruins of stately edifices yet remaining amongst them the melancholy monuments of their former grandeur and long-lost science, they always answer: 'They were built by magicians.' The untaught mind finds a vast gulf between its own powers and those works of complicated art, which it is utterly unable to fathom; and it supposes that such a void can be passed only by supernatural powers." What Sir Joshua says of painting is true of oratory. Those who know not the *cause* of any thing extraordinary and beyond them may well be astonished at the *effect;* and what the uncivilized ascribe to magic, others ascribe to genius,— two mighty pretenders who, for the most part, are safe from rivalry only because by the terror of their names they discourage in their own peculiar sphere that resolute and sanguine spirit of enterprise which is essential to success. But as has been well said, "all magic is science in disguise," and it is our object in this article to proceed to take off the mask — to show that the mightiest objects of our wonder, so far as eloquence is concerned, are mere men like ourselves, have attained their superiority by steps which we can follow, and that we can walk in the same path even though there remain at last a broad space between us.

Lord Chesterfield was not very far wrong when, in his letters to his son, he told him that any man of reasonable abilities might make himself an orator; not an orator like Cicero's magnificent myth, who should have "the acuteness of the logician, the wisdom of the philosophers, the language almost of poetry, the memory of lawyers, the voice of tragedians, the gesture of the best actors;"* such orators, we admit, must be *nascitur, non fit* — born, not made — and they are rarely to be found; but orators like Pitt and Fox, like Mansfield and Erskine, like Pinkney and Choate — orators who can "sway listening senates," who are stormy masters of the jury-box.

Chesterfield was perhaps an illustration of his own theory for he said that he at one time determined to make himself the best speaker in Parliament and set about a severe course of training for it; and we have the opinion of so able a judge as Horace Walpole that he was the first speaker of the House. Every schoolboy can tell you of the gigantic labors of Demosthenes in training himself for a public speaker. It will be refreshing for any student who desires to improve himself in speaking to turn to Plutarch's life of Demosthenes, and read of his early struggles with obstacles which would have discouraged at the

* Cicero's De Oratore, Book I, c. 28.

threshold the great majority of mankind. Laughed at and interrupted by the clamor of the people in his first efforts, by reason of his violent and awkward manner, and a weakness and stammering in his voice, he retired to his house with covered head and in great distress, yet not disheartened. At one time he complained to Satyrus, the player, "that though he was the most laborious of all the orators, and had almost sacrificed his health to that application, yet he could gain no favor with the people." Satyrus seems to have been a judicious adviser, and proceeded to correct his faults as Hume says, he who teaches eloquence must—by *example*. He requested Demosthenes to read some speech from Euripides or Sophocles. When he had done, Satyrus pronounced the same speech with so much propriety of action that it appeared to the orator quite a different passage. "He now understood so well," says Plutarch, "how much grace and dignity action adds to the best oration, that he thought it a small matter to premeditate and compose, though with the utmost care, if the pronunciation and propriety of gesture were not attended to. Upon this he built himself a subterranean study, whither he repaired every day to form his action and exercise his voice; and he would often stay there two or three months together, shaving one side of his head, that if he should happen to be ever so desirous of going abroad, the shame of appearing in that condition might keep him in." The contemporaries of Demosthenes esteemed him as a man of but little genius, and concluded that all his eloquence was the result of labor. Certain it is that he was seldom heard to speak *extempore;* and though often called upon in the assembly to speak, he would not do it unless he came prepared. It is undoubtedly true that nature had sowed in Demosthenes the seeds of a great orator; but they were brought to perfection only by the most patient labor and severe discipline—labor and discipline that would make any student of the law, of ordinary judgment and sense, the equal of Pinkney, of Wirt, or of Choate.

Think of the eloquence of Cicero! How wonderful the grandeur and magnificence of his style; how copious and elegant his diction; how various and comprehensive his knowledge; surely, we say, like the dwellers in the East, this is the work of magic—of genius. But when we take off the mask we find that it is mainly the result of careful, unflagging, untiring study and practice. Middleton says: "His industry was incredible, beyond the example or even conception of our days; this was the secret by which he performed such wonders, and reconciled perpetual study with perpetual affairs."

Nor were these orators of antiquity singular in their devotion to the *art* of speaking. All the great orators of modern times have emulated their greatness by emulating their love of labor. Lord Chatham, who has been justly regarded as the most powerful orator of modern times, was from his early youth a most laborious and devoted student of oratory. His biographer says of him: "At the age of eighteen, Mr. Pitt (afterward Lord Chatham), was removed to the University of Oxford. Here, in connection with his other studies, he entered on that severe course of rhetorical training, which he often referred to in after life as forming so large a part of his early discipline. He took up the practice of writing out translations from the ancient orators and historians, on the broadest scale. Demosthenes was his model; and we are told that he rendered a large part of his orations again and again into English, as the best means of acquiring a forcible and expressive style. . . . As a means of acquiring copiousness of diction and an exact choice of words, Mr. Pitt also read and re-read the sermons of Dr. Barrow till he knew many of them by heart. With the same view he performed a task, to which, perhaps, no other student in oratory has ever submitted. *He went twice through the folio dictionary of Bailey, examining each word* attentively, dwelling on its peculiar import and modes of construction, and thus endeavoring to bring the whole range of our language completely under his control. At this time, also, he began those exercises in elocution by which he is known to have obtained his extraordinary powers of delivery. Though gifted by nature with a commanding voice and person, he spared no effort to add everything that art could confer for his improvement as an orator." His success was commensurate with his zeal. Garrick himself was not a greater actor, in that higher sense of the term in which Demosthenes declared *action* to be the first, and second, and third thing in oratory. The labor which he bestowed on these exercises was surprisingly great. Probably no man of genius since the days of Cicero has ever submitted to an equal amount of drudgery.

Lord Mansfield, equally famous as an advocate and judge, affords us another example of unwearying, patient discipline. He studied oratory with the greatest fervor and diligence. He read everything that had been written on the subject of the art; he made himself familiar with all the great masters of eloquence in Greece and Rome, and spent much of his time in translating their finest productions as the best means of improving his style. During his study of the law at Lincoln's Inn, he carried on the practice of oratory with the utmost zeal, and was a constant attendant and speaker in a debating society which he had joined. One day, says his biographer, he was surprised by a friend, who suddenly entered his room, in "the act of practicing before a glass, while Pope (the poet) sat by to aid him in the character of an instructor." Such are the arts by which are produced those results that the uninitiated ascribe to genius.

Sheridan was one of the most brilliant orators of modern times, and yet his maiden speech in Parliament, delivered when he was nearly thirty years old, was a failure. Woodfall, the reporter, used to relate that Sheridan came up to him in the gallery, when the speech was ended, and asked him, with much anxiety, what he thought of his first attempt. "I am sorry to say," replied Woodfall, "that I don't think this is your line; you would better have stuck to your former pursuit." Sheridan rested his head on his hand for a few minutes, and then exclaimed, with vehemence: "It is *in* me, and it *shall come out of me*." Quickened by a sense of shame, he now devoted himself, with the utmost assiduity, to the cultivation of his powers as a speaker. Seven years after he brought forward, in the House of Commons, the charges against Warren Hastings, relating to the princesses of Oude, in a

speech of such brilliancy and eloquence that the whole assembly, at its conclusion, broke forth into expressions of tumultuous applause, and the House adjourned to recover from the excitement produced by it. Pitt said, "an abler speech was perhaps *never delivered*," and Fox and Windham, years after, spoke of it with undiminished admiration. As Sheridan had said to Woodfall, it *was* in him and it *did* come out, but it was wrought out by patient toil and study. Moore paints him at his desk at work on this very speech — writing and erasing with all the care and pains-taking of a special pleader. Indeed, it transpired after his death, that his *wit* was most of it studied out before hand. His common-place book was found to be full of humorous thoughts and sportive turns, written first in one form and then in another — the point shifted from one part of the sentence to another to try the effect. How little did his delighted hearers imagine, as some playful allusion, keen retort, or brilliant sally, flashed out upon them from his speeches, in a manner so easy, natural, and yet unexpected, that it had been long before laboriously moulded and manufactured. Johnson tells us that Butler, the author of "Hudibras," had garnered up his wit in the same way. How conclusively do these examples illustrate the truth of Sir JOSHUA REYNOLDS' remark, that the effects of genius must have their causes, and that these may, for the most part, be analyzed, digested, and copied, though sometimes they may be too subtle to be reduced to a written art.

Charles James Fox rose, says Mr. Burke, "by slow degrees, to be the most brilliant and accomplished debater the world ever knew," and Fox himself has told us the secret of his skill. He gained it, he says, "at the expense of the House," for he had frequently tasked himself, during an entire session, to speak on every question that came up, whether he was interested in it or not, as a means of exercising and training his faculties.

Curran, the Irish orator and advocate, was known at school as "stuttering Jack Curran;" and, while studying at an Inn of Court, the members of a debating society to which he belonged called him "Orator Mum," in honor of his signal failure as a speaker. But he had made up his mind to become an orator, and was not to be put down by obstacles. He spent his mornings, as he states, "in reading even to exhaustion," and the rest of the day in the more congenial pursuits of literature, and especially in unremitting efforts to perfect himself as a speaker. His voice was bad, and his articulation hasty and confused; his manner was awkward, his gestures constrained and meaningless, and his whole appearance calculated only to produce laughter. Such is the picture of him left us by his biographers. Surely, one would think, an orator could never be made out of such materials. Yet all these faults he overcame by severe and patient labor. Constantly on the watch against bad habits, he practiced daily before a glass, reciting passages from Shakspeare, Junius, and the best English orators. He frequented debating societies, and unmindful of the ridicule that greeted his repeated failures, he continued to take part in the discussions. At last, he surmounted every difficulty. "He turned his shrill and stumbling brogue," says one of his friends, "into a flexible, sustained, and finely-modulated voice; his action became free and forcible; and he acquired perfect readiness in thinking on his legs;" in short, he became one of the most brilliant and eloquent advocates that the world has ever produced. Well might one of his biographers say: "His oratorical training was as severe as any Greek ever underwent."

The biographies of Pultney, of Burke, of Pitt, of Erskine, of Grattan, of Brougham—of all the great orators of England—contain records of the same careful training and discipline in the art of speaking.

Nor have American orators found the path to success less difficult. Rufus Choate—who was, perhaps, the most accomplished advocate America has yet produced—was a noble illustration of what systematic culture and discipline can do. He was, in the truest sense of the term, a *made* orator. Forensic rhetoric was the great study of his life, and he pursued it with a patience, a steadiness, a zeal, equal to that of Chatham or Curran. He trusted to no native gift of eloquence, but practiced elocution every day for forty years as a critical study. Everything that could be prepared, was prepared; every nerve, every muscle that could be trained, was trained; every power that daily practice could strengthen, was invigorated. So thoroughly imbued was he with a zeal for oratory, that it formed the subject of his almost daily conversation, as it did of his daily practice; and his biography will rouse an ambitious student as the sound of the trumpet does the war-horse.

Daniel Webster may, perhaps, be considered to have been as nearly a *natural* orator as any this country has produced; and yet the students are few indeed that cultivate the *art* of oratory so laboriously as did he. Even his genius was mainly "science in disguise." He himself told the late Senator Fessenden, that those figures and illustrations in his speeches, which had become so famous and been so often quoted, were, like Sheridan's wit, the result of previous study and preparation; and that that passage in his speech, wherein he describes the glory and power of England—a passage known and quoted the world over—was conceived and fashioned while he was standing on the American side of the Niagara river, listening to the British drum-beats on the Canada shore.

From these examples, we may learn that all truly noble orators in every age have trusted, not to inspiration, but to discipline; that great as were their natural abilities, they were much less than the ignorant rated them; that even the mightiest condescended to certain rules and methods of study by which the humblest are able to profit. It is good for the student to read of the studies and labors, the trials and conflicts, the difficulties and triumphs of such men. It is to the ambitious student as the touch of mother earth was to Antæus in his struggle with Hercules—renewing his strength and reviving his flagging zeal. It rouses him to severer self-denial, to more assiduous study, to more self-sustaining confidence, and leads him to feel, like Themistocles of old, that "the trophies of Miltiades will not let me sleep." These examples will teach him that God has set a price on every real and noble achievement; that success in oratory, as in everything else worth succeeding in, can be purchased only by pain and labor; and lastly and mainly, that

those who would follow in their steps must give their days and nights to study, and emulate their greatness by emulating their love of labor. In our next number we shall offer some suggestions as to the best means of improvement in forensic rhetoric.

THE DUTY OF CARRIERS AS TO PROVIDING ROAD-WORTHY CARRIAGES.

The English Court of Exchequer has recently decided a case — *Redhead* v. *The Midland Railway Co.* (20 L. T. Rep. 628) — which is of interest in this country, and which will probably hereafter be taken as a precedent in all cases relating to the liability of carriers of passengers. In that case, the plaintiff, whilst a passenger on the defendant's road, was injured by an accident, caused by the breaking of the tyre of one of the wheels of the car in which he was seated; it was proved that such breaking was owing to an air-bubble, which could neither be discovered in the course of manufacture nor afterwards, and that in fact there was no negligence on the part of either the manufacturer or the railway company.

LUSH, J., who tried the case, directed the jury that if the accident could not be foreseen, and was not due to any fault or carelessness on the part of the defendants, they were entitled to a verdict; and this ruling was afterwards upheld by MELLOR and LUSH, JJ., in the Queen's Bench, though dissented from by BLACKBURN, J. (*Law Rep.* 2 *Q. B.* 412). The Exchequer Chamber has now unanimously sustained this judgment, after a most careful review of both the English and American decisions, and established, so far at least as England is concerned, the principle that carriers of passengers are not warranters of the absolute road-worthiness of their vehicles, or in other words that there is no implied contract that their carriages and machinery are free from those defects which neither skill, care nor foresight can detect.

This decision is commended alike by sound sense and an almost unbroken current of authorities. Carriers of goods are insurers against all events but the act of God and the king's enemies. The reason of this rigid rule is, as Lord HOLT says, in *Cogg* v. *Bernard* (1 Sm. Lead. Cas.), that men are obliged, when they intrust their goods to carriers, to part with all control over them, and that, if carriers were not insurers, it would be easy for them to combine with thieves, and that "in such a clandestine manner as would not be possible to be discovered." But with regard to the carriers of passengers, the same rule has not, with one or two exceptions, to be hereafter noticed, been applied, "and for the obvious reason," as Judge HUBBARD remarked in *Ingalls* v. *Bills* (9 Met. 1), "that a great distinction exists between persons and goods — the passengers being capable of taking care of themselves, and of exercising that vigilance and foresight in the maintenance of their rights, which the owners of goods cannot do, who have intrusted them to others."

The carrier of passengers undertakes that as far as human foresight can go he will provide for their safe conveyance. The ground upon which his liability rests is negligence, while the ground of the liability of the carrier of goods is the absolute warranty for safe delivery *in any event*. This we understand to be the distinction drawn by the great body of authorities between the two classes of carriers.

But in this State the Court of Appeals has attempted to establish a rule ignoring this distinction, and rendering the obligation of the carrier of passengers as extensive as that of the carrier of goods.

In *Alden* v. *The N. Y. Central Railroad Co.* (26 N. Y. R. 102), the court lays down the broad proposition that the passenger carrier is bound, absolutely and irrespective of negligence, to provide road-worthy vehicles. In that case the accident was caused by the breaking of an axle of the car. The weather was, and had been for some time, extremely cold, which tended to render the iron brittle. There was a small, old crack in the axle, so covered by the wheel that it was absolutely out of reach of discovery by any practicable examination of the axle, unless by taking off the wheel, with great difficulty and labor. No claim was made that the axle had not been properly manufactured.

The opinion in the case is very brief and seems to have been prepared without an examination of the many cases bearing on the question. This may account for the extraordinary proposition it attempts to establish. The judgment is founded on the case of *Sharp* v. *Grey* (9 Bing. 457), which was the only case cited, except that of *Hegeman* v. *The Western Railroad Company*, which we shall notice hereafter, and which had evidently no influence in shaping the opinion of the court.

If the interpretation given to the case of *Sharp* v. *Grey* by the Exchequer Court in the case of Redhead, before cited, be correct, it is evident that the judgment in the Alden case is unwarranted by it, and stands without a precedent. Speaking of that case SMITH, J., who delivered the opinion of the Exchequer Court, says: "That case, when examined, furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose upon the defendant. There the plaintiff was injured by an accident caused by the breaking of the axletree of a stage-coach. The defect might have been discovered if a certain examination had taken place; and it was made a question of fact at the trial whether it would have been prudent or not to make that examination.

TINDAL, C. J., who tried the cause, is reported to have directed the jury to consider whether there had been, on the part of the defendant, that degree of vigilance which was required by his engagement to carry the plaintiff safely. Now, if the learned Chief Justice had supposed there was an absolute warranty of road-worthiness, this direction could not have been given, as it would then have been immaterial whether the defendant had used vigilance or not, and the degree of vigilance would have been an utterly immaterial consideration. The jury having found, on his direction, for the plaintiff, a motion was made, in the absence of TINDAL, C. J., for a new trial. Two of the learned judges, in refusing the rule (GASELEE and BOSANQUET, JJ.), are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a road-worthy vehicle. PARK, J., used language which, as reported, is ambiguous. But the judgment of ALDERSON, J.,

is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered by investigation. We have referred somewhat fully to this case, because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was relied on by the judges of the Court of Appeals, in New York, in a decision which will be hereafter referred to. But the case, when examined, furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and the authority of TINDAL, C. J., and ALDERSON is against the plaintiff."

On such unreliable and misapprehended authority has our Court of Appeals imported a new and extraordinary condition into the contract between carrier and passenger.

The Supreme Court of the seventh district, in the case of *McPadden* v. *New York Central Railroad Co.* (47 Barb. 247), repeats the rule of the Alden case, but the principle was not involved, and the remarks of the learned judge are wholly *obiter*. That case was for an accident caused by a broken rail. It appeared that an express train had passed over the place where the rail was broken but a short time before the train on which the plaintiff was riding, and that there had been no examination of the track between that time and the time of the accident. The plaintiff, at the trial, asked to go to the jury upon the question whether the rail was not broken before the train on which the plaintiff was a passenger came up, but his request was refused, and a non-suit granted. It was a proper question for the jury even within the rule of the Exchequer Chamber. It has never been questioned that carriers were bound to exercise the uttermost care and foresight in preventing accidents; and a neglect to examine the track, after the passage of a train, may justly be regarded as a violation of that rule. Indeed, under the rule of the Alden case, the question whether the rail was broken previously to, or at the instant of the accident, could not properly be submitted to the jury, as it was entirely immaterial — the company being absolutely liable for a breakage of its machinery.

So far as we have been able to learn, the law, as laid down by the Court of Appeals, has never been followed outside of this State.

In Massachusetts it has long been settled that carriers of passengers are not responsible for hidden defects which it is not in their power to discover by any ordinary means. The case of *Ingalls* v. *Bills* (9 Met. 1), was for an injury caused by the breaking of an axle-tree of a coach, in which there was a very small flaw, entirely surrounded by sound iron one-fourth of an inch thick, and which could not be discovered by the most careful examination externally. The court held, after a most elaborate examination of the authorities, that the action could not be maintained; and said: "Where accidents arise from a hidden and internal defect, which a careful and thorough examination would not disclose, and which could not be guarded against by the exercise of a sound judgment, and the most vigilant oversight, then the proprietor is not liable for the injury, but the misfortune must be borne by the sufferer as one of that class of injuries for which the law can afford no redress in the form of pecuniary recompense."

In *Edwards* v. *Lord* (49 Maine, 279), it was held that if a passenger receive an injury which any reasonable care or skill could have prevented, the carrier is liable therefor. In *Sales* v. *Western Stage Company* (4 Iowa 547), the court says: Carriers of passengers, for hire, are bound to exert the utmost skill and prudence in conveying their passengers, and are responsible for the slightest negligence or want of skilfullness either in themselves or their servants. In *Galena and Chicago R. Co.* v. *Fay* (16 Ill. 558), the court says: The care, skill and diligence required of carriers of passengers are of the highest degree, and must be proportionate to the danger of their particular mode of conveyance; but they are not insurers against all accidents, and the passengers take all the risks incident to the mode of travel. Such, in short, has been the purport of every decision on the subject, in every State in the Union where the question has arisen. Such was also the doctrine of the courts of this State before the innovations of the Alden case. In *Camden and Amboy Railroad Co.* v. *Burk* (13 Wend. 626); *Hollister* v. *Nowlen* (19 Wend. 236); *Curtis* v. *Syracuse and Rochester R. R. Co.* (20 Barb. 282); *Weed* v. *Panama R. Co.* (5 Duer, 193); *Caldwell* v. *Murphy* (1 Duer, 233), and other cases, the courts have held the carriers of passengers responsible only for the exercise of human care and foresight.

We regard the rule as laid down in the case of *Hegeman* v. *The Western Railroad Co.* (13 N. Y. R. 9), sufficiently rigid to afford the necessary protection to travelers, and believe that, should the question again come before the Court of Appeals, it will be taken as a precedent rather than the Alden decision. The case was also for injuries occasioned by the breaking of a car axle, caused by a slight crack or flaw. It was proved that the axle was made of the best iron, and by reputable manufacturers, and that the only way of detecting the flaw was by bending the axle, after its manufacture — a test which, it appeared, was used by some manufacturers, but which had not been applied to the axle in question. It was a defect in construction resulting from a want of skill or care on the part of the manufacturers. The court held that the railroad company was bound to the exercise of the utmost skill and foresight, not only in running their cars, but in their construction; and that it was a question for the jury to determine whether there had been negligence either on the part of the company or of the manufacturers. Only five judges concurred in the decision; MARVIN and DENIO, JJ., dissenting, on the ground that the company was not liable for the negligence of the manufacturers. In the case of *Sharp* v. *Grey*, before cited, ALDERSON, J., expressed views similar to those of the majority of the court in the above case. He says: "A coach proprietor is liable for all defects in his vehicle, which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation."

From this cursory examination of the authorities it would seem, as is the fact, that the case of *Alden* v. *The New York Central Railroad* stands alone and un-

supported in the broad proposition it attempts to establish. Indeed the learned judge who delivered the opinion in that case seems to have been conscious that he was annexing to the contract of the carrier of passengers what had not hitherto been understood to form a part of it, and attempts to palliate it by saying: "Though this may seem a hard rule, it is probably the best that can be laid down, since it is plain and of easy application, and, when once established, is distinct notice to all parties of their duties. And, practically, it will be likely to work no more burdensome results to carriers of passengers than to leave them, with an uncertain criterion of responsibility, to the trouble and expense of strongly litigated contests before juries." We had never before supposed that any plea of convenience, or ease of application, was a sufficient excuse for a departure from, or innovation upon the common law, especially so far as to introduce new and onerous obligations into the contracts of parties.

We are in favor of holding all carriers of passengers to the exercise of the highest degree of human skill, care and foresight, but to make them liable for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill, care or foresight could either have prevented or detected, is neither just nor reasonable, nor requisite to the safety of the public.

LAW AND LAWYERS IN LITERATURE.

Law and lawyers have always been a prominent subject for comment, and not infrequently, of ridicule, in literature. A good deal of this is too familiar to justify review. Every school-boy has grown gloomy over Eugene Aram, and cried at the court scenes in The Heart of Mid-Lothian. The first law book read by the young man on entering the study of our profession is usually Ten Thousand a Year, by the amiable and funny, but rather mean-spirited Mr. Samuel Warren, who mixes up some bad law with a good deal of toadyism and servility. We are all quite well acquainted with Mr. Dickens' legal characters — Tulkinghorn and Vholes, Sampson Brass and his sister Sally, Justice Nupkins and his clerk Jinks, Sergeant Buzfuz and promising young Mr. Phunkey, Messrs. Doddson & Fogg, the inexorable partner Jorkins, etc., and with the admirable and humane spirit of his satire on the abuses of the chancery system. If Mr. Dickens had done nothing else in this way except to draw that wonderful scene in Our Mutual Friend, in which Rogue Riderhood makes his "Alfred Davy," he would have demonstrated at once his acute knowledge of human nature and of the workings of legal affairs. I suppose there are certain other weak persons beside myself who have been tempted into reading certain of Mr. Anthony Trollope's novels, in which legal matters are marvelously but dully dealt with. Those who are favorable to the admission of women to the bar will find warrant for their opinions in two works of fiction — to mention the sublime and the ridiculous in one breath — The Merchant of Venice and Griffith Gaunt. All these things are familiar, and have been well commented on by a writer for the American Law Review, in an article entitled Law in Romance, in the number for April, 1867.

It has long been a favorite project of mine to carry this research further back and more extensively into literature, and to trace how law and lawyers stood in the estimation of the older and less familiar moralists, dramatists, and novelists. The field, I am sure, is a rich and inviting one, and however incompletely I may succeed in developing its interest, I shall be entirely satisfied if my essay shall operate to induce the study of our more ancient authors.

I shall endeavor at first to preserve something like a chronological series, but if in the course of my investigations anything new turns up, which ought to have been inserted before, I shall not allow any restriction to the order of time to prevent its insertion out of place. Nor shall I permit my predilection for the English tongue to prohibit some little rambling into foreign countries and literatures. In short, I propose to be as rambling and desultory as Dr. Foster's children, under the influence of the paternal rod, when they danced

> "Out of England into France;
> Out of France into Spain;
> Then he made 'em dance back again."

In the "Herdsman's Happy Life," found in Byrd's Songs (1588), we read:

> "For lawyers and their pleading
> They 'steem it not a straw;
> They think that honest meaning
> Is of itself a law;
> Where conscience judgeth plainly,
> They spend no money vainly."

CHAUCER.

Before this, Chaucer had described a lawyer as one of the Canterbury Pilgrims:

> "A Sergeant of the Lawe, ware and wise,
> That often hadde yben at the paruis,*
> Ther was also, ful riche of excellence.
> Discrete he was, and of gret reverence:
> He semed swiche,† his wordes were so wise,
> Justice he was ful often in assise,
> By patent, and by pleine commissioun;
> For his science, and for his high renoun,
> Of fees and robes had he many on.
> So grete a pourchasour was nowher non.
> All was fee simple in him to effect,
> His pourchasing might not ben in suspect.
> Nowhere so besy a man as he ther n'as,
> And yet he semed besier than he was.
> In termes hadde he cas and domes‡ alle,
> That fro the time of King Will weren falle.
> Thereto he coude endite, and make a thing,
> Ther coude no wight pinche¶ at his writing.
> And every statute coude he plaine by rote.
> He rode but homely in a medlee cote,
> Girt with a seint** of silk, with barres smale;
> Of his array tell I no longer tale."

* Parvis, church portico. † Such. ‡ Opinions. ¶ Find flaw. ** Girdle.

What a vivid description, especially the touch "seemed busier than he was."

SELDEN.

The learned Selden, in "Table Talk," has an interesting section on law, in which the most striking observation is: "Ignorance of the law excuses no man; not that all men know the law, but because 'tis an excuse every man will plead, and no man can tell how to confute him."

BEAUMONT AND FLETCHER.

The legal profession and Frenchmen were held up to scorn in Beaumont and Fletcher's comedy, entitled "The Little French Lawyer," in which, strange to say, the lawyer is by no means the principal personage, and is not closely connected with the plot. The character of La Writ, the lawyer, is ascribed by several editors to Beaumont's pen. La Writ is a fussy, busy, choleric, mean-spirited fellow, who, by an accidental success in a duel forced on him by a ruffling gallant, is filled with the idea that he is a man of spirit, and courts strife until his affected bravery is cudgeled out of him. He makes his first appearance in a sort of general answer to a crowd of clients:

"I understand your causes;
Yours about corn, yours about pins and glasses—
Will you make me mad? have I not all the parcels?
And his petition, too, about bell-founding?
Send in your witnesses—What will you have me do?
Will you have me break my heart? My brains are melted!
And tell your master, as I am a gentleman,
His cause shall be the first. Commend me to your mistress,
And tell her, if there be an extraordinary feather,
And tall enough for her—I shall despatch you too,
I know your cause, for transporting of farthingales;
Trouble me no more. I say again to you,
No more vexation! Bid my wife send me some puddings;
I have a cause to run through requires puddings;
Puddings enough. Farewell."

That it was the fashion in those days for attorneys to carry bags, is evidenced by the fact that in the duel La Writ's life is saved by his bag, which he hangs in front of him. His antagonist loses his sword, and La Writ triumphs—an example of nonsuit applied to the duel. He takes this success so kindly that he becomes intoxicated, sings lewd songs, asks for "a wench or two," says he "hates a coward"—a reminder of Falstaff's "a plague o' all cowards say I." But while he is winning glory in this unaccustomed field, his causes go by default, and he flings away his bag, with "Avaunt, thou buckram budget of petitions! Thou spital of lame causes!" He challenges the president-judge for dismissing his causes, and when told that he is no swordsman, says: "Let him learn; time, that trains chickens up, will teach him quickly." The judge, on receiving the challenge from this "wrangling advocate," this "little figent thing," this "notable talking knave," pleads his old age as an excuse for not meeting him in person, and deputes his kinsman to fight in his place. The kinsman Sampson appears, and the seconds, by preconcert, strip both combatants to the skin for the purpose of discovering any concealed armor, and then run away with their clothing and their swords. After a noisy combat of words, in which the shivering La Writ proposes "to fight at buffets," which Sampson scoffs at,—"My lord, mine uncle's cause depend on boxes!"—the two fall in with the judge and his friends, and La Writ is beaten by one of the latter, who says:

"Nay, never look; your lawyer's pate is broken.
And your litigious blood about your ears, sirrah.
Why do you fight and snarl?
La Writ. I was possessed.
Champernel. I'll dispossess you. (Beats him.)"

After promising to "fall close to his trade again, and leave brawling," and asking the judge's forgiveness, he is permitted to depart, "an advocate new-vamp'd." After this, La Writ is as meek as Katherine after her taming by Petruchio, and gives Sampson and his clients as good advice as Katherine her friends. He dissuades Sampson from revenge, saying:

"I find I am wiser than a justice of peace now:
Give me the wisdom that's beaten into a man!
That sticks still by him.
Go, my son Sampson, I have now begot thee,
I'll send thee causes; speak to thy lord and live,
And lay my share by; go, and live in peace;
Put on new suits, and show fit for thy place;
That man neglects his living is an ass.
Come cheerly, boys, about our business!
Now welcome tongue again; hang swords!"

In "The Widow," Martino, clerk of Brandino, the justice, gives a warrant to a suitor, with:

"Nay, look upon 't, and spare not; every one cannot get that kind of warrant from me, signior. Do you see this prick i' the bottom? it betokens power and speed; it is a privy mark that runs betwixt the constables and my master; those that cannot read, when they see this, know 'tis for lechery or murder; and this being away, the warrant comes gelded and insufficient. * * * Look you, all these are *nihils;* they want the punction."

Much of the "Spanish Curate" seems designed to "crucify the lawyer." In this admirable comedy, the character of Bartolus, the lawyer and one of the principal personages, and the standing of lawyers as evidenced by the luxurious habits of their wives, is strikingly and succinctly exhibited in the opening speeches of his handsome spouse, Amaranta:

"You know your own disease, distrust and jealousy.
* * * * * * * * *
You are too covetous;
If that be rank'd a virtue, you have a rich one.
Set me, like other lawyers' wives, off handsomely,
Attended as I ought; and, as they have it,
My coach, my people, and my handsome women,
My will in honest things."

From another speech of Bartolus, it appears that one of the learned professions brought grist to the lawyer's mill, which, in modern times, does not except indirectly:

"'Tis some honest client,
Rich and litigious, the curate has brought to me."

But the curate brings instead a law student in the person of Leandro, a gallant disguised, who is in love with the beautiful Amaranta; and, as a means to prosecute his suit, proposes to become an inmate of Bartolus' house and office. It would be pleasing to the profession to meet a law student of equal ability and willingness to pay now-a-days, for this one offered twenty ducats a month for the privilege, besides three hundred down, and to "defray his diet." Of course, he was accepted. Diego, the sexton, who accompanies him, bids him adieu with:

"Take a good heart; and when you are a cunning lawyer,
I'll sell my bells, and you shall prove it lawful."

Amaranta's suspicions are aroused by the liberal payments which her husband tells her the student has made, and the student serenades her in some verses, which she says "are no law; they sound too sweetly." Don Henrique employs Bartolus in a dishonest cause, upon which hinges the other branch of the plot. Bartolus scruples not; "we surgeons of the law do

desperate cures; good fees beget good causes; the prerogative of the crowns will carry the matter; the assistant sits to-morrow, and he's your friend; your moneyed men love naturally, and as your loves are clear, so are your causes. Hang the penurious! their causes, like their purses, have poor issues." But he "must have witnesses enough and ready—substantial, fearless souls—that will swear suddenly—that will swear anything; for variety, they may swear truth, else 'tis not much look'd after." He then advises his client to "see" the judge, and dismisses him with "go, and believe i' the law." Before they come into court, the defendant assails Bartolus with foul language, and insinuates that he "would plead a needy client's cause for a starv'd hen, or half a little loin of veal, though fly-blown." Bartolus' opening speech in court is quite in the modern vein:

"If I stood here
To plead in the defence of an ill man,
Most equal judge, or to accuse the innocent,
(To both which I profess myself a stranger),
It would be requisite I should deck my language
With tropes and figures, and all flourishes
That grace a rhetorician; 'tis confess'd
Adulterate metals need the goldsmith's art
To set 'em off; what in itself is perfect
Contemns a borrowed gloss."

As a matter of course, the court is with Bartolus and his client. On another occasion Bartolus says:

"I have been atoning two most wrangling neighbors;
They had no money, therefore I made even."

But Leandro finding scant opportunities to court Amaranta, his friends, the curate and the sexton, enter into a plot to entice Bartolus from home. Diego feigns mortal sickness, and sends Lopez for Bartolus to draw his will. Then ensues a most amusing scene. It is represented to Bartolus that Diego is very rich, and, after making sundry bequests, intends most of his estate for the covetous lawyer. Diego's attendants give him drink to sustain his strength, and he, becoming tipsy, makes the most extravagant and absurd provisions for all sorts of strange objects, and the lawyer is in an agony at seeing his prospects dissipated. After spinning out this will as long as possible, the conspirators confess that they have been fooling Bartolus. He raves, and Diego "finds this cataplasm of a well-cozened lawyer, laid to his stomach, lenifies his fever." In the meantime, the handsome wife and the law student are improving the opportunity at home, and in a pretended attendance at church. On Bartolus' return he rages horribly, but is quieted by Lopez's mention of the inquisition as a terror to those who deny their wives the privilege of church. He pretends to be reconciled, and invites the conspirators to breakfast. They attend, he deprives them of their weapons, surrounds them with officers, and instead of edibles, puts in one dish "an execution for a thousand ducats" against the guest; in another, "a capias from his surgeon and his silk man;" in another, "a strong citation;" and in another, "a warrant to appear before the judges." Out of this mess they are rescued by a *deus ex machina*, and in the end all parties are reconciled.

In "A Wife for a Month" a "Lawyer, Physician, Captain, and Cutpurse pass over the stage," and Tony, a fool, in his remarks to Podrano concerning the various "suitors to the widow lady," deals out hard measure to our profession, in respect to our gallantry toward the fair sex:

"*Podrano.* Why, these are rascals.
Tony. They were meant to be so:
Does thy master deserve better kindred?
Pod. There's an old lawyer,
Trimm'd up like a galley-foist; what would he do with her?
Tony. As usurers do with their gold; he would look on her,
And read her over once a day, like a hard report,
Feed his dull eye, and keep his fingers itching;
For anything else she may appeal to a parliament;
Subpœnas and *posteas* have spoil'd his codpiece."

When the suitors present themselves and urge their claims, the lawyer says: "I am a lawyer; I can make her a jointure of any man's land in Naples; and she shall keep it, too; I have a trick for it." To which Tony answers:

"Canst thou make her a jointure of thine honesty,
Or thy ability, thou lewd abridgement?
Those are nonsuited and flung o'er the bar."

When, to test their sincerity, it is inquired of the suitors which of them will "dare take her for one month, and then die?" the lawyer excuses himself, because

"This is like to be a year of great dissention
Among good people, and I dare not lose it;
There will be money got."

[To be continued.]

THE MORAL STANDING OF THE LEGAL PROFESSION.

A recent writer in the New York *Independent* makes a violent onslaught on lawyers. "What profession," he asks, "has sent so many representatives to corrupt legislation, and to disgrace human nature by the successful glorification of crime? What profession has given so few saints, so few martyrs, so few moral heroes to the world?" To which we answer, that to lawyers is due a state of social affairs in which there is no longer any possibility of martyrdom or necessity for moral heroism. It is highly probable that if it were not for the profession he reviles, this writer would never have had a chance to publish his foolish article, for these are the days of unlicensed printing. Nearly every trace of social and religious liberty on earth is due to lawyers. No class has been so fruitful of "saints, martyrs, and moral heroes" as the clergy, and yet what a world this would be if ruled by priests! A priest-governed people is synonymous with an ignorant, degraded, superstitious, and unaspiring people. The priests have always been the cause of all "martyrdom," and "moral heroism" was an outgrowth. The physical safety of society, the liberty of religious opinion, the cohesion of our moral system, are all in great measure due to, and dependent on, law and its officers. If it were not for ameliorations which lawyers have effected, some Cotton Mather would still be hanging witches; some Calvin would still be burning Servetus; slavery would overspread the world; lazy monks would still be scaring rich and moribund sinners into large gifts to fatten pretended religious uses. In his recent great work on "European Morals," Mr. Lecky says that no other agent is so potently beneficial in moulding public

opinion in England at the present day as the newspapers, and that much of their increased influence is due to the fact that the lawyers have taken to writing for them. The truth is, that mankind have always had so poor an opinion of themselves, that, were it not for lawyers, they would still be unwilling to allow to each other the smallest credence, in or out of court. Until lawyers caused the rule to be changed, no person accused of crime could testify on his own behalf, because the theologians had taught that he must necessarily perjure himself, and now all the croaking against the present rule comes from dyspeptic haters of our profession. All the ameliorations of the laws respecting women are due to lawyers, and yet all the women think us a terrible set of fellows. They would prefer counsel like Mrs. Stowe.

It is high time that the vulgar notions about lawyers were done away. They are the offspring of the envy that mankind bear toward those who are able to earn a living without manual exertion or the employment of capital. The deities of society are Muscle and Money. Sheer Intellect is something they grudgingly tolerate. Rich men and laboring men alike are envious of lawyers, and yet we can assure them that if the mean things that lawyers consent to do at the instigation of their clients were weighed against the mean things that they prevent their clients from doing, the balance would incline heavily in favor of the lawyers. In a word, the standard of professional honor among us is as much higher than the standard of commercial honor — yes, and of clerical honor, too — as heaven is higher than earth.

We would like to ask this *Independent* gentleman a few plain questions. First. To whom does he think Catholic Emancipation in the British Empire was due, to the lawyers of the House of Commons, or to the prelates of the House of Lords? Second. Does he not think that such men as Sam Adams, John Adams, and Patrick Henry, who represented all the lawyers, were of as much weight in the struggle for American political liberty as the Rev. Mr. Duche, who counselled Washington to surrender the colonies to Great Britain, and who fully represented a large number of the "martyr" and "moral-hero" class in the Middle States? Third. Does he not think that such men as Lord Mansfield, in England, and Abraham Lincoln, Charles Sumner, Thaddeus Stevens, Salmon P. Chase, John Jay, and Ben Butler have had some influence in effecting the abolition of slavery and the slave trade? Fourth. Will he not concede "moral heroism" to such men as John Somers, of England, who defended the seven bishops, and to Daniel O'Connell, and the other reformers and liberators and champions of civil liberty in the legal ranks, whose names shine on every page of history?

As to the charge of corruption, not one in a hundred of our legislative "corruptionists" is a lawyer. "Corruptionists" are the representatives of a constituency who are too envious of our profession to elect them to legislative or municipal office, but elect instead a body of unprincipled and illiterate adventurers, and offer them an inducement to steal by paying them inadequate wages. In the days when lawyers, to some degree, monopolized such offices, corruption was almost unknown. It is the growth of recent times. The Constitutional Convention proposed a very effectual preventive of legislative corruption in the shape of an article on bribery. Most of our profession voted for the adoption of that article, but it remains to be proved whether the *Independent* writer and the rest of the folks who dislike lawyers gave it their support.

CURRENT TOPICS.

—A writer in the Chicago *Legal News* urges the holding of annual meetings of members of the legal profession from every part of the United States, for the discussion of law reforms, similar to meetings held by members of other learned professions both in this country and in Europe. The Jurisconsults of Germany adopted the idea eight years ago, and have since held a congress regularly every year. Their society numbers among its 2,500 members all who are so interested in the law as to be obliged to study it — as magistrates, advocates, notaries, or administrators. Its purposes are to examine legal questions and to promote the unification of German law.

—The Usury law has long since become a dead letter, and should be stricken from the statute book. Term after term, in obedience to the requirements of the statute, grand juries are charged to inquire into any violations of the Usury law, and yet, day after day, year out and year in, the lenders of money violate that law with impunity. Once in a while a spasmodic effort is made — as was recently the case in New York — to vindicate the law and to punish the offender; but, as in all other cases of spasmodic efforts, little if any good is accomplished. The old reasons for the law are gone, and other and juster laws afford the protection to the debtor which this statute was meant to give. There are even positive grounds why the law should be abolished. The principal one is that men can no longer afford to lend money at seven per cent. The taxes on property — National, State and Municipal — have increased to such an extent that after paying them there is but a pitiful margin left to the lender for the use of his money. But the fact that the law is not enforced is ground enough for its repeal. The dignity of the State and the interests of society, demand that there should be none but living laws upon our statute books, and that the violators of those laws should be visited with the prescribed penalties. Edmund Burke truly said: "Living law, full of reason and of equity, and of justice (as it is, or it should not exist), ought to be severe and awful too; or the words of menace, whether written on the parchment-roll of England or cut into the brazen tablet of Rome, will excite nothing but contempt."

—The progress which the "softer sex" are making in their attempt to break down the barriers which heretofore excluded them from the Bar, may be rather startling to the nerves of the timid and bashful portion of the profession. In several of the western states attorneys and counsellors at law of the female sex have become fixed facts. An Iowa court, not long since, appointed a committee to examine Mrs. Arabella A. Mansfield, A. B., and the committee very gallantly recommended her admission, and ex-

pressed their desire to "welcome her as one of our members." The court, either imbued with that spirit of progress so prevalent in the West, or out of regard to the feelings of the committee, granted the application, and Mrs. Arabella was duly inducted into the profession. It is incidentally related that the husband of the lady was admitted at the same time, and it may be fairly presumed that the "shingle" of "Arabella A. Mansfield and husband," has been long since flung to the breeze. It would seem that the guardians and rulers of the Columbia College Law School of New York, are less chivalrous and courteous to the fair sex. A lady recently complained through the columns of the *Tribune* that she had procured her testimonials and fees, and presented her application for admission to the junior class in that school; but that she was informed that *person*, as used in their catalogue, meant *man*, therefore, that she could not enter, being a woman. The lady's logic is rather formidable. It seems that the catalogue of the law school says that "any person of good moral character * * may be admitted." Also, that "the design of the law school is to afford a complete course of legal education for gentlemen intended for the bar in *any of the United States.*" On this the fair communicant predicates the following: "The last clause of the last quotation would seem at first sight to exclude women; but when it is remembered that words change their meaning in the progress of a language, and with the changes of the times, and as the progress of the age has been such that *women are now admitted to the bar in some of the United States*, it follows that the phrase '*gentlemen intended for the bar* has lost its exclusive significance, is a relic of a past epoch, and can only be interpreted now, in the light of the present facts, to mean, '*those (men or women) intended for the bar.*'" If the popular theory — that it is the business of the profession to lie — be true, which we have reason to doubt, there is one qualification possessed by ladies which would eminently fit them for the practice, provided the Rev. Mr. Cowen, of Boston, who, by the way, is an ardent champion of woman's rights, and should know, is to be relied on. That gentleman, in an address before the recent Woman's Suffrage Convention, at Cleveland, said "women are not as truthful as men." He had seen "young women lie with a steadfastness and imperturbability unapproachable by young men." We have never regarded lying as a female accomplishment, nor an essential qualification for the legal profession, but if our views are incorrect, it may become necessary for the gentlemen of the profession, as a matter of self-preservation, to set their faces against the ladies in their efforts to gain admission to the bar.

—Senator Carpenter, of Wisconsin, has introduced into the Senate a bill to increase the salary of the Chief Justice of the Supreme Court of the United States to $12,000 per annum, and that of the Associate Justices to $10,000. We believe that every fair-minded lawyer will approve of the bill, and it is to be hoped it will become a law. The present salary of the Chief Justice is $6,500, and of the Associates $6,000—compensations in no wise adequate to the abilities and attainments demanded by the positions. England pays her Lord Chancellor £10,000, or nearly $50,000, per annum, and her Lords Justices of the Court of Appeal £6,000 each, or nearly three times the salary proposed by this bill for the highest judicial officer in the country. Even her Commissioners in Bankruptcy and Masters in Lunacy receive nearly double the salary of any United States Judge, and receive it in gold. The position of Judge of the Supreme Court is one of great importance, and demands the highest abilities and the most varied attainments—qualities that in the ordinary walks of the legal profession would bring to their possessor double or treble the remuneration of our present Chief Justice. It is no uncommon thing for an insurance or railroad company to pay ten or fifteen thousand dollars salary to a president; and it is in accordance with the "eternal fitness of things" that those who serve their country in a position of the highest responsibility should receive an equally liberal remuneration.

—A "Lawyer's Congress," attended by some of the most eminent jurists of Germany, was held, a few weeks since, at Heidelberg, and passed several resolutions on important social and judicial questions. Among these were the following: 1. "Civil marriages should be recognized as a necessary principle of the relation between Church and State in the whole of Germany; and the State should make no objection to the marriage of persons of different religions." This was proposed by Dr. Gneist, and passed against a minority of one only. 2. "That government sanction should not be required for the formation of joint stock companies or other associations, but that the liability of each member of such company should be unlimited." 3. "A written document acknowledging a debt should be taken as sufficient proof of such debt, independently of the circumstances under which such debt was incurred." 4. "As nearly all the objects of punishment are more effectually obtained by solitary confinement than by any other system of imprisonment, such confinement should be recognized by law as the regulated mode of executing sentences which involve the loss of liberty; exceptions to this rule might be made when necessary, either by the judge or the governor of the prison." This resolution was passed almost unanimously.

—Dickens tells us, in one of his Christmas stories, of the performances of the ghost of a murdered man that would not lie quiet in its grave like a well behaved Christian ghost, but persisted in revisiting the "glimpses of the moon" to aid the prosecuting attorney in bringing the murderer to justice. While in a murder trial a ghostly interference of this kind may be tolerated, we doubt very much whether in the ordinary litigations and trials it would tend to advance the cause of justice or conduce to the well-being of society. We, therefore, have to regret the position which the Philadelphia spirits seem to have taken in the matter. The story comes to us from that city that Judge PIERCE recently sent a jury out to deliberate, and received a note from the jury room the next day stating that all had agreed except one, who had communed with the spirits, and had been told by them that the law bearing on the case was illegal. The jury asked to be discharged, and the request was finally granted. If it is to become fashionable for spirits thus to usurp the functions of the judges, it may become necessary to add another to the present causes of

challege, that gentlemen who are in the habit of holding communications with spirits may be excluded from the jury-box.

—It may be regarded as settled that Mr. Attorney-General Hoar will not have the honor of filling the vacant seat on the United States Supreme Court Bench. The Senate have by a very decided majority laid his nomination on the table. The opposition to him was strong and settled. Some opposed him because of his locality, claiming that the South should have at least one representative on that Bench; others opposed him for lack of confidence in his ability to properly fill the position; but the great body of the Senators objected to him because of effronts which they had received at his hands. It is to be regretted that men occupying the high position of Senators of the United States should allow mere personal pique to so seriously affect their actions in matters of the greatest importance to the country. We were surprised that doubt should be expressed as to his ability. He has long ranked among the ablest jurists in Massachusetts, which fact alone ought to be sufficient evidence of his ability to fill any judicial position. It is quite probable that the President will now withdraw the name of Judge Hoar and substitute that of some Southern lawyer.

—There is a lamentable tendency among people to denounce a system as soon as any irregularities shall be discovered therein, no matter howsoever exceptional they may be in their nature. An excellent illustration of this tendency has recently occurred in the denunciation of our judicial system by the newspapers because one or two judges have interfered with each other's orders in the "Erie Imbroglio." Nothing is said about the fact that in nine hundred and ninety-nine cases the order or decree of one judge is never modified or reviewed by a brother judge, except for the most urgent reasons, but the fact that in the one thousandth case a judge departs from this rule sets the public press in a perfect furore. These papers say that the judicial system must be reorganized and that the judges of the Supreme Court must be so limited in their powers and jurisdiction as not to be able thus to interfere with the particular business of each other. But the great difficulty is that no two papers agree as to how this happy result is to be brought about. Nor do they follow the thing out to its logical sequence to see about what would be the effect of any such revolution. One very respectable paper talks thus learnedly on the subject: "It would be well, however, if some judge whose orders have been interfered with would bring the matter before the Court of Appeals, with a view to seeing if the common law affords a remedy. We suppose this might be done by *quo warranto* issued by a third judge." Now this proposition—quite as good as any we have yet seen on the subject—may strike some as being very sensible, but it strikes us as being very absurd. If any single judge exercise improperly the powers conferred upon him by the law it may be well enough for the public press to reprove him for it; but the wholesale attacks on the judiciary and the judicial system which have of late become so fashionable tend to no good and should be abandoned.

—The new Judiciary Article is likely to work important improvements in the character of our courts and judicial proceedings. The old system was one of the worst, if not the worst, judicial systems in the world. The court of last resort was five years in arrears with its business, and counsel and clients who had causes on its calendar had about as little prospect of getting a final adjudication as had the suitors in the old English Court of Chancery. Its members were annually changing, and, a very natural result, its decisions were vacillating and conflicting. In the Supreme Court the evils were as great, though not of the same character. Judges all over the State sat in review of their own decisions, and in many districts judicial courtesy ran so high as to allow the judge who had made the order or ruling appealed from to write the opinion and announce the decision of the appellate court. The judges of one district very seldom sat at the General Term of another district. Each district, had therefore, in effect, a separate local court, which decided questions according to its own convictions and precedents, without any very high regard for the precedents of another district. The County Court was practically without original jurisdiction in civil matters, and the Circuit calendar was therefore crowded with causes of slight importance.

Under the new article these evils will in a great measure be done away with. The Court of Appeals' calendar will be cleared up by the Commission; that Court will gain the element of stability, and with it an increased working power that will enable it to keep up with the business. The Supreme Judges will no longer sit in review of their own decisions. Instead of eight General Terms there will be but four, and possibly not so many, and thereby is insured a greater uniformity of decisions. Besides this, the Justices who hold the General Terms are to be chosen from the whole number of Justices in the State, thus doing away in a great measure with those local and sectional influences which have sometimes affected our General Term decisions. The jurisdiction of the County Courts is extended, and a large number of the causes which now burden the Circuit calendar can be disposed of in this court. While we do not regard the new system as by any means perfect, yet it is so much of an improvement on the old one that we hail its adoption with pleasure.

—Associate Justice Robert C. Grier has resigned his seat on the Bench of the United States Supreme Court; the resignation to take effect on the 1st of February next. Justice Grier was appointed by President Polk in 1846, and, next to Mr. Justice Nelson, is the oldest judge on the Supreme Bench. He had long since become disqualified by age and sickness to discharge the duties of his position, and his resignation was urged by his brother judges as well as by his friends. He will receive his full salary during his life-time, as provided by the act of congress.

The late Edwin M. Stanton had received the appointment to the seat made vacant by the resignation of Justice Grier, but his sudden death has reopened the vacancy.

—"Have we a Court of Appeals among us?" is a conundrum which is at present exciting the ingenuity of both the Bench and Bar of the State. From what

we have heard and seen expressed on the subject, we should say that it was very like that question which gave rise to the celebrated *mot* of Earl Russell, "That only two men ever did understand this question,—another gentleman and I. The other gentleman is dead. He explained it to me, but I have forgotten all about it."

The question arises from the doubt, as to when the new Judiciary article is to take effect. The last section of the proposed Constitution provided, that the Constitution should be in force from and including the 1st day of January next after its adoption by the people. When the legislature made provision for submitting the Judiciary article separately, they declared as follows:

"If a majority of the ballots indorsed 'Constitution—Judiciary' shall contain on the inside the words, 'For the amended Judiciary article,' then the Judiciary article proposed by said Convention shall be deemed to be adopted by the people, and shall be the sixth article of the Constitution of this state."

If this language were to be literally construed, it would seem that the Judiciary article took effect as soon as adopted, that is, as soon as the State canvassers had declared the result of the vote on it. Again, it is contended, that, inasmuch as it was provided that the proposed Constitution should take effect from January first, therefore, the Judiciary article must take effect from the same time. Whatever may have been the intention of the legislature, it will be rather difficult to sustain this argument by strict construction. The clause providing when the Constitution should take effect was rejected by the people. How then is it to govern as to the Judiciary article? But supposing it to go into effect on the first, have we any Court of Appeals, properly so called? The twenty-fourth section of the new Judiciary article is in these words:

"Section 24. The first election of Judges of the Court of Appeals, and of the three additional Judges of the Court of Common Pleas for the City and County of New York, shall take place on such day, between the first Tuesday of April and the second Tuesday in June, next after the adoption of this article, as may be provided by law. The Court of Appeals, the Commissioners of Appeals, and the additional Judges of the said Court of Common Pleas, shall respectively enter upon their duties on the first Monday of July thereafter."

No provision is made in the new article to continue the old court, and if the article takes effect from January first, it would seem that the recent Court of Appeals' judges have now no power except as Commissioners of Appeals, under the Judiciary article itself. They are the creatures of the old Constitution, and if the Judiciary article in that is superseded by the new article, we are quite at a loss to find any argument to justify a longer existence of the old Court. But *salus populi Suprema est lex*, and we shall not be surprised if the judges should construe this maxim to justify their continuance till the new Court comes into operation.

Since writing the above we have learned that the Judges of the Court of Appeals have decided, after consultation, to hold the January term of the court, and to hear the arguments in all cases as usual.

—The sudden death of the Hon. Edwin M. Stanton has struck every one with surprise and regret. Only a little time before his death the announcement was made that his health was improving, and his friends cherished the hope that a long and useful career was before him in the position on the bench of the United States Supreme Court to which he had just been elevated. He was but fifty-four, and few of those who listened to his argument in the Whitney and Morey case before Mr. Justice Swayne, only some ten days before his death—an argument worthy of the palmiest days of the American bar—could have imagined how shortly that apparently vigorous frame and giant intellect were to be laid low. Of Mr. Stanton as a politician and office-holder, we do not propose to speak. It must be left to history to form a just estimate of him in those respects. We of to-day are too much swayed by passion and prejudice to form correct notions as to either his faults or his merits. As a lawyer, his position was established. However much men may have differed as to the propriety of placing on the bench of the Supreme Court a man who had been actively engaged in the political questions of the day, we presume there were very few capable of forming a correct opinion, who doubted either his ability or integrity for the position. Of late years, while not in office, he had devoted his attention chiefly to cases in the United States courts. He was an able lawyer and an advocate of more than ordinary ability. Thoroughly grounded in the principles of the law; clear and quick in the perception of the right, and steadfast in its maintenance; diligent and conscientious in the discharge of his duties, he had worthily won a place alongside of the great lawyers of the country. An obituary notice of Mr. Stanton will be found in another column.

OCCASIONAL NOTES.

The design and scope of the LAW JOURNAL are so fully set forth in the Prospectus, which will be found in our advertising columns, that it will be unnecessary for us to dwell on the subject. Horace Smith seems to have had a very poor opinion of prospectuses, for he said of some one that "he lies like the prospectus of a new magazine." However happy may have been the simile in his day, it has not improved with age. Publishers have learned from experience that mendacious prospectuses, like curses, "come home to roost." The promises made and plan proposed in the Prospectus of the LAW JOURNAL will be fully carried out. The publishers have undertaken its publication with the usually charitable object of "supplying a want long felt by the legal profession," and it is their purpose to make it, in every respect, capable of accomplishing that object. It is not intended to make it either local or sectional in its character. It is designed for the profession at large, and no reasonable effort will be spared to make it of value to the lawyers of every State in the Union.

It is no part of our plan to report decisions in full, except in special cases where the decision is deemed of great general importance. It would be impossible to give, within the necessary limits of a journal of this kind, but a very small part of the important de-

cisions made during the year, and we have therefore deemed it the better plan to give an abstract of all the decisions, sufficiently full to enable the practitioner to comprehend readily the question decided. Should any one desire a full report of any case, he can very readily procure it by sending to the Reporter, whose name is given. The pages of the LAW JOURNAL will always be open to the discussion of all questions pertaining to the law or its professors, and contributions are invited on all subjects of general legal interest.

It was announced that the first number of the LAW JOURNAL would appear on the 20th of November last, but a postponement was rendered necessary by reason of the protracted illness of the managing editor.

The present number is sent free to the members of the bar throughout the country. If they desire its continuance, they should forward their names to the publishers at once. The LAW JOURNAL is stereotyped, and back numbers can be furnished at any time.

— One of the most entertaining and valuable books ever written on the Study of the Law, is that by Samuel Warren, the author of "Ten Thousand a Year," and we are glad to know that an American edition of it is about to be issued from the press of Mr. John D. Parsons, Jr., Law Publisher, Albany. We know of no book that we can more honestly and heartily commend to both lawyers and students than this. It is, indeed, as said in *Blackwood's Magazine*, "a treasury of valuable information and sound advice." The work is the production of a man who has felt the difficulties which he has endeavored to remove; who writes not from hearsay nor conjecture, but from positive and painful experience still fresh in his memory; who knows what the student must feel by knowing what he himself has felt, and who writes *to* the student as well as *for* him. A vast amount of time is at present wasted by law students from not knowing how to study and what to study. Mr. Warren's treatise will teach them these things, and will afford them valuable aid in other directions.

— Mr. Hand, the Court of Appeals Reporter, has completed his labors on the first volume of his reports — the forty of the Court of Appeals series — and it will shortly be ready for delivery to the profession. Mr. Hand is an able lawyer, and if he displays the same ability in the discharge of his duties as Reporter that he does in the practice of his profession, his reports will be a great improvement on many in the Court of Appeals series.

— The new Supreme Court Reporter, Mr. Abram Lansing, is engaged in preparing a volume of reports, which will shortly appear from the press of Messrs. Banks. Mr. Lansing, though a young man, is a well-read lawyer and a gentleman of culture, and will do his work well. The fifty-fourth volume of Barbour's Reports is in preparation. We have not learned whether it is Mr. Barbour's intention to continue his series further.

— Mr. N. C. Moak, of Albany, is engaged in preparing a new edition of Van Santvoord's Pleadings. The original work has always ranked high among treatises on the subject, and we have no doubt that its value will be greatly increased by the labors of Mr. Moak. He is a thorough lawyer, and has the experience derived from long and extensive practice, which, combined, should render him capable of supplying all the shortcomings and deficiencies in the work which he has in hand.

— Montgomery H. Throop, of New York, a lawyer of great ability and culture, is engaged in the preparation of a treatise on the validity of verbal agreements, which will shortly be published by Mr. John D. Parsons, Jr., Law Publisher, Albany. The want of a full, accurate and well-planned treatise upon this subject has long been felt by the profession. The subject is one of the most obscure, as well as the most important, with which a lawyer has to deal. Mr. Throop has all the qualifications necessary to prepare a work which shall supply this want, and we await his book with high expectations.

OBITUARY.

EDWIN M. STANTON.

The Hon. Edwin M. Stanton, for several years Secretary of War, and a lawyer of marked ability and distinction, died at his residence in the city of Washington, on the morning of the 24th of December. The cause of his death was congestion of the heart, superinduced by exhaustion of the vital energies.

Edwin Macy Stanton was the son of Dr. David Stanton, and was born at Steubenville, Ohio, on the 19th day of December, 1815.

At an early age he entered Kenyon college, but, in the course of a few months, was compelled to give up his collegiate studies, on account of the failing circumstances of his father. He then became a clerk in a bookstore at Columbus, Ohio. During his clerkship he studied law, and afterward completed his studies in the office of Daniel L. Collier. He was admitted to the bar in 1836, and began the practice of his profession at Cadiz, Ohio. Shortly after, he was elected Prosecuting Attorney of Harrison county.

In 1842, having removed to his native town, he was chosen Reporter of the Supreme Court of the State, and issued a series of reports known as "Stanton's Reports."

In 1847, he became a partner of the Hon. Charles Shaler of Pittsburgh, and practiced chiefly before the courts of Pennsylvania and the United States District Circuit and Supreme Courts. He was counsel for the Erie Railway Company in the cases which grew out of and were continued by the first "Erie War," and was also the leading counsel for the State of Pennsylvania in the great Wheeling Bridge case. In 1856 or 1857, he removed to Washington, to argue before the Supreme Court in an important case connected with the Mexican boundary question; and, in 1858, was sent to California, as special counsel for the government in certain land cases which involved great public interests. These he conducted with marked ability, and the fees he received for his services were very large. In 1859 he was associated, at Cincinnati, with Mr. Lincoln in the suit arising out of the conflicting interest of the Manney and McCormick reaping machine. He was also engaged as counsel for General Sickles in the famous trial for the murder of Key. In December,

1860, he was called by President Buchanan to take the position of Attorney-General. On leaving the cabinet, at the expiration of Mr. Buchanan's term, he resumed the practice of his profession; but, on the 20th of January, 1862, accepted the position of Secretary of War, tendered him by President Lincoln.

His history since that time is well known to the country.

ADMITTED TO THE BAR.

At the fourth general terms of the Supreme Court, held in the several judicial district of the State, the following named gentlemen were admitted to practice as attorneys and counsellors at law in all the courts of the State:

First District—Albert H. Ammidown, Frank H. Angel, George D. A. Armstrong, Louis Aubacher, Albert A. Abbott, Wm. C. Bailey, Godard Bailey, Wm. J. Bell, Arthur C. Butts, Butler G. Bixby, Hiram S. Blunt, Wm. H. Brown, John Contrell, Fredric Chase, Joseph B. Coe, John Charlton, Timothy I. Campbell, Chas. M. Clancy, Maurice S. De Vries, Willett Denike, Jr., Wm. A. Dunham, Henry S. Farley, Ashbel P. Fitch, Abraham Feuchtwanger, J. Henry Fowler, Hiram B. Ferguson, William J. Finnigan, Richard G. Fowles, Edward I. Fennell, Wm. Henry Gardiner, Andrew Gilhooly, Charles S. Gage, Isaac Heyman, Germain Hauschel, Lovell Hall, James O. Hoyt, George H. Hardie, Gerson N. Herman, Emanuel B. Hart, Judson Jarvis, Fredk. H. Kenny, Frank J. Kimball, Herman Kobbe, Samuel Kalisch, Wm. Korff, Isaiah Keyser, James H. Lawrence, Frank R. Lawrence, Louis C. Lewis, Wm. H. Lyon, Elias G. Levy, John D. Lindon, John McGinn, M. J. McKenna, James McConnell, David McClure, Peter Mitchell, James Maxwell, Allan McDonald, John E. McGowan, George McKechnie, James H. Matthaer, Frank H. Nugent, John H. O'Brien, Charles H. Pierson, Merritt A. Potter, George W. Poucher, Simon Kaufman, Obed H. Sanderson, Albert M. Schuck, George J. Smith, Lewis Sanders, Robert Sutherland, James G. Sinclair, Sergeant P. Stearns, Richard A. Storrs, Edward C. Sterling, Wm. Sinclair, Jr., Stephen C. Lynes, John J. Tindale, Louis C. Wachner, Abraham Webb, Jesse H. Whitaker, Henry T. Wing, George S. Wilkes, Matthew P. Breen, John C. McGuire, Benjamin H. Yard.

Second District—William S. Palmer, Patrick Keady, Chalmers M. Benson, Mayer Butzel, Joseph H. Bartlett, Samuel W. Clifford, Frank Crooke, Cornelius J. O'Donnell, Henry C. Duryea, John C. Donahue, Thomas Douglass, Levi B. Faron, Garret J. Garretson, Rudolph Herr, Edward F. Hart, Reynold Hunt, John Linsky, Eli Long, James H. McKenny, J. Sprague Meeker, Harrison W. Nanny, Nicholas E. O'Reilly, Charles A. Quitson, Eugene C. Roe, Whitehead H. Van Wyck, Henry Wilson, Jr. Bernard J. York, Thomas H. York.

Third District—John B. Grant, Schoharie; F. M. Sprague, Hudson; John M. Mattice, Schoharie; Peyton F. Miller, Hudson; J. M. Wagner, Wallace Westbrook, Samuel W. Buck, Kingston; Wallace Bruce, Hudson; Geo. P. Lawton, Fred. W. Brown, Thomas J. Guy, Clayton M. Parke, Hugh Maguire, Troy.

Fourth District—Charles A. Benton, Watertown; Robert B. Fish, Fultonville; Dexter A. Johnson, Gouverneur; James W. Sheehy, Port Byron; John W. Stone, Ogdensburgh; George B. Shepherd, Ogdensburgh.

Fifth District—Johnson C. Babcock, Sandy Creek, Oswego county, admitted by certificate from Supreme Court of California; Elbridge R. Adams, Lowville, Lewis county; Edwin S. Butterfield, Syracuse; Byron A. Benedict, Syracuse; Emmit W. Blanchard, Sandy Creek, Oswego county; William H. Carran, Utica; Joseph D. Denison, Syracuse; H. Clay Hawes, Belleville, Jefferson county; Charles A. Hammond, Syracuse; John H. Knox, Utica; P. H. McEvoy, Little Falls, Herkimer county; Henry C. McCarty, Lowville, Lewis county; Dexter E. Pomeroy, Rome, Oneida county; John A. Ryan, Fairfield, Herkimer county; Orin G. Walrath, Watertown, Jefferson county.

Seventh District—Geo. H. Dickson, Rochester; Lanman Chase, Rochester; Wm. H. Clark, Lyons; James K. Smith, Hammondsport; H. H. Rockwell, Elmira; John Boyle, Cortland; Carlos E. Warner, Canandaigua; Robert P. Willson, Canandaigua; M. A. Leary, Penn Yan; John T. Andrew, 2d, Penn Yan; R. F. Randolph, Elmira; Charles S. Thomas, Cortland; Ogden Marsh, Dansville; George L. Waters, Cortland.

Eighth District—Leroy W. Filkins, John B. Greene, Geo. A. Blanchard, Sheldon T. Viele, Edward R. Bacon, Edward C. Hawks, Geo. A. Newell, Theodore F. Hascall, Dan. E. Chapin, Daniel E. Corbitt, Charles B. Knowlton.

LEGAL NEWS.

Russia is about to introduce trial by jury as a new pledge of her progress in civilization.

The Hon. Henry M. Waite, formerly Chief Justice of the State of Connecticut, died at Lyme, Conn., last month.

Norman L. Freeman has been reappointed Supreme Court Reporter of the State of Illinois for the term of six years.

Judge Isaac Davis, of Sacramento, is dead. He was a pioneer Californian, and a prominent Mason and Odd Fellow.

The Quebec Court of Appeals has decided against a plaintiff who claimed $400 deposited as a stake on an election bet.

The Attorney-General of Louisiana has obtained judgment against the State Treasurer for $16,000 for alleged services in collecting the special tax of 1868. He claimed $125,000.

An Ex-Judge of Probate in Oxford county, Me., has been indicted by the grand jury for fraudulently altering a deed of real estate. He was arraigned, pleaded not guilty, and was admitted to bail in $3,000.

Judge Barnard, of New York, recently refused to appoint a man committee of a lunatic's estate, on the ground that he had been heard, some time previous, to call the judge a scoundrel. The judge does not mean to encourage "contempt of court."

The following named gentlemen were recently admitted to the bar of the United States Supreme Court: E. D. Wheeler, of San Francisco, Wm. T. Wallace, of San Jose, Cal.; Robinson Toff, of Memphis, Tenn.; Eugene M. Wilson, of Minneapolis, Minn.; Albert Todd, of St. Louis, Mo. and C. P. Shaw, of New York city.

The Hon. Samuel Smith Nicholas died in Louisville, Ky., on the 11th ult. He was made Judge of the Court of Appeals in Louisville in 1831; was Chancellor of the city, and a Member of the State Legislature for many years. As an appropriate close to his official labors, he assisted in the preparation of the Revised Code of Kentucky, to which he contributed some of its best features.

Judge Hall, of the United States District Court, recently decided that the making of a general assignment, without preferences, by an insolvent debtor, was an act of bankruptcy; that an express denial, under oath, of an intent to defeat or delay the operations of the Bankrupt act, by making such assignment, was of no avail, as against the conclusive legal inference of such intent, arising out of the admission of the execution of such assignment.

Secretary Nelson says that it is not his fault that the law-publishers' edition of the State laws is delivered by the printer before the State edition is delivered, and he adds: "Where publishers inform me that the work for which $1.74 per signature is paid is worth from $14 to $15 per signature (which difference the State contractor undoubtedly makes up in his dealings with the law publishers and booksellers, and which falls severely upon the legal profession), very little good would be accomplished by declaring the State contract broken for failure to deliver within proper time, as the State would then be obliged to pay higher rates."

Governor Hoffman has appointed Charles H. Van Brunt, Esq., Judge of the Court of Common Pleas in the city of New York, to fill the vacancy occasioned by the elevation of Judge Brady to the Supreme Bench. The position was tendered in turn to ex-Judge Bosworth and Hamilton W. Robinson, Esq., but both these gentlemen declined. Mr. Van Brunt was formerly the law partner of Governor Hoffman. He afterwards formed professional connections with the present Comptroller, Hon. Wm. F. Allen. He is still a young man, being about thirty-five years old. Judge Van Brunt brings to the discharge of his new duties a clear judicial mind, enriched by much study and practice of his profession.

An act of the last Congress provided for the appointment of an additional Circuit Judge for each of the nine existing Circuits. The Senate has confirmed the following nominations made in pursuance of this act: George F. Shepley of Maine, for the First Circuit; Lewis B. Woodruff of New York, for the Second Circuit; Wm. McKennan of Pennsylvania, for the Third Circuit; Wm. B. Woods of Alabama, for the Fifth Circuit; S. L. Withey of Michigan, for the Sixth Circuit; Thomas Drummond of Illinois, for the Seventh Circuit; John T. Dillon of Iowa, for the Eighth Circuit. The nomination of George A. Pearre of Maryland, for the Fourth Circuit, is understood to have met with some unfavorable action in the nature of a postponement, but is still pending, together with that of Lorenzo Sawyer of California, for the Ninth Circuit.

BOOK NOTICES.

A General Digest of the Law of Corporations: presenting the American adjudications upon Public and Private Corporations of every kind, with a full selection of English cases: By Benj. Vaughan Abbott and Austin Abbott. New York: Baker, Voorhis & Co., 1869.

In these days of almost innumerable reports, the author of a good Digest may justly be regarded as a benefactor of the profession. It is true, as Montesquieu says, that he is "only a collector of other peoples' stuff;" but he is none the less entitled to rank along side of the commentator and treatise writer. To extract the exact points decided by the courts from the mass of verbiage in which they are too frequently involved; to state these points accurately and intelligibly, and to arrange the subjects in such a manner that any given principle may be turned to at once, require peculiar talents, and we know of none who can lay claim to such talents with more justice than the Messrs. Abbott. Their "New York Digest" has been for years one of the most popular works extant with the profession of the State, and their "National Digest," though but recently issued, has become a standard authority all over the country. A careful examination of the present work has satisfied us that it is in no wise calculated to detract from the high reputation of its authors.

The design of the work may be gathered from the following extract from the Preface: "The object throughout is to give to the practitioner in each State a knowledge of whatever has been established as law throughout England or America which can elucidate or illustrate the American law of Corporations."

The value of such a work will not be questioned. Were it possible for a lawyer of the early days of the Republic to wake up from his half century's sleep, nothing would astonish him more than the present number and magnitude of incorporated bodies and the variety and multiplicity of litigations growing out of their affairs. Fifty years ago a Digest on the law of corporations would have been a small and profitless work; but to-day a brief syllabus of the more important decisions can only be compressed within the space of one thousand pages, and the work has become an essential to almost every practicing lawyer.

We have had occasion to subject Messrs. Abbott's book to the only test that can disclose the merits or demerits of a Digest—that of use—and have found it accurate, reliable and well arranged. In making their abstracts they have been very successful in preserving a golden mean between the fullness of a report and the meagreness of an index; and they have eschewed entirely, as all law writers should, the head notes of the reporters. They have very wisely pursued the plan of classifying decisions under general topics, rather than under the head of a particular kind of corporations, and have thus enabled us to trace out those principles which govern corporations in general. At the end of the volume is a full and carefully prepared Table of Cases, in which is given briefly the subject to which each decision relates. While the work may be considered as somewhat defective in the matter of cross references, it is on the whole eminently adapted to meet the wants of the profession, so far as relates to the law of corporations.

Statutes at Large of the State of New York: comprising the Revised Statutes as they existed on the first day of January, 1867, and all the general Public Statutes then in force, with reference to the Judicial decisions and the material notes of the revisers in their report to the Legislature. By John W. Edmonds. Second edition. Vol. 1. Containing the Constitution of the United States and the Constitution of the State; an introduction; an analysis of all the Statutes, and part first and chapters 1, 2, 3, and 4, of part second of the Revised Statutes. Published by Weed, Parsons & Company. 1869.

We know of no one who has more satisfactorily discharged the debt which Lord Bacon said every man owes to his profession than the learned editor of the above work, and it is gratifying to know that the profession have so far appreciated his efforts in their behalf as to demand a second edition of the Statutes at Large so soon after the publication of the first.

We have used Judge Edmond's edition of the Statutes since its first publication, and speak from experience, when we say that it is admirably planned and ably executed, and far superior to any other edition ever published in the State.

There was always much that was unsatisfactory and objectionable in the editions in use prior to the work of Judge Edmonds. They were gotten up on a plan that was radically wrong. The editors attempted to incorporate into the text of the Revised Statute not only the amendments made thereto, but also the general statutes which had never been enacted by the Legislature as a part of the Revised Statutes. The result was chaos and confusion. Acts were divided and subdivided, and a part put in one place and another part in another place, and, in many instances, entire sections were omitted. In many instances, also, the compilers assumed to themselves the functions of the Legislature or the courts, by omitting, as repealed, acts which were not repealed by direct legislation. No one could learn from those editions what the law really was; no careful practitioner felt justified in trusting to the opinion of the editors as to the real purport of a statute, or as to the effect of a subsequent statute upon a previous one, and a reference to the original act became necessary in all cases of any importance.

There are no faults of this character in the work before us. Judge Edmonds' plan is simple and natural, and the only one on which the statutes of this or any other State can be successfully compiled. He has given, in the first two volumes, the Revised Statutes by themselves just as they stood when the work left his hands, divided as in the original edition, and in conformity with the original paging. The General Statutes he has grouped together in the

subsequent volumes, so that the acts on any given subject are brought together in their chronological order. Wherever any statute, either Revised or general, is in any wise affected by any other statute, a reference is given, thus enabling one to readily trace the course of legislation on any subject, and to obtain an accurate knowledge of the existing law. Another feature of immense value to the profession is the citation of decisions bearing on the several statutes in connection with the statutes themselves. The editor assures us that he has endeavored to cite every case bearing upon the statutes, and so far as we have been able to examine, he has been mainly successful. The revisers' notes have also been given.

The edition before us contains all the statutes, both Revised and general, as they were on the first day of January, 1867. Also a reference to all the adjudications up to the same time. A seventh volume is in preparation, and will shortly appear, which will contain the laws of 1867, 1868, 1869, and 1870.

This work will prove extremely useful to all officers to whom is intrusted the execution of the laws of the State, but to the members of the legal profession, who are compelled almost hourly to consult the statutes, it is indispensable.

The Supervisor's Manual: containing the Laws relating to the powers and duties of Supervisors, both in their individual and collective capacities, with an Appendix of Forms. By Isaac Grant Thompson, author of "The Law and Practice of Provisional Remedies," "Law of Highways," etc. Second Edition. Albany: John D. Parsons, Jr. 1869.

We welcome this book as likely to supply a need which has long been felt, both by the profession and by those officers to whose duties it relates. No systematic and well-directed attempt has ever before been made to bring together and arrange the numerous statutes and decisions pertaining to this important class of officers. Supervisors and lawyers have alike been left to search the statutes to ascertain the rights and duties of these "county legislators." The work before us will save a great amount of unprofitable and uncertain labor in this respect. It compresses within the space of three hundred pages the whole duty of the supervisor as laid down by the Legislature and the courts. The arrangement is such as to render a reference to any particular question or statute a matter of the greatest ease. Beginning with the election and qualification of a supervisor, it presents his duties individually as an officer of the town, including his duties as a town auditor and a county canvasser. Then follow the duties and powers of the supervisors acting collectively as a board. The decisions have been carefully examined, and wherever the courts have explained or modified a statute such explanation or modification is given.

The work cannot fail to prove of value to the profession, especially to those members of it living outside of the large cities, who are continually interrogated on the subjects to which it relates.

The Law and Practice in Bankruptcy: The Bankrupt Law of the United States, with all the amendments and the rules and forms as amended, together with notes referring to all decisions reported to October 1, 1869, to which is added the rules of the District Court of the United States for the Southern District of New York. Annotated by Orlando F. Bump, Register in Bankruptcy. New York: Baker, Voorhis & Co. 1869.

This is the second edition of Mr. Bump's little book—the first edition of which was published about a year ago. That one edition of a work of this character has been so soon exhausted, is of itself a very satisfactory proof of its value.

Mr. Bump is a Register in Bankruptcy and brings to the work a knowledge gained by extensive experience of what is needed by the profession. He has given especial attention to the practice in bankrupt courts—a subject of the greatest importance to the profession, and one on which most bankrupt manuals are defective. The rules and proceedings in those courts are so unlike the ordinary rules and proceedings in a State court that a practitioner therein, unless he has had great experience, feels out of his element, and needs a manual of practice to guide him through the labyrinth of regulations and technicalities. The points decided by the courts have been arranged under the sections construed and have been fully and accurately stated. Mr. Bump's work is the best we have seen on the subject, and will greatly facilitate the labors of the practitioner in the bankrupt courts. It is a marvel of beauty in its typography, and is well bound.

General and Public Statute Laws of the several States of the United States relating to Fire, Inland-Navigation, Marine, Life, and Health and Casualty Insurance Companies, and Miscellaneous Laws pertaining to Insurance: Edited by George Wolford, LL. B., Deputy Superintendent of the New York Insurance Department, and one of the editors of the Fifth Edition of the Revised Statutes of the State of New York. Albany: Weed, Parsons & Company. 1870.

Mr. Wolford has brought together, within the compass of a single volume, all the existing insurance laws of the several States, together with the general statutes relating to insurance enacted by the Congress of the United States. These laws are given *in extenso*, a chapter being devoted to each State, and the States are arranged in alphabetical order. That the work will be of great service to the legal profession there can be no doubt. The subject of insurance has made remarkable progress during the last ten years. Companies, almost without number, have been formed and have established their agencies in every State in the Union. As a very natural result litigations arising from their transactions have become frequent—litigations the determination of which often depends on the construction of the insurance statutes of States other than those in which they arise. In all such cases the present volume will lessen the labor of both the bench and bar, by presenting in a compact and convenient form what otherwise might require hours to find. There is another way in which, we trust, Mr. Wolford's compilation will prove valuable, and that is in suggesting, by comparison, improvements on our present insurance system. In many respects the legislatures of several of the States have approved themselves bunglers in the construction of statutes relating to insurance, and a careful examination and comparison of the laws of other States will aid them materially in the correction of their errors.

One of the most commendable features of Mr. Wolford's book is its index, which covers over two hundred pages, and which has evidently been prepared with great care and labor. It will prove invaluable in facilitating reference to the statutes contained in the work. Copious notes and citations of adjudicated cases have also been given in the margin in connection with the statute to which they relate.

A Treatise on the Law of Negligence: By Thomas G. Sherman and Amasa A. Redfield. New York: Baker, Voorhis & Co. 1869.

We know of few books likely to prove of more value to the profession than this. The increase of actions grounded in negligence, during the last ten years, has been remarkable, and has created a demand for a separate treatise on the subject, in which should be gathered and classified the principles decided both by the American and English courts. This treatise of Messrs. Sherman & Redfield will meet that demand. They have cited upwards of four thousand adjudged cases, embracing all the American and English, and most of the Scotch and Irish decisions on that subject.

The work is written in a style both clear and concise, and the arrangement of topics and collocution of principles are logical and convenient.

The first three chapters are devoted to a consideration of the general subject of Negligence, the Degrees of Negligence, and Contributory Negligence. Then follows a consideration of the various relations of parties to each other, embraced in chapters on Parties to Action, Liability of Masters for Acts of Servants, of Masters to Servants, of Servants to third parties, of Municipal corporations, of Public officers, of Attorneys and Counsellors at Law,

etc. The other chapters treat of Animals, Bankers and Bill collectors, Bridges, Canals, Carriers of Passengers, Clerks and other Recording Officers, Injuries causing Death, Driving and Riding, Fences, Fire, Gas companies, Highways, Notaries Public, Physicians and Surgeons, construction and maintenance of Railroads, Railroad Fences, General Management of Railroads, Real Property, Sheriffs, Telegraphs, Water-courses, Miscellaneous cases, and Measure of Damages in actions for Negligence—subjects sufficiently various and important to attract the attention of any practitioner.

The large and constantly increasing number of actions arising out of railroad accidents, renders the chapters on Carriers of Passengers and General Management of Railroads of peculiar value.

As much may perhaps be said of nearly every chapter in the book. In fact we know of few law books which contain, within the same compass, so much useful and valuable information, upon questions which are constantly arising in our courts.

The authors claim—we believe correctly—that their work is "a pioneer in its peculiar field." There have been chapters in other words devoted to Negligence, but we believe no other book written exclusively on that subject, so far at least as the English and American law is concerned. The authors have therefore had but little assistance from previous works, and have had the whole ground to go over for themselves. This may account for the occasional errors that occur in the book. These errors, if we may judge from the examination that we have been able to make, are neither numerous, nor likely seriously to mislead the practitioner, and are confined mainly to the notes. For instance, on page 392, the authors say in a note to their definition of the term "Highway": "There must be a *thoroughfare;* in other words, 'a way which is open to the public to pass through it,'" and cite Rex *v.* Lloyd, 1 Camp. 260; Wood *v.* Veal, 5 Barn. & Ald. 454 (incorrectly cited as Ward *v.* Veal, 3 Barn. & Ad.), and Holdane *v.* Cold Spring, 23 Barb. 103. The note is not a correct statement of the existing law. In England, as late as 1852, in the case of Bateman *v.* Black, 14 Eng. Law and Eq. 69, the Court of Queen's Bench expressly held that there need *not* be a *thoroughfare* to constitute a highway, sustaining the decision of Lord Kenyon in the case of the Rugby Charity *v.* Merryweather, 11 East. 375, n. It must also be regarded as settled in this State, that both at common law and under the statute, a *cul de sac* may be a highway. People *v.* Kingman, 24 N. Y. 559; Wiggins *v.* Tallmadge, 11 Barb. 457; Hickok *v.* Trustees of Plattsburgh, 41 Barb. 135. There are a few other errors that we purposed noticing, but have not the space. Taken all in all, it is a work of great value, and we heartily commend it to the profession.

A Treatise on the Law of Set-off, Recoupment, and Counterclaim: By Thomas W. Waterman, Counsellor at Law. New York: Baker, Voorhis & Co., Publishers. 1869.

The rapidly increasing number of decisions on minute points of the law, makes absolutely necessary to the practicing lawyer a work of this kind. The task of finding and reading everything that may have been written in the reports concerning the subjects of set-off, recoupment and counterclaim, would be impossible to one whose days must be spent in the contentions of the court and his nights in preparing for his daily labors. Eighteen hundred cases, each one studied critically, indicates to the professional man the labor required to produce this work.

We have examined, not as carefully and thoroughly as we would like, Mr. Waterman's treatise. It has one advantage over many law books published in New York city, in that it is well printed and well bound. That goes to the credit of the publisher, though we think it more than probable the author suggested much with reference to the style of publication. Another thing, and here the author has the whole responsibility, the work is well indexed. So many works of great value are rendered practically useless by a poor index that we can almost say that the index is the most important part of the book. The valuable treatise of Judge Wait on Justices' Courts loses much by the imperfection of its indexes. His index is rather a summary of the subjects treated, of advantage indeed to the student, but no better than the pages of the book for the purpose of reference.

It is easy to criticise a work of this kind and point out defects. Doubtless every one who has occasion to consult an elementary treatise upon any science finds mistakes, sometimes glaring ones, and in his mind condemns the author for his apparent want of knowledge. But let the critic try and state in clear language some abstract principle that he believes he fully understands, and submit the result to the public. He will find in one quarter and another doubt after doubt raised against his truth until they become as numerous as the exceptions to a rule in grammar. He will then appreciate something of the difficulty of writing a satisfactory scientific work. We must say that while we may have detected errors in Mr. Waterman's book there is nothing that will mislead.

Although the work was written and published in New York, it will be beneficial chiefly to the profession in other States. The sweeping changes of the Constitution of 1846 and the Code, have reached not only the practice but the very essence of the law. A liberality, aye a looseness now obtains in the courts, that renders valueless the technical learning of earlier days. Under other jurisdictions where the spirit of the common law still holds its vigor, Mr. Waterman's work will be better appreciated. And we are confident that here also in a little time, the traditions of our profession will snow themselves superior to the innovations of the day and enable us to restore a little of the technicality of our ancestors. When we can say that the law is determined by precedent and not by the discretion of a judge, we will obtain the full benefit of the researches of scholarly men. The work is needed, however, in every law library, and with the practicing attorney will be in almost daily use.

A Digest of New York Reports from the Organization of the State to the year 1869: containing the Decisions of all the Courts of the State, except such as are digested in Clinton's Digest. Second Edition, with references to the Statutes. Volume 1. By William Wait, Counsellor at Law. Albany: William Gould & Son. 1869.

The second edition of Clinton's Digest was published in 1860, and so far as it went was an accurate and valuable work; but, unfortunately, the author's plan did not include practice cases, and a large number of practice reports were not digested at all. Notwithstanding its incompleteness in this respect, the care and ability with which it had been prepared rendered it a standard authority and an important aid to the profession. It was therefore with gratification that the announcement was received that a supplement was in preparation by William Wait, a lawyer of known ability and learning. Mr. Wait had displayed such vast research, such skill in extracting principles, and precision in stating them, and such method in arrangement, in his treatise on "The Law and Practice in Justices' Courts," that we had formed great expectations in regard to the forthcoming Digest. Thus far we are not disappointed. The volume before us is complete, comprehensive, and accurate; and, what is of the first importance in a digest, remarkably methodical and convenient in its arrangement. So well, indeed, has Mr. Wait performed his work, that we have only to regret that he did not commence *de novo*, and give us a uniform and entire digest of all the decisions of the State. The author says in his preface: "In the use of a digest, one of the principal difficulties is that which arises from the different modes of thought and reading. One person would classify a case under a title where another person would scarcely look for it. To obviate this inconvenience as far as possible, a very complete table of titles has been made, and a system of cross references has been adopted, which will do much toward directing attention to some

title under which any case may be found." As another aid to ready reference, an initial index has been prefixed to each title, giving the pages of the subdivisions, and the cases have been arranged alphabetically under appropriate catchwords, thereby enabling a given principle to be found at a glance. The points adjudged have been stated with clearness and precision, and with sufficient fullness to enable the reader to understand readily the principle involved. We know of no digest that we would rather have upon our office table and at our right hand, on any emergency or occasion of difficulty or of doubt. The present volume terminates with the title "Husband and Wife." The other volumes, two in number, are in press, and will be issued in the course of a few weeks.

COURT OF APPEALS ABSTRACT.

The People, Plffs. in Error, v. *Joel B. Thompson, Deft. in Error.* Not Reported.

The main question presented was whether the Supreme Court or the Court of Appeals, upon a writ of error, can review the conviction upon the merits, or whether such review is confined to questions of law arising upon exceptions taken upon the trial. The defendant in error was indicted for murder in the first degree. It appeared that the accused and the murdered man had met in the street and that almost at the instant of meeting the accused, actuated by some supposed insult or apprehended bodily harm, fired the fatal shot.

Hogeboom, J., who tried the case, charged the jury that they might convict the defendant of murder in the second degree if they found that his intent to effect death was less deliberate and atrocious than was requisite to justify a conviction in the first degree. No exceptions were taken to the charge by the defendant. On writ of error sued out by the defendant, the Supreme Court reversed the judgment and ordered a new trial. The People brought the proceedings to this court. The Court held that that portion of the judge's charge that the jury might convict the defendant of murder in the second degree, if they found that his intent was less deliberate and atrocious than what was requisite to justify a conviction in the first degree, was erroneous—the defendant in error not having been engaged in the commission of a felony at the time of the killing; but that having failed to except thereto at the time, the defendant could not now avail himself of the error, since, on a writ of error, the court could review the conviction only on questions of law arising upon exceptions taken at the trial. The question also arose as to whether a judgment convicting the accused of murder in the second degree under a common law indictment for murder was erroneous. Following its decision in the *Keith* case, decided at the June term, the court held that such judgment was proper.

Calkins v. *Falk.* To appear in 38 How.

By the statute of frauds "every contract for the sale of any goods, chattels or things in action for the price of $50 or more is declared void unless a note or memorandum of such contract be made in writing and be subscribed by the parties, &c." The form of the memorandum is not material, but it must state the contract with reasonable certainty, so that the substance of it can be made to appear and be understood from the writing itself without recourse to parol proof. (*Bailey* v. *Ogden*, 3 Johns. R. 398–418.) To constitute a contract there must be parties, a subject-matter and a consideration. In the written memorandum demanded by the statute all these elements must plainly appear. In the case of *Calkins* v. *Falk* the memorandum relied upon showed but one contracting party. The court held it not to be a compliance with the statute. In *Champion* v. *Plummer*, 4 Bos. & Pull. 253, decided under a similar statute, Lord Mansfield in deciding the case said: "How can that be said to be a contract or memorandum of a contract which does not state who are the contracting parties? By this note it does not appear to whom the goods were sold. It would prove a sale to any other party as well as to the plaintiff; there cannot be a contract without two parties."

Daggett v. *Keating et al.* Not Reported.

The parties to the action, after the commencement thereof in the Supreme Court, agreed to an arbitration—that judgment should be rendered upon the award by the Court, and that in the meantime the case be nominally continued. The award was in favor of the defendants, but was set aside at Special Term, which decision was reversed at General Term and the award confirmed. Plaintiff appealed from the judgment entered under this decision, and defendants now moved to dismiss the appeal, on the ground that the code did not provide for the case of awards, and that writ of error, and not appeal, was the plaintiff's true remedy. Plaintiff contended, in opposition to the motion to dismiss, that, as by the agreement the action was kept alive, the judgment was entered in the action and was therefore appealable. The Court concurred in the ground taken by the defendants, and dismissed the appeal.

John Flanagan et al. v. *Patrick Cassidy.* Not Reported.

This action was originally brought to recover a balance due for attorney's fees, and, on a motion that the cause be referred on the ground that it involved the taking of a long account, the defendant, to avoid a reference, offered to admit all the items except one, as to which he claimed that the negligence of the attorney had given an offset.

The Court below referred the case, and from the order of reference the defendant appealed. On the motion to dismiss the appeal it was argued on behalf of the defendant that the amendment to section 11, subdivision 4 of the present year authorized such an appeal.

The Court held that the amendment to the Code did not extend appealable orders, and therefore dismissed the appeal.

DIGEST OF AMERICAN DECISIONS.

To appear in the following State Reports: 38 Howard (N. Y.), Nathan Howard, Jr., Reporter; 6 Abb., N. S. (N. Y.), Benj. Vaughan Abbott and Austin Abbott, Reporters; 37 Iowa, E. H. Stiles, Reporter; 36 California, J. E. Hale, Reporter; 48 Illinois, Norman L. Freeman, Reporter; 59 Penn., P. F. Smith, Reporter. Cases marked N. R. are not reported.

ADVERSE POSSESSION.

1. *Must be hostile.*—Adverse possession, sufficient to defeat the legal title, where there is no paper title, must be hostile in its inception, and continue uninterruptedly for twenty years. *Jackson* v. *Birner*, 48 Ill.

2. *Proof of, must be positive.*—Adverse possession is not to be made out by inference, but by clear and positive proof. The possession must be such as to show clearly that the party claims the land as his own, openly and exclusively. *Ib.*

AMENDMENT.

1. *Of complaint.*—After an amended complaint has been held insufficient on demurrer, leave to amend a second time should not be granted, especially where the action is on a statute and the demurrer turned on the construction of the statute. *Lowry* v. *Inman*, 6 Abb. N. S.

2. *Variance: Discretion.*—The action of the court below in allowing the plaintiff to amend his petition while the second argument was being made to the jury by defendant's counsel, in order to conform the pleadings more definitely to the facts proved on the trial, will not be disturbed by the Supreme Court unless satisfied that there has been abuse of discretion or that the order made was not in furtherance of justice. *Smith* v. *Howard*, 27 Iowa.

3. *Pleading.*—The allowance of an amendment, after one trial has been had in which the jury disagreed, withdrawing the denial of the due execution and attestation of a will in a case in which its validity was contested on the ground of the mental weakness and undue influence of the testator, and thereupon giving the affirmative of the issue and the right of opening and closing the case to the contestants, was held not erroneous. *Bates* v. *Bates et al.* 27 Iowa.

4. *Acceptance of terms estops appeal.*—Where an order was granted allowing a defendant to amend his answer on payment of costs, and the costs were accepted by the plaintiff, *held*, that the acceptance of the costs estopped the plaintiff from appealing from the order. N. Y. Super. Ct. 1869, *Howard* v. *Smith*, N. R.

ARREST.

In action of claim and delivery.—In an action of claim and delivery to recover possession of property, an order of arrest on the ground that the defendant has concealed the property cannot be granted until after the sheriff has certified in the return to the writ that he has made demand of the property, but has been unable to recover it. N. Y. Super. Ct., 1869, *Sherlock* v. *Sherlock*. N. R.

ATTORNEY'S FEES.

Where suit is settled by plaintiff.—Where a plaintiff, without the knowledge of his attorney, settled the case by accepting an amount less than that claimed, and afterward refused to pay the service-bill of his attorney, *held*, on a motion to annul the settlement, that the papers on which the motion is made must show fraud, and that it must appear also that the plaintiff is not able to pay the amount of fees claimed. N. Y. Super. Ct., 1869, *Carr* v. *Kohner*, N. R.

BAR TO ACTION.

1. *Commencement of prior action.*—The commencement of an action for the recovery of part of a demand does not extinguish the right of action for the balance; but if such action proceed to judgment, then the judgment would be a bar to any action for the balance. *O'Beirne* v. *Lloyd*, 6 Abb. N. S.

2. *Plea in abatement.*—The pendency of the prior action for part of the entire demand may, however, be pleaded in abatement, in the subsequent action. If such plea is interposed, the plaintiff in the second suit may discontinue the first one, and thereupon the plea falls. *Ib.*

BOUNDARY LINES.

Uncertain Calls of Deed—Establishment of Line by Parties. If there be such uncertainty in the calls of a deed that either one of two or more objects will answer it, so that the line will run in two or more positions, and still harmonize with the other calls of the deed, the parties to the deed may adopt either line—and, when so established, it concludes both parties. *Hastings* v. *Stark*, 36 Cal.

CHATTEL MORTGAGE.

Chattel Mortgage.—In case of a chattel mortgage, the title of the mortgagee becomes absolute at law on the default of the mortgagor, and on the foreclosure of the mortgage the mortgagee is at liberty to become the purchaser. *Wright* v. *Ross*, 36 Cal.

CIVIL RIGHTS BILL.

Validity of the Civil Rights Bill.—The provisions of the Act of Congress commonly known as the "Civil Rights Bill" (14 U. S. Stats. at Large, p. 27), which provide that "all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States, and such citizens of every race and color * * * shall have the same right in every State and Territory of the United States * * * * to full and equal benefit of al. laws and proceedings for the security of person and property as is enjoyed by white citizens, * * * any law, statute, ordinance, regulation or custom to the contrary notwithstanding," were not repugnant to the Constitution of the United States as it read prior to the adoption of the Fourteenth Amendment thereto, and are valid. *People* v. *Washington*, 36 Cal.

COMMON CARRIERS.

Liability for Goods Burned—Delivery.—The defendants, the New Haven Steamboat Company, received merchandise at New Haven shipped for the west, brought it safely to New York, and landed it on their pier, where it was burned a short time after, with a large quantity of other merchandise. It appeared that it had been loaded on to the trucks of a firm of common carriers, ready to be carted away to a connecting line the next morning, had not the fire occurred. In an action to recover the value of t e goods, the court held that the loading of the goods upon the trucks of the firm of common carriers was a delivery to them, and that by such delivery the liability of the defendants as insurers had ceased, though the goods still remained on their pier. Sup. Ct. Spe. T., 1869, *Williams* v. *New Haven Steamboat Co.*, N. R.

CONDITIONAL SALE.

Conditional Sale of Personal Property—Title.—Where on sale of personal property "the right to receive payment before delivery is waived by the seller, and immediate possession is given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a fixed day, such payment is strictly a condition precedent, and until performance the right of property is not vested in the purchaser." *Putnam* v. *Lamphier*, 36 Cal.

CONTRACTS.

1. *Of insane persons.*—Where a contract has been entered into under circumstances which would ordinarily make it binding, by a sane person with one who is insane, and such contract has been adopted and is sought to be enforced by the representatives of the latter, it is no defense to the sane party to show that the other party was *non compos mentis* at the time the contract was made.

Argu. 1. *Infants.*—If an infant make a contract with one of full age, it may be enforced by the infant against the adult, though not by the adult against the infant.

Argu. 2. *Surety: coverture.*—While as a general rule the discharge of the principal discharges the surety, yet if a person *sui juris* become surety for a married woman, a minor, or other person incapable of contracting, the surety is bound, notwithstanding a successful plea of disability on the part of the principal. *Allen, by his guardian, Stephens*, v. *Berryhill*, 27 Iowa.

2. Contracts which are wholly executory, made by a person totally insane, are so far void as that they will not be specifically enforced, even at the suit of the lunatic or his representatives against the sane party. *Per* COLE, J., *dissenting in same case.*

3. *Mutuality: railroad subscriptions.*—If one promise to pay another a sum of money if he will do a particular act, and he does the act, the contract is not void for want of mutuality, and the promissor is liable, though the promissee did not at the time of the promise engage to do the act; for upon the performance of the condition by the promissee, the contract becomes clothed with a valid consideration which relates back and renders the promise obligatory. *Des Moines Valley R. R. Co.* v. *Graff et al.*, 27 Iowa.

4. It is accordingly held that if certain subscribers promise and undertake to pay a railroad company a certain sum or sums if it will build its road to a designated place, the subsequent completion of the road according to the terms of the promise,

furnishes in itself a consideration, removes the objection of want of mutuality, and renders the promise binding upon the subscribers. *Ib.*

CONTRIBUTORY NEGLIGENCE.

1. In an action whose *gravamen* is negligence, it is the duty of the plaintiff to show a case clear of contributory negligence. There must be shown a *prima facie* case resulting exclusively from the wrong of the defendant, before he can be called to answer. *Waters* v. *Wing*, 59 Penn.

2. The plaintiff's horse was killed by the shaft of the defendant's carriage running into him, both being on a public highway. The defendant asked the court to charge: "That the defendant had a right to be on the public highway, and if the jury believe that at the time of the alleged accident he was traveling in an ordinary manner, he is not liable for an injury resulting from such use of the public thoroughfare." *Held*, that the point should have been affirmed. *Ib.*

CRIMINAL LAW.

1. *Circumstantial evidence; instruction.*—In a prosecution for larceny the court instructed the jury that the evidence to establish the facts necessary to convict the defendant might be direct or circumstantial, or partly direct and partly circumstantial; direct, as by persons who saw the act, or circumstantial, as by evidence of facts from which the jury might fairly presume the guilt of defendant. *Held*, that the instruction was not erroneous. *The State* v. *Brady*, 27 Iowa.

2. *Larceny: possession of stolen property.*—Where a large portion of stolen goods were found soon after the theft in defendant's house, which was of a disreputable character and at which disreputable persons visited, and a part of the goods were found in a bed-room occupied by the defendant, this possession, together with some other circumstances tending to show defendant's participation in the commission of the offense, were held sufficient to warrant his conviction. *Ib.*

3. *Larceny: proof of owner's non-consent.*—The rule requiring in a prosecution for larceny the introduction of the owner of the property stolen in order to prove his non-consent to the taking, does not apply in cases where the property is stolen from a bailee or another holding the possession thereof, or where it is impossible to produce the evidence of the owner as in case of death or the like. In such cases the evidence of the bailee or persons holding possession is sufficient, and in case the owner cannot be produced the fact of his non-consent may be shown by proper secondary evidence. *The State* v. *Osborne*, 27 Iowa.

4. *Drunkenness no excuse for crime.*—Insanity produced by intoxication does not destroy responsibility for the commission of a crime, when the party who committed the crime when sane voluntarily made himself intoxicated. *People* v. *Lewis*, 36 Cal.

5. *Evidence of drunkenness as excuse for guilt.*—Drunkenness is no defense to the fact of guilt. Evidence of drunkenness can only be received and considered by the jury for the purpose of determining the degree of guilt, and for this purpose it should be received with great caution. *Ib.*

ESTOPPEL.

Positive acts.—Positive acts tending to mislead one ignorant of the truth, which do mislead him to his injury, are good ground of estoppel, and ignorance of title on the part of him who is estopped will not excuse him. *Chapman* v. *Chapman et al.*, 59 Penn.

EVIDENCE.

1. *Declarations of agent: res gestæ.*—To render the declarations of an agent admissible in evidence to bind his principal, they must have been within the scope of the agency and made during the continuance of it in respect to the transaction then depending. Subsequent declarations are not part of the *res gestæ*, and are not admissible. *Sweatland* v. *Telegraph Co.*, 27 Iowa.

2. *Testimony of attorney as to client's declarations.*—The rule not permitting an attorney to testify to communications made to him by his client, as such, does not extend so far as to prohibit the attorney from stating by whom he was employed; neither does the rule prevent the attorney from testifying to communications made to him by his client, unless they are confidential communications made by the client in the course and for the purposes of the employment of the attorney. 36 Cal.

3. *Testimony of defendant in criminal case.*—If the defendant in a criminal case does not avail himself of his right given by the statute to testify in his own behalf, the District Attorney should not be allowed, in addressing the jury, to comment on his failure to testify as an evidence of guilt. *People* v. *Tyler*, 36 Cal.

4. *Defendant need not testify in his own behalf.*—A defendant in a criminal case is entitled to rest in silence and security upon his plea of not guilty, and no inference of guilt can properly be drawn against him from his failure to testify in his own behalf. *Ib.*

EXECUTOR.

1. *Liability of, to the estate.*—The common law rule that a debtor who is made the executor of his creditor is thereby released from the debt, it not appearing that the assets of the estate are insufficient to meet the testator's debts, is not in force in this country, and the debt in the executor's hands is regarded as general assets of the estate for the benefit not only of creditors, but of legatees and all others interested. *Castor* v. *Pierson*, 27 Iowa.

2. *Judgment against executor.*—In an action by a receiver appointed to sue for and collect the choses in action belonging to an estate, against the executor upon a promissory note executed by him to the testator, judgment should be rendered against him in his individual capacity, and not as executor. *Ib.*

HUSBAND AND WIFE.

Parties to action.—In an action for trespass committed by the cattle of a married woman, the husband need not be joined. *Rowe* v. *Smith*, 38 How.

INJUNCTION.

In actions to recover real property.—Where an action presents grounds for the equitable interference of the court, a preliminary injunction will be granted and a receiver appointed, if the condition of the subject of the controversy requires the aid of these provisional remedies. Thus, in an action to recover the possession of real property, on the ground that the proceedings to foreclose a lien under which the plaintiff was divested of title were fraudulent, and the court in which the proceedings were had without jurisdiction, and where it appeared that the defendants were irresponsible, that they were collecting rents, which they were unable to refund, and that the premises were supposed to go to ruin, an injunction and receiver were granted. *Rogers* v. *Marshall*, 38 How.

JUDGMENT.

Correction of: Practice.—Judgment in an action on a note was ordered, and the clerk directed to assess the amount due thereon, which, by mistake, he made a much smaller amount than was actually due, and judgment was entered accordingly. The mistake was not discovered until after the period allowed by the statute to correct such errors on motion had expired, and until after the case had been appealed to the Supreme Court, where it was affirmed on motion of the plaintiff, the defendant having failed to perfect his appeal, and judgment rendered for the same amount as the judgment in the District Court. *Held*, notwithstanding the affirmance of the judgment in the Supreme Court, that the plaintiff, being without fault or negligence and without any remedy at law, was entitled by an equitable proceeding in the District Court to have the error in the amount of the judgment corrected, the correction being in respect to a matter not passed upon by the Supreme Court. *Partridge & Co.* v. *Harrow et al.*, 27 Iowa.

MALICIOUS PROSECUTION.

Probable cause.—In an action for malicious prosecution the jury may infer malice from want of probable cause, but they are not bound to make this inference. And if malice is deduced from want of probable cause it is as much malice in fact, within the meaning of the law, as though shown or deduced from any other fact or facts. *Smith* v. *Howard*, 27 Iowa.

MANDAMUS.

When allowed.—When the statute prescribes no remedy for the refusal to perform a duty made imperative thereby, or in case of doubt, whether there be another effectual remedy, the writ will be allowed. *People* v. *Ottawa*, 48 Ill.

NEW TRIAL.

1. *Jury.*—There is no error in the action of the court in refusing a new trial on the ground that one of the jurors sat in a previous trial of the case, when it is not shown that the attorneys

of the applicant, as well as the applicant himself were ignorant of the fact until after the return of the verdict and the discharge of the jury; especially where it does not appear that any inquiries were made of the juror before he was empaneled and sworn. *Hurtert* v. *Weines*, 27 Iowa.

2. *Newly discovered evidence.* — Evidence discovered after the close of the evidence but before the completion of the trial and the submission of the case to the jury, is not newly discovered evidence, for which a new trial will be granted, where it appears that such evidence was at the time of discovery within reach of the party. In such a case the party should move before the termination of the trial for permission to introduce such evidence. *Dodge* v. *N. Y. & Washington Steamship Co.*, 6 Abb., N. S.

PARTNERSHIP.

1. *Joint owners.*—Where two farmers buy in common a threshing machine, which they use and operate together, and for which they execute to the vendor a note signed by both individually, they are to be treated as joint owners and not as partners. *Iliff* v. *Brazill*, 27 Iowa.

2. *Liability of partners for fraud.*—In case of a debt fraudulently contracted by a partnership firm by one member alone, the others being ignorant of the fraud, while all the members will be bound in an action brought on the contract or to recover the property so fraudulently obtained, yet the liability to an action for the fraud, which is essentially different and involves moral turpitude, is limited to the partner committing the same, unless the others assented to the fraud or ratified it by adopting the act of the fraudulent partner, or retaining its fruits with knowledge of the fraud. 36 Cal.

3. *Rights of Partners: When Lien from State Court Supersedes Proceedings in Bankruptcy.*—After one of two partners had procured the appointment of a receiver of the partnership property the other partner attempted to defeat the proceedings by inducing an alleged creditor to apply under the bankruptcy law to have the firm declared bankrupt, and the U. S. Marshal had endeavored to take possession of the property, the court held, on an application to preserve the property, as follows: "Where a lien has been acquired by proceedings in a State Court, that lien is not divested nor the jurisdiction of the State Court superseded and ousted by subsequent proceedings in the Court of Bankruptcy. (*Lowry* v. *Morrison*, 11 Paige, 327; *Matter of Allen*, Law Rep. 362; *Storm* v. *Waddell*, 2 Sand. ch. 494; *Stewart* v. *Isidore*, 5 Abb., N. S. 70, and numerous authorities cited in 2 Sandford and 5 Abb.) In terms, the present bankrupt law preserves all existing liens on the debtor's property. The appointment of a receiver in an action in this Court operates as a lien on all the partnership property for the benefit of the plaintiff's partner and of the social creditors; and that lien cannot be disturbed or destroyed by the subsequent fiat of a Bankruptcy Court in after-instituted proceedings. N. Y. Super. Ct. Sp. T. *Clark* v. *Binginger*, N. R.

4. *Bankruptcy.*—One partner cannot throw the firm into bankruptcy where it appears that the assets are greater than the liabilities. *Ib.*

SLANDER.

1. *Words spoken while a witness.*—A person is not liable for slander on account of words spoken by him as a witness, if in response to questions asked him, he spoke the words alleged without malice. The rule in such case is, that what was said pertinent to the matter in controversy, being privileged, the legal idea of malice is excluded; but if not pertinent and not uttered *bona fide*, but for the purpose of defaming plaintiff, protection cannot be claimed and the witness would be liable. *Smith* v. *Howard*, 27 Iowa.

2. *Evidence.*—Where the only witness for the plaintiff in an action for slander to prove the slanderous words was a German unacquainted with the English language, the court refused to disturb a judgment for the plaintiff, upon the ground that it was not shown but that the words were spoken in English, which the witness did not understand, when it did not appear that the words were spoken in his presence alone, and he distinctly testified that he understood them himself. *Hurtert* v. *Weines*, 27 Iowa.

TELEGRAPH COMPANIES.

1. *Printed restrictions: statute.*—It *seems* that it is competent for a telegraph company, notwithstanding section 1353 of the Revision which provides that a telegraph company is liable for all mistakes in transmitting messages made by any person in its employment, as well as for all damages resulting from a failure to perform any other duty required by law, to adopt reasonable rules, conditions, and regulations governing the transmission of messages, restricting its liability in cases where the message is not repeated. *Sweatland* v. *Telegraph Company*, 27 Iowa.

2. *Extent of liability: negligence.*—While a telegraph company may in the absence of any statutory regulation to the contrary, restrict by printed stipulations and conditions attached to the message, its liability in cases where the message is not repeated, it will notwithstanding such special printed conditions be liable for mistakes happening in consequence of its own fault, such as want of proper skill or ordinary care on the part of its operators or the use of defective instruments; but not for mistakes occasioned by uncontrollable causes, such as atmospheric electricity, provided these mistakes could not have been guarded against or prevented by the exercise of ordinary care and skill on the part of the operating agents of the company. *Ib.*

3. *Can not exonerate from all liability.*—Telegraph companies it would seem by general printed conditions can not relieve themselves from liability for the improper or negligent conduct of their servants. *Ib.*

4. These companies, like railroad companies, owe important duties to the public. They must act in good faith towards it, and can not by general printed conditions demand unreasonable concessions from those proposing to send messages. *Ib.*

5. *Ordinary care: gross negligence: onus probandi.*—While they are liable for want of ordinary care and skill as well as for gross negligence notwithstanding the condition restricting their liability in cases where the message is not repeated, the burden of proof is on the plaintiff to show this want of ordinary care or fault on the part of the company; and where this condition as to repeating messages exists and is known to the party sending the message, or where he is bound to take notice of it, and a mistake occurs in an unrepeated message, the mere proof of such mistake without some other evidence of carlessness or negligence on the part of the company would not render them liable. *Ib.*

6. *Rule applied.*—It was *held* in the present case, that the plaintiff, in order to recover, must prove something more than the mistake in the message, and the damage resulting therefrom. He must show that this mistake was caused by the fault of the company, and that it might have been avoided if the company's instruments had been good ones and if its agents had possessed the requisite skill and exercised proper care and diligence in respect to the transmission and receipt of the message in question. *Ib.*

Connecting lines.—Under a statute requiring connecting telegraph companies to receive and forward messages on each other's lines, a company which receives a message to be forwarded in part over such a connecting line is to be regarded as authorized to make contract respecting its transmission for such other line, and the receipt by it of an entire price is a sufficient consideration for the obligation of such connecting company. *Baldwin* v. *U. S. Telegraph Co.*, 6 Abb. N. S.

The contract made with the sender by the company receiving such message and within their apparent authority, is binding on the connecting company, notwithstanding any agreement to the contrary between the two companies, unknown to the sender. *Ib.*

VOLUNTARY CONVEYANCES.

Binding between the parties.—A deed or mortgage, voluntarily executed and delivered, is binding at the common law, and cannot be relieved against, as between parties thereto, simply because it is voluntary. *Fitzgerald* v. *Farristal et al.*, 48 Ill.

TERMS OF THE SUPREME COURT FOR THE CURRENT WEEK.

January 10 — *Circuit and Oyer and Terminer*, at Goshen, Orange county, by Justice Tappen; Columbia county, by Justice Hogeboom; Ulster county, by Justice Miller; Otsego county, by Justice Murray; Chautauqua county, by Justice Marvin.

January 11 — *Circuit and Oyer and Terminer*, at Johnstown, Fulton county, by Justice James. *Special Terms* — Erie county, by Justice Daniels; Oneida county, justice not assigned.

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LAW AND LAWYERS IN LITERATURE.

II.

MASSINGER.

Massinger's drama, "The Old Law," derives its title from the edict "that every man living to fourscore years, and woman to three score, shall then be cut off as fruitless to the republic, and law shall finish what nature lingers at." The justice of this enactment is gravely discussed by the lawyers in the piece, described as first and second. Cleanthes insists that the law is unjust, because it kills innocents. Number one replies that he understands conscience, but not law; and when asked if there is any "main difference," answers that the inquirer "will never be good lawyer if he understands not that." Besides, he argues that it does not take the lives of the innocent, because people cannot live to such an age and be innocent. Cleanthes evidently was a woman's rights advocate, for he comments on the unjust discrimination between the sexes, and infers that "there was no woman in this senate, certain." Cleanthes then fees number one for advice as to some plan to evade the law, and the counsellor is delivered of this sage opinion:

> "We say, man is not at age,
> Till he be one and twenty; before it's infancy,
> And adolescency; now, by that addition,
> Fourscore he cannot be till a hundred and one."

The client, not regarding the jest as a good one, demands the fee, but is told "there is no law for the restitution of fees."

Through the enforcement of this law arise many touching scenes of filial affection and many horrible instances of filial ingratitude and marital infidelity. But it turns out that the law was only a trick to test the morals of the young people of the realm; nobody was put to death, and the supposed victims are produced at the close to confront their putative unkind survivors. The bad sons are deprived of their inheritance, and the incontinent women are forbidden to marry for ten years. The faithful are suitably rewarded. There seems no defect of strict poetic justice save some punishment on the counsellors for their bad law. Perhaps the poet considered the sarcasm of making them defend such an unjust enactment a sufficient retribution. The piece winds up with:

> "The good needs fear no law,
> It is his safety, and the bad man's awe."

JONSON.

In Jonson's best drama, "The Fox," Voltore, an advocate, is made a most unenviable character. Volpone, the Fox, is a sensual old miser, who has accumulated a large fortune by presents from persons whom he promises to make his heirs, and among whom is the advocate. Voltore also serves the Fox in a disgraceful legal proceeding, instituted by Volpone against a woman who refuses to gratify his lust. The advocate's character is aptly described by one who says of him, "his soul moves in his fee;" "this fellow, for six sols more, would plead against his Maker." The advocate's argument in court is described by the Fox's factotum, Mosca, to his master:

> "Had you heard him first
> Draw it to certain heads, then aggravate,
> Then use his vehement figures. I look'd still
> When he would shift a shirt: and doing this
> Out of pure love—no hope of gain."

The Fox feigns death, and wills all his property to Mosca, who says when the plan is suggested, "Your advocate will turn stark dull upon it;" and the Fox replies, "It will take off his oratory's edge." When the lawyer reads the pretended will there is a scene. Mosca, in a passage of exquisite irony, says:

> "Marry, my joy is that you need it not;
> You have a gift, sir, (thank your education,)
> Will never let you want, while there are men,
> And malice, to breed causes. Would I had
> But half the like for all my fortune, sir!
> If I have any suits, as I do hope,
> Things being so easy and direct, I shall not,
> I will make bold with your obstreperous aid,
> Conceive me,—for your fee, sir. In meantime,
> You that have so much law, I know have the conscience
> Not to be covetous of what is mine."

Afterward the lawyer meeting Mosca in the street, rails at him, and the latter expostulates:

> "Good advocate,
> Pray thee not rail nor threaten out of place thus."

But the lawyer turns the tables on the Fox by exposing to the court the false accusation against Celia:

> "It is not passion in me, reverend fathers,
> But only conscience, conscience my good sires,
> That makes me now tell truth."

However, at the last pinch, the Fox, in disguise and unknown to the lawyer, whispers him that Mosca,

> "the parasite,
> Will'd me to tell you that his master lives;
> That you are still the man; your hope the same;
> And this was only a jest."

Whereupon the lawyer falls down in court, and goes through various affected spasms to appear bewitched, and on recovering takes back all he had said against Volpone. "It is to the praise of Jonson," says Gifford, "that he lets slip no opportunity of showing his contempt for the popular opinions on this head"—of witchcraft. Some other complications ensue which it is not necessary in this connection to unravel, but in the end Volpone's possessions are confiscated, and he is sent to prison; Mosca is condemned to the galleys; and

> "Thou Voltore, to take away the scandal
> Thou hast given all worthy men of thy profession,
> Art banished from their fellowship, and our state."

Jonson's treatment of the subject of witchcraft is shown in "The Devil is an Ass," in which Sir Paul Eitherside, a superstitious and unfeeling lawyer and justice, explains the dumb show of certain pretended demoniacs brought before him. Among other qualities that Sir Paul attributes to the devil, is that of being "the master of players and poets too." The justice is solemn, sententious and uninteresting, but as to his belief in witchcraft, no more credulous than Bacon and Matthew Hale.

In the Magnetic Lady, the character of Practice, the lawyer, is described by Compass with some irreverent fun at our gown and wig:

"A man so dedicate to his profession,
And the preferments go along with it,
As scarce the thundering bruit of an invasion
Another eighty-eight, threatening his country
With ruin, would no more work upon him
Than Syracusa's sack on Archimede;
So much he loves that night-cap! the bench-gown,
With the broad gard on the back! these show a man
Betrothed unto the study of our laws."

To which Practice answers:

"Which you but think the crafty impositions
Of subtile clerk, feats of fine understanding,
To abuse clots and clowns with."

When asked if "Practice will be of counsel against us?" Compass says:

"He is a lawyer and must speak for his fee,
Against his father and mother, all his kindred,
His brothers or his sisters; no exception
Lies at the common law. He must not alter
Nature for form, but go on in his path."

Jonson seems to think it necessary to explain that in this character he meant no disrespect to our profession, for in one of the interlocutory passages, the Boy, in answer to Master Dampley, who inquires whom the poet means by certain characters of the drama, replies: "You might as well ask me what eminent lawyer by the ridiculous master Practice, who hath rather his name invented for laughter, than any offense or injury it can stick on the reverend professors of the law; and so the wise ones will think."

To Sir Diaphanous Silkworm, who has been assaulted, Practice recommends a resort to law:

"That will give you damages:
Five thousand pounds for a finger I have known
Given in court; and let me pack your jury."

Further on, Practice says he is "a bencher, and now double reader;" a reference to the days when readings in the Inns of Court were kept up; after seven years the lawyer was in turn to read the second time, and was then called a "double reader." Practice is evidently of authority, for the clerk issues to him a marriage license in blank. To Compass, who asks him how to recover his wife's portion, Practice advises:

"Sue him at common law:
Arrest him on an action of choke-bail,
Five hundred thousand pounds; it will affright him
And all his sureties."

Of this peculiar action Sir Diaphanous says:

"It is a terrible action; more indeed
Than many a man is worth: and is call'd frightball."

Practice gives an opinion on another point of law, namely, the crime of infanticide:

"The law is plain; if it were heard to cry
And you produce it not, he may indict
All that conceal it, of felony and murder."

WEBSTER.

"The Devil's Law Case," by Webster, as may be inferred from the title, is very rich in law and lawyers. The action is conveyed in a word:

"Oh, jealousy,
How violent, especially in women!
How often has it rais'd the devil up in form of a law case!"

The first scene in point is between Crispiano, a civil lawyer, and Sanitonella, his clerk. The latter gives us a good idea of the lucrativeness of law practice in Spain, by telling us that his master, "by his mere practice of the law, has gotten, in less than half a jubilee, thirty thousand ducats a year." But it has been accumulated by hard work, as now-a-days. Here the clerk's rehearsal of these toils:

"All the time of your collectionship
Has been a perpetual calendar; begin first
With your melancholy study of the law,
Before you come to finger the ruddocks; after that
The tiring importunity of clients,
To rise so early and sit up so late;
You made yourself half ready in a dream,
And never pray'd but in your sleep. Can I think
That you have half your lungs left with crying out
For judgments and days of trial? Remember, sir,
How often have I bore you on my shoulder,
Among a shoal or swarm of reeking night-caps,
When that your worship has bespit yourself
Either with vehemency of argument
Or being out from the matter."

By "ruddocks" we understand red gold coin; "half ready" means half dressed; "night-caps" is sarcastic for wigs. Sanitonella is a practical rogue; he insists "that no proctor in the term-time be tolerated to go to the tavern above six times i' th' forenoon; it makes their clients overtaken, and become friends sooner than they would be."

The master himself has an eye to the main chance, and deems nothing

"like the pleasure
In taking clients' fees, and piling them
In several goodly rows before my desk,
And according to the bigness of each heap,
Which I took by a leer (for lawyers do not tell them);"

That is, judged of by a glance, without counting—

"I vail'd my cap, and gave great hope
The cause should go on their sides."
"The noise of clients at my chamber door
Was sweeter music far, in my conceit,
Than all the hunting in Europe."

Ariosto, an advocate, in Crispiano's opinion, is

"the very miracle of a lawyer;
One that persuades men to peace, and compounds quarrels
Among his neighbors, without going to law."
"Yes, and will counsel
In honest causes gratis; never in his life
Took fee but he came and spake for't; is a man
Of extreme practice; and yet all his longing
Is to become a judge."

We infer from this that judicial salaries were larger then than now.

Romelio has a poor opinion of our profession. He tells Ariosto:

"Of all men living,
You lawyers I account the only men
To confirm patience in us; your delays
Would make three parts of this little christian world
Run out of their wits else."

Sanitonella introduces to his master, Leonora, as a client, the nature of whose business is shadowed forth in the first line:

"Take her into your office, sir; she has that in her belly
Will dry up your ink, I can tell you.
This is the man that is your learned counsel,
A fellow that will trowl it off with tongue;
He never goes without restorative powder
Of the lungs of fox in's pocket, and Malaga raisins
To make him long-winded."

And hands him a brief. Ariosto asks:

"Do you call this a brief?
Here's, as I weigh them, some fourscore sheets of paper."

But Sanitonella replies:

"We call this but a brief in our office;
The scope of the business lies in the margin."

But Ariosto likes not the odor of the suit, and Sanitonella employs Contilupo, a spruce lawyer, who, Ariosto having in anger torn up the brief, is still able to read the "foul copy" by the aid of "twenty double ducats;" inquiring, "Is not this *vivire honeste?*" is

told by Sanitonella, "that's struck out, sir; and wherever you find *vivire honeste* in these papers give it a dash, sir;" is "wont to give young clerks half fees to help him to clients." Of course he accepts the business.

The court scene is very strongly drawn. Sanitonella cautions the officers to "take special care that you let in no brachy graphy men (short hand writers) to take notes." He is provided against a long sitting with "a lovely pudding pie, which we clerks find great relief in." Crispiano appears as a judge, but is not known to the suitors. The charge is that Romelio is illegitimate, being really the son of Crispiano, while his mother, Leonora, is married to another. Crispiano being thus implicated, discovers himself, descends from the bench and surrenders his place to Ariosto, who fears

"This law business
Will leave me so small leisure to serve God
I shall serve the king the worse."

And makes a seemingly necessary explanation in accepting:

"I do here first make protestation,
I ne'er took fee of this Romelio
For being of his counsel; which may free me,
Being now his judge, fro' the imputation
Of taking a bribe."

The cross-examination by Crispiano of the waiting-woman produced by Leonora to prove his intimacy with her mistress, is exceedingly skillful and humorously drawn, but the trial is too broad, as well as too long, to be here detailed. It is sufficient to say that the accusation is completely disproved. According to the roguish clerk:

"Uds foot, we are spoil'd;
Why, my client's proved an honest woman.
Well, I will put up my papers,
And send them to France as a precedent,
That they may not say yet, but for one strange
Lawsuit, we come somewhat near them."

Law makes a less prominent figure in "A Cure for a Cuckhold," but the play treats of a novel and amusing question. Franckford has a suit against Compass, a sailor, for the custody of a child, the fruit of an intrigue between himself and Compass' wife during the husband's absence at sea; and with his attorney, Dodge, resorts to a tavern where also comes Compass and his attorney, Pettifog. The parties and attorneys talk over the suit separately. Dodge tells his client "we shall carry it through most indubitably. You have money to go through with the business, and ne'er fear it but we'll trounce 'em; you are the true father." The tavern boy asks Compass if he will have any music, and he answers: "Music among lawyers! here's nothing but discord." Pettifog tells him that "the defendant was arrested first by Lattitat in an action of trespass." Compass says, "a lawyer told me it should have been an action of the case"—a touch of nature which every lawyer will recognize. Pettifog thinks "your action of the case is in that point too ticklish;" but has no doubt he will overthrow his adversary. "Sans question. The child is none of yours. What of that? I marry a widow is possessed of a ward; shall not I have the tution of that ward? Now, sir, you lie at a stronger ward; for *partus sequitur ventrem*, says the civil law, and if you were within compass of the four seas, as the common law goes, the child shall be yours certainly." *Compass:* "There's some comfort in that yet. O, you attorneys in Guildhall have a fine time on't! You are in effect both judge and jury yourselves. And how you will laugh at your clients, when you sit in a tavern and call them coxcombs, and whip up a cause, as a barber trims his customers on a Christmas eve, a snip, a wipe and away!" *Pettifog:* "That's ordinary, sir; you shall have the like at a *nisi prius*."

Two other clients come in to Pettifog, and stand treat, or rather hand money ostensibly for that purpose to him, of which the lawyer says: "This is my tribute; custom is not more duly paid in the Sound of Denmark," and thus reckons up his gains: "I have sate here in this tavern but one half hour, drunk but three pints of wine, and what with the offerings of my clients in that short time, I have got nine shillings clear, and paid all the reckoning." "Almost a counsellor's fee," says another of the party. "And a great one, as the world goes in Guildhall," replies Pettifog, "for now our young clerks share with 'em, to help 'em to clients." Of the two last coming clients he says: "My client that came in now sues his neighbor for kicking his dog, and using the defamatory speeches, *come out, cuckhold's cur*. The other that came in was an informer, a precious knave." The legal party is now increased by the advent of Justice Woodroff, and a counsellor. The justice is one of the "compromisers" or arbitrators to whose judgment the controversy has been left, and the counsellor announces to Compass that the decision is against him, and gives him the prevailing reasons:

"A child that's base and illegitimate born,
The father found, who (if the need required it)
Secures the charge and damage of the parish,
But the father? who charged with education
But the father? then, by clear consequence,
He ought, for what he pays for to enjoy.
Come to the strength of reason, upon which
The law is grounded: the earth brings forth,
This ground or that, her crop of wheat or rye;
Whether shall the seedsman enjoy the sheaf,
Or leave it to the earth that brings it forth?
The summer tree brings forth her natural fruit,
Spreads her large arms; who but the lord of it
Shall pluck the apples or command the lops?
Or shall they sink into the root again?
'Tis still most clear upon the father's part."

But Compass retorts: "All this law I deny, and will be mine own lawyer. Is not the earth our mother? and shall not the earth have all her children again? I would see that law durst keep any of us back; she'll have lawyers and all first, though they be none of her best children. My wife is the mother; and so much for the civil law. Now I come again, and y' are gone at the common law." He then adduces a striking illustration derived from the natural history of domestic animals, in which he supposes one man's gentleman-pig to associate with another man's lady-pig, and in respect to their progeny, asks with great force, "who shall keep these pigs?" This course of reasoning convinces both the justice and the counsellor, they revoke their former opinion, and the child is adjudged to Compass.

In the Duchess of Malfi, Webster draws the character of an unjust prince, and among other things, says:

"Hears men's suits
With others' ears; will seem to sleep o' the bench,
Only to entrap offenders in their answers;
Dooms men to death by information,
Rewards by hear-say.

"The law to him
Is like a foul black cobweb to a spider,
He makes it his dwelling, and a prison
To entangle those shall feed him."

LAW OF ARREST WITHOUT WARRANT.

The arrest and imprisonment of a citizen is, at all times, a deprivation of one of his dearest natural rights, and cannot be justified upon any ground, except it be for the public good, or when his conduct has been such as to interfere materially with the public in the enjoyment of personal rights. And, therefore, when a man commits a crime, there seems to be a necessity for his arrest in order to protect the rights of others, under a government which should afford protection to all, and that he should forfeit his liberty at least for the time being to secure public benefit.

"The arrest of a citizen upon a criminal charge before indictment by the grand jury, is an important branch of the law relative to the punishment of crime. A security against unlawful arrests is one of the great objects of a free government; and the due regulation of them in cases where the public peace and the safety of individuals require them to be made, is essential to the administration of public justice." It having been enacted by Magna Charta, that no one should be taken or imprisoned but by the lawful judgment of his peers, or by the law of the land, there was formerly some doubt as to the authority of officers to arrest on suspicion on the warrant of a magistrate before indictment found, and it was for some time even insisted in England that no one could be deprived of his liberty for any offense until after the finding of an indictment against him by a grand jury, which afforded probable evidence that he was guilty. All the deviations from this rule have been considered as encroachments upon the common law. An exception was very early allowed to prevail, when a thief was taken in a *mainour* — that is, apprehended with the stolen goods actually in his possession. Lord HALE combated the doctrine that a man must first be indicted before he could be arrested on suspicion of having committed a felony, with invincible authority and strength of reason. The above provision of Magna Charta is in the United States Constitution, and in the several State Constitutions, but it is now settled as sound constitutional law, that warrants may be granted by justices of the peace upon a complaint made upon oath before indictment by the grand jury.

It is altogether adverse to the spirit and genius of American governments, in the present state of their well-adjusted powers and provisions, that any man's liberty or safety should be invaded or restrained, either by public officers or private citizens, without the interference of lawful authority.

A proper understanding, therefore, of the law, so far as it authorizes an officer or a private citizen to arrest without warrant, is of the greatest importance; and more especially when it is believed that the popular opinion is, that no person can be arrested upon suspicion without a warrant from lawful authority.

The fifth article of the amendments to the Constitution of the United States provides, that "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized."

The question has been raised as to whether there is a constitutional right to arrest without warrant on suspicion of felony; but that question is now settled in the affirmative. Chief Justice TILGHMAN, in regard to a similar provision in the Constitution of Pennsylvania, said, in *Wakely* v. *Hart*, 6 Binney, 319 (Pa. 1814): "The provisions of this section, so far as concerns warrants, only guard against their abuse by issuing them without good cause, or in so general or vague a form, as may put it in the power of the officers who execute them, to harass innocent persons. But it is nowhere said that there shall be no arrest without warrant. To have said so would have endangered the safety of society. * * * * * * * * *

"The whole section, indeed, was nothing more than an affirmance of the common law, for general warrants have been decided to be illegal; but as the practice of issuing them had been ancient, the abuses great, and the decisions against them only of modern date, the agitation occasioned by the discussion of this important question had scarcely subsided; and it was thought prudent to enter a solemn veto against this powerful engine of despotism."

Again, in *Rohan* v. *Sawin*, 5 Cush. Rep. 28 (Mass.), 1850, DEWEY, Justice, said: "It has been sometimes contended that an arrest of this character, without a warrant, was a violation of the great fundamental principles of our National and State Constitutions forbidding unreasonable searches and arrests, except by warrant founded upon a complaint made under oath. Those provisions doubtless had another and different purpose, being in restraint of general warrants to make searches, and requiring warrants to be made only upon a complaint made under oath. They do not conflict with the authority of constables, or other peace officers, or private persons under limitations, to arrest, without warrants, those who have committed felonies. The public safety, and the due apprehension of criminals charged with heinous offenses, imperiously require that such arrests should be made without warrants by the officers of the law."

We will first consider the authority of private persons to arrest offenders without warrant.

First. In the act of committing the offense.

Every person, private individuals as well as officers, present when a felony is committed, or a dangerous wound given, not only may apprehend the offender, but is bound to do so. Such is the common law, from its early history, and such has been the practice in this country, from the time governments were established by a civilized people; and although an attempt to commit a felony may be only a misdemeanor, yet it is such a crime as authorizes a citizen to apprehend the perpetrator, without warrant, when the attempt is made in his presence or view.

Any person whatever, if an affray be made to the breach of the peace, may, without a warrant from a magistrate, restrain any of the offenders in order to preserve the peace, and although such restraint will not always be by way of an actual arrest, and the taking of the offender to prison, or into the presence of the magistrate, yet it may be, and, in some cases, ought to be. A private person is not justified in arresting or giving in charge of an officer a party who has been engaged in an affray, unless the affray is still continuing, or there is a reasonable ground for apprehending

that he intends to renew it, and as an officer cannot arrest for misdemeanor committed out of his view, upon the information of others, the lawful right of the officer to take such party in charge must depend upon the fact of his having *himself* reasonable ground to apprehend a renewal of the affray.

Whether or no, when all danger of any further breach of the peace is over, no felony having been committed, private individuals are bound to set at liberty persons in their custody, or whether they may take them before a magistrate, or give them into the custody of a peace officer, does not appear to have been discussed. (See Ros. Cr. Ev. 240.) The power of an officer to take into his custody, upon a reasonable information of a private person under such circumstances, and of that person to give in charge, must be reciprocal; in other words, if the one has the right to place a party in custody of the other, the other *certainly* has the corresponding right to receive the party into his custody; and if the officer has no right to receive a prisoner from a private person who arrested him in an affray, such person can have no right to place him in the officer's custody. This is a proposition too plain to admit of discussion.

An officer cannot arrest a party for an affray out of his own view, after it is over, without a warrant from a magistrate; in other words, he cannot act upon the information of others in such cases. For a like reason it would seem he cannot take into his custody a person brought to him by a private individual who apprehended him at the time of the commission of such offense. In 1 Russ. on Crimes, 600, it is laid down as follows: "There is no distinction as to the power to apprehend between one kind of misdemeanor and another, as between breach of the peace and fraud, but the rule is general that in all cases of misdemeanor there is no power to apprehend after the misdemeanor is committed. We conclude, therefore, that an officer has no greater authority to take into his custody a prisoner arrested by a private citizen, for a breach of the peace, than he would have to make the arrest himself in the first instance after it is all over, but that the citizen may, after the affray is wholly over, and there is no danger of its renewal, either discharge the prisoner or take him before a magistrate." It is a *legal* duty imposed upon citizens to endeavor to arrest those who commit felonies, or dangerously wound another in their presence, and, therefore, they are liable to have some criminal punishment inflicted upon them for a neglect of such duty; but as to affrays and riots, there does not exist such grave responsibilities. And although the law compels citizens to act at once in the arrest of felonies, it permits only their interference in the other class of crimes; and it is, perhaps, only a moral instead of a legal duty for them to endeavor to suppress affrays and riots by way of arrest of the guilty parties.

If a private person see another on the point of committing treason or felony, or doing any act which would manifestly endanger the life of another, he may lay hold of him until it may be presumed that he has changed his purpose. There seems to be, however, no authority for extending this common law right of private individuals to arrest for certain misdemeanors, committed in their presence, to all other misdemeanors, as, for instance, that numerous class called statutory misdemeanors.

On this subject Mr. Bishop, in his Criminal Procedure, vol. 1, § 628, has the following: "If a person is present when another is committing a crime, it is incumbent on him to do something to prevent the crime, and, failing in this, to bring the criminal to justice. When the crime is treason or felony, the duty, as we have seen, is accompanied with the penalty of fine and imprisonment for its neglect. But when the crime is of a lower grade, and in one sense the duty is a mere moral one, the reason of the thing would seem to be, that the law will permit the person, if he is disposed to discharge this moral duty, by interfering to prevent the commission of the crime, or to arrest the criminal, or both. Yet the law might not allow this duty to be carried to all lengths. If the thing done was merely *malum prohibitum*, not being *malum in se*, or was of a nature not immediately disturbing the public repose, and not offending public morals, or the like, so injudicious would it be to make the arrest, without a warrant, by a private person, when no perceptible harm would come from the delay necessary to call in public authority, that the courts could hardly be expected to sanction such arrest. Indeed, it is very uncertain how far the courts would go in the midst of any facts standing on this shadowy ground of legal doubt."

There are some special powers given by statute to private individuals to arrest without warrant in some cases when the offense is committed in whole or in part in their presence, as for violation of the statute in relation to persons trading as hawkers and peddlers without license, etc., the statute in relation to persons appearing disguised contrary to law, and also, the statute to "provide for the more effectual protection of fruit growers against trespassers." The legislatures of the different States have been very slow, however, to confer upon private persons the power to arrest without warrant for statutory offenses not above the grade of misdemeanors, and it is presumed that when such extraordinary power is granted to the citizen it is in cases where there is a *great* necessity for its exercise.

Second. After the offense has been committed.

The right of private persons to arrest without warrant, after the offense has been committed, is confined to cases of felony. Where private persons use their endeavors to bring felons to justice, some precaution ought to be observed:

First. It should be ascertained that a felony has been actually committed by some one; for, if that be not the case, no suspicion, however well grounded, will justify the arrest, or afford the protection which the law extends to persons acting with proper authority; but if a felony has been in fact committed, then a private person has the same authority to arrest without warrant that an officer possesses; that is, after it is ascertained that a felony has been committed by some person, he may pursue the suspected felon and arrest him, subject only to proper legal restraint; and we, therefore, inquire into the nature of such legal conditions and restrictions.

Second. A felony having been committed, and a private person having reasonable cause to suspect a particular person to be guilty of its commission, he

may, acting in good faith, arrest such person; and he will not be liable, either in civil or criminal prosecution, should the suspicion prove unfounded.

It is, however, often imprudent, in a private person, to arrest for such offense formerly committed; at least, unless he was present at the time of its commission, and there is danger of the offender otherwise escaping. It is better for the citizen to disclose his suspicion to an officer, and let him take upon himself the responsibility of arresting the suspected party, or to a magistrate, who may grant a warrant to an officer to apprehend him.

Chief Justice SAVAGE has very clearly stated the rule as follows: "My understanding of the law is, that if a felony has, in fact, been committed by the person arrested, the arrest may be justified by any person without warrant, whether there is time to obtain one or not. If an innocent person is arrested upon supicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the party arrested; but if no felony was committed by any one, and a private individual arrest without warrant, such arrest is illegal, though an officer would be justified if he acted upon information which he had reason to rely on."

It is evident that it is impossible to give any certain rule as to what constitutes reasonable cause to arrest every suspected party. From the nature of things, this depends upon the peculiar circumstances of each case. What facts will amount to a sufficient excuse, or will justify a reasonable suspicion that the party had committed a felony, although sometimes treated as a question of law, seems rather to be a question of fact for the jury, to be determined by the circumstances of each particular case, or, as some authorities say, a mixed question of law and fact. The suspicion ought to be reasonable, and not without good cause. It is said that *mere suspicion* that a felony has been committed will not justify an arrest; but a belief founded on pregnant circumstances—such facts and circumstances as would warrant a cautious man in the belief that the party arrested was the real offender—is sufficient.

ON THE STUDY OF FORENSIC ELOQUENCE.

II.

Having endeavored in a previous article to show that eloquence is not so much the result of natural gifts as of persevering and persistent labor, we now proceed to offer some suggestions as to the best means of improvement in forensic eloquence.

Socrates used to say that "all men are sufficiently eloquent in that which they understand;" but it would have been nearer truth to say that no man can be eloquent on a subject that he does not understand; nor on a subject that he does understand, unless he knows how to form and polish his speech. The two essential things to the orator are something to say and a knowledge of how to say it. There is no art that can teach one to be eloquent without knowledge. Attention to style, diction and all the arts of speech can only assist the orator in setting off to advantage the stock of materials which he possesses; but the stock, the materials themselves, must be brought from other quarters than from rhetoric. In the first place the advocate must have a profound knowledge of the law. On this depends his reputation and success, and nothing is of such consequence to him or deserves more his deep and serious study. In no other profession is superficial knowledge sooner detected or more ruthlessly exposed, and however brilliant as a speaker one may be, if it but become known that he is not well grounded in the law, few will choose to commit their cause to him. Besides a knowledge of the general principles of law, another thing highly material to the success of every advocate is a diligent and careful attention to every cause that is entrusted to him, so as to be thoroughly master of all the facts and circumstances relating to it. Cicero has left a very instructive record of the method pursued by him in the preparation of a cause for trial, and which we commend to the careful consideration of every student and lawyer. He tells us, under the character of Antonius, in the second book *De Oratore*, that he always conversed at full length with every client who came to consult him; that he took care there should be no witnesses to their conversation, in order that his client might explain himself more freely; that he was wont to start every objection and to plead the cause of the adverse party with him, that he might come at the whole truth and be fully prepared on every point of the business; and that after the client had retired he used to balance all the facts with himself under three different characters: his own, that of the adversary and that of the judge. He censures very severely those of the profession who decline to take so much trouble; taxing them not only with shameful negligence, but with dishonesty and breach of trust. Quintilian likewise urged the necessity of carefully studying every cause, again and again recommending patience and attention in conversation with clients. "For," said he, "to listen to something that is superfluous can do no hurt; whereas to be ignorant of something that is material may be highly prejudicial. The advocate will frequently discover the weak side of a cause, and learn at the same time what is the proper defence, from circumstances which to the party himself appeared to be of little or no moment." It is said of Rufus Choate, that he began to study a case the moment it was brought to him, and that he continued to study it till the day of trial.

Besides the knowledge of the law, the advocate must make himself acquainted with the general principles of logic. He must learn how to *reason;* how to draw conclusions from premises; how to found an argument. Without a knowledge of these things, no matter how copious his diction or elegant his delivery, his speeches will be little more than "sounding brass and tinkling cymbals."

The object of the advocate is chiefly to convince, and to do this he must satisfy the understanding. Solid argument and clear method must, therefore, be used. Nothing can be more erroneous than the idea that mere declamation is eloquence. It may have the show, but never can produce the effect; it "may tickle the ear," but it will never lead a judge to pass that judgment or a jury to adopt that side of the cause to which we seek to bring them. "There is no talent, I

apprehend," said Dugald Stewart, "so essential to a public speaker, as to be able to state clearly every step of those trains of thought by which he himself was led to the conclusions he wishes to establish." Especially is this true at the bar—the eloquence suited to which is of the calm and temperate kind, connected with close reasoning. Let the advocate take for his motto the advice of Quintillian, "To your expression be attentive; but about your matter be solicitous."

There was much wisdom in the remark of Sir William Jones, that "an elegant method of arranging the thoughts is powerful to persuade as well as to please." William Pitt, being asked how he acquired his talent for *reply*, answered at once that he owed it to the study of Aristotle's logic in early life, and the habit of applying its principles to all the discussions he met with in the works he read and the debates he witnessed. So it is said of Rufus Choate, "he was a thorough master of logic. He had studied it, not only in detail and immediate application of style and arrangement, but in its essence and origin."

The treatise best calculated to give the student an insight into the rules and principles of logic, is that by Dr. Whately. The book recommended for the exercitation of the reasoning faculties, is Chillingworth's "The Religion of Protestants a safe way to Salvation," which was written in answer to the arguments of an adversary, and which has for years been considered the most perfect specimen of logical argument. Locke, than whom there could not be a more competent authority, proposes "for the attainment of right reasoning, the constant reading of Chillingworth"; and Lord Mansfield pronounced it the "perfection of reasoning."

Law and logic are the immediate and foundation studies of the advocate, but they are not all. Besides these he must drink deep at the fountains of science, philosophy, history and *belles-lettres*. These are the handmaids of oratory. They enlarge and liberalize the mind, embellish the style and afford illustrations, ideas, arguments, phrases, words, and last though not least, intellectual enthusiasm. There are few occasions, indeed, on which an advocate will not derive assistance from a cultivated taste and extensive knowledge. Their illustrations, allusions and principles, woven in with the weightier matters of the law, will make a pattern which will not fail to please and interest—will throw around the dry and uninteresting legal principles a freshness and charm that will fix the attention and fascinate the hearer.

But perhaps the chief benefit to be derived from their study is the improvement they afford to style and language. Cicero remarked in the third book *De Oratore*, that "all elegance of language, though it receive a polish from the science of grammar, is yet augmented by the reading of orators and poets." From this source have all great orators drawn their copious and elegant diction and their polished and graceful style. Erskine is represented by an excellent authority as having spoken the finest and richest English ever spoken by an advocate. For two years prior to his call to the bar, he devoted himself exclusively to the study of literature, and probably no two years of his life were so profitably spent. In addition to his reading in prose he devoted himself with great ardor to the study of Milton and Shakspeare. His biographers tell us that he committed a large part of the former to memory, and became so familiar with the latter "that he could almost like Porson have held conversations on all subjects for days together in the phrases of the great English dramatist." Here it was that he acquired that fine choice of words, that rich and varied imagery, that sense of harmony in the structure of his sentences, that boldness of thought and magnificence of expression for which he was afterwards so much distinguished. He could have drawn these things from no richer source. To use the words of Johnson, slightly varied, he who would excel in this noblest of arts must give his days and nights to the study of Milton and Shakspeare.

> "Hither, as to a fountain,
> Other suns repair, and in their urns
> Draw golden light."

Lord Chatham read and reread Dr. Barrow's sermons until he knew many of them by heart, "for the purpose," as he himself said, "of acquiring copiousness of diction and an exact choice of words." William Pitt, his son, obtained his remarkable command of the English tongue from the same source, in connection with Shakspeare and the Bible; the latter he studied not only as a guide of life, but as the true "*well* of English undefiled." No wonder that his cotemporary, Fox, should have said of him, "he always has the right word in the right place."

William Pinkney has himself unlocked the secret of his intellectual affluence and elegant diction. He says that he made it a rule from his youth never to see a fine idea without committing it to memory. Rufus Choate, in speaking of this fact, said "the result was the most splendid and powerful English *spoken* style I ever heard." Choate pursued a plan equally commendable. During the greater portion of his life, he made it a practice to read aloud every day a page or more from some fine English author. This he did for the improvement of his expression. He was a most indefatigable student of *words*, and made the whole round of literature tributary to his vocabulary.

The following extract from the address of Lord Brougham to the University of Glasgow, will be a sufficient guide, with what has been already said, to the selection of those authors that will tend most to improve the style and diction: "The English writers who really unlock the rich sources of the language are those who flourished from the end of Elizabeth's to the end of Queen Anne's reign: who used a good Saxon dialect with ease, but correctness and perspicuity—learned in the ancient classics, but only enriching their mother tongue where the Attic could supply its defects—not overlaying it with a profuse pedantic colnage of words."

The great masters of oratory should be studied most carefully and diligently; Erskine, Burke, Pinkney, Webster, and above all, the legal orations of Cicero, are the best models for a young lawyer. Read Bolingbroke for specimens of the splendid and ornate; Fox and Pitt for the classical and argumentative; advantage may likewise be derived from the letters of Junius.

In pursuing these studies the motto must be *mul-*

tum haud multa—much not many. No real advantage and improvment will be gained from a rambling, desultory course of reading. There is a whole sermon in that saying of Hobbes, of Malmesbury, "If I had read as many books as other persons, I should probably know as little." The wisest and the best informed teach us, both by counsel and example, to read a little and that well; to count not by the books we have read, but by the subjects we have exhausted. Swift said that the reason a certain university was a learned place was that most persons took some learning there and few brought any away with them, so it accumulated. Such is the effect of a proper course of reading, everything adds and nothing takes away.

We are not counseling an imitation of the *men of one book*, but the pursuit of one system. Choose those authors most suited to the object in view and *know* them.

The advocate should make choice of his book, Shakspeare, Milton, Bacon, Burke, Erskine, Bolingbroke, and make that his chief study. One stirling anthor to call *my own*, ever most conspicuous and most at hand, read, re-read, "marked and quoted," will do much to form the mind, to teach one to think, to give precision of expression, purity of taste, loftiness of views and fervency of spirit. No better selection can be made by the advocate than the works of Edmund Burke. "Among the characteristics of Lord Erskine's eloquence," observes one of his recent biographers, "the perpetual illustrations derived from the writings of Burke is very remarkable. In every one of the great state trials in which he was engaged he referred to the productions of that extraordinary person as to a text-book of political wisdom—expounding, enforcing and justifying all the great and noble principles of freedom and of justice." "When I look," says Lord Erskine himself, "into my own mind and find its best lights and principles fed from that immense magazine of moral and political wisdom which he has left as an inheritance to mankind for their instruction, I feel myself repelled by an awful and grateful sensibility from petulantly approaching him." Take, then, the words of this sublime philosopher and orator, bind them up in one thick volume, on which write WISDOM in gold letters, and begin to read it through every New Year's day.

Another means of acquiring a command of language is translation, and it is commended alike by the precepts and example of the great masters. Two thousand years ago Cicero stocked his vocabulary by this plan, translating from the Greek into Latin. Chatham translated the orations of Demosthenes again and again into English. Mansfield declared that there was not one of the orations of Cicero that he had not translated more than once. Pitt pursued the same plan for ten years, and to this he ascribed his extraordinary command of language which enabled him to give every idea its most felicitous expression, and to pour out an unbroken stream of thought hour after hour without once hesitating for a word or recalling a phrase, or sinking for a moment into looseness or inaccuracy in the structure of a sentence. Choate was a most indefatigable translator. This exercise he persevered in daily, even in the midst of the most arduous business. Five minutes a day, if no more, he would seize in the morning for this task. Tacitus was his favorite author. He attended chiefly to the multiplication of synonyms. For every word he translated he would rack his brain and search his books till he got five or six corresponding English words. This is the true way to translate when style and diction is the object. Turn the passage read into regular English sentences, aiming to give the idea with great exactness and to express it with idiomatic accuracy and ease. This plan of translating is infinitely better than the plan sometimes advised of taking some passage of classic English, getting the ideas from it and then expressing them in the best manner possible. In this latter method the author has already selected the most appropriate words, and if the student use the same words he will receive no profit, or if other words, it is prejudicial, as it accustoms one to use such as are less eligible. The student of advocacy cannot give two much attention to the culture of *expression*. Orators in every age have made it a specific study. Cicero says, "the proper concern of an orator, as I have already often said, is language of power and eloquence accommodated to the feelings and understanding of mankind." Language and its elements, words, are to be mastered by direct earnest labor. A speaker ought *daily* to exercise and *air* his vocabulary and add to and enrich it. The advocate does not want a diction gathered from the newspapers, caught from the air, common and unsuggestive; but one whose every word is full freighted with suggestion and association, with beauty and power. It is a rich and rare English that one ought to command, who is aiming to control a jury's ear.

We had intended to conclude the suggestions we purposed to make in the present number, but have written at such length that we are compelled to defer the subject of Elocution till the next number.

THE LAW OF REVIEW IN CRIMINAL CASES.*

The decision of the Court of Appeals in *The People* v. *Joel B. Thompson* (not reported)—an abstract of which was given in our last number—presents a phase of the situation of the law in such cases, which seems to demand some legislative action. The prisoner was indicted for murder in the first degree. His offense was the shooting and killing the murdered man, upon a sudden meeting in the open street. The defense was, attempted or apprehended bodily violence to the prisoner. The evidence was conflicting and directly contradictory. If the witnesses upon the one side were to be believed, the prisoner had shot the deceased upon the instant of meeting, and without provocation. The testimony on the other side went to show that the fatal shot was fired, after a threat of violence and a blow given to the prisoner. The Court of Appeals had previously decided that murder in the second degree could only be committed while the perpetrator was engaged in the commission of a felony other than arson in the first degree. (*Fitzgerold* v. *The People*, 37 N. Y. 413.) Hence the homicide committed by the prisoner was murder in the first degree,

* This article was written and in type before the publication of Governor Hoffman's Message containing a suggestion on the same subject. ED. L. J.

manslaughter or justifiable. The court, however, acting either in ignorance or misapprehension of the case of *Fitzgerold* v. *The People*, charged the jury (1 Albany Law Journal, 20) "that they might convict the defendant of murder in the second degree if they found that his intent to effect death was less deliberate and atrocious than was requisite to justify a conviction in the first degree." To this portion of the charge the counsel for the prisoner neglected to take an exception.

The General Term of the third district, on the cause being brought up by writ of error, reversed the verdict and ordered a new trial. The People carried the case to the Court of Appeals, where the judgment of the General Term was reversed, and the verdict of the jury sustained, not upon the ground that it was not erroneous, but that the prisoner's counsel had failed to take proper exceptions to the charge of the court on the trial. Thus the law is settled that where the indictment will sustain the verdict, no matter how erroneous that verdict may be, there is no power in the courts to relieve from the error of the jury, if the counsel who have charge of the defense neglect to take the proper exceptions. In the case under consideration, the highest court in the State admits and affirms that the prisoner never committed the crime of murder in the second degree, yet finds every court before which the cause can be considered powerless to shield him from the punishment imposed upon him. Though this may be the law of the land, is it not clear that here is a wrong for which there should be found a remedy?

The decision of the General Term of the third district in *McCann* v. *The People* (6 Park. 629), though practically overruled by the Court of Appeals in the Thompson case, is certainly more consonant with justice. There the court held, that, "when a person is convicted, upon undisputed evidence, of a capital offense, and an indispensable element to constitute such crime is wanting, there being no proof in the case of its existence, the Supreme Court will reverse on writ of error, although no valid exception was taken to any decision made at the trial, or to the charge of the court." But this is no longer the law. It may be said that it is no injustice that counsel should lose their cause in court if they fail to properly prepare themselves for its presentation, or to avail themselves of their preparation. In consequence, their clients suffer punishment not for crime committed by themselves, but for the ignorance of licensed practitioners. But the case may arise, and indeed has arisen, where the learning and experience of counsel can afford no shield against a similar wrong. The newspapers in the spring of 1869 reported the charge of the court to a jury in the city of New York, where the prisoner was on trial for murder, and the express charge was that in no event was the prisoner to be found guilty of murder in the second degree. (I think, but am not certain, that this was the case of Donati Migaldo, tried in February, 1869, at Oyer and Terminer, BARNARD, Ch. J). Nevertheless the jury found a verdict of guilty of murder in the second degree. It is evident that to this charge the prisoner's counsel could take no exception which would avail on review, for the charge was correct, and upon this point in the prisoner's favor. No court could set aside the verdict, and it only remained to carry it into effect, unfounded as it was. The Court of Appeals has decided (*Duffy* v. *The People*, 26 N. Y. 588) that it is the duty of the jury "to be governed by the instructions of the court as to all legal questions involved" in their verdicts, whether in criminal or in civil cases. But it is now the law, that if the jury exercise an arbitrary power in criminal actions, and disregard the instructions of the court, from the effect of their action there is no relief.

More tender of our property than of our lives and liberty, the legislature has provided (Code, § 264) that the trial court may set aside a verdict and grant a new trial because of "insufficient evidence." This, though not an exception was taken on the trial.

It might be too startling an innovation upon the modes of trial now in vogue, to propose the abolition entirely of exceptions to a ruling upon the trial or to the charge of the court after the trial. Yet the exception is but a technical formality, more honored for its antiquity than for its usefulness. More than a hundred years ago, in his excellent commentaries, Sir William Blackstone informs us that "neither these demurrers to evidence, nor the bills of exceptions, are at present so much in use as formerly; since the more frequent extension of the discretionary powers of the court in granting a new trial, which is now very commonly had for the misdirection of the judge at *nisi prius*." If a question of evidence is presented for decision, the attention of the court will be sufficiently called to it by objection duly taken, and if carefully decided the court will not revoke its decision, because by the technical words of an exception, counsel give information of an intention to present that question on review if necessary. Still less is the conduct of the trial affected by exceptions to the charge, for the statute (3 R. S., 5th ed., 720, § 139) allows such exceptions to be taken at any time "before the jury shall have delivered their verdict." Of course, the charge is never altered or the result affected by an exception taken after the jury have retired for deliberation. If it be deemed necessary to advise the opposing counsel of the questions intended to be raised on appeal or review, this may be done by filing or serving exceptions which on deliberation, and after the hurry and excitement incident to the trial of the cause, counsel may deem will be regarded well taken; not, however, allowing an exception to the erroneous admission of evidence received without objection.

To remedy the defects of the law as established by the decision in *The People* v. *Thompson*, it is only necessary for the legislature to extend to the criminal courts the power exercised by the civil courts to set aside a verdict "for insufficient evidence." And the writer deems it not unworthy of consideration, whether more good than harm might not result by extending the time within which exceptions may be taken to the charge of the court until a reasonable time after the rendition of the verdict. Where it is considered that the evidence on the trial oftentimes presents the case in a phase not anticipated, and not to be anticipated, and that the court, from its superior learning, introduces views of the law which have escaped the attention of the less learned lawyer, it will be admitted that much can be said in favor of extending the privilege of studying the case after the verdict and in view of the new light shed upon it, by the result and incidents of the trial.

CURRENT TOPICS.

It is devoutly to be hoped that the Legislature of this and other States will exhibit, during the winter session, a little more care and ability in legislation than some of their predecessors have heretofore exhibited. The statute books of every State in the Union are monuments "more durable than brass," of the carelessness and incompetency of many of the men elected to the office of legislators. Judge Edmonds, in the preface to the third volume of his "Statutes at Large" of the State of New York, cites some striking instances of legislative blunders. He refers to chapter 188 of the Laws of 1848, which is "An act to amend an act," etc., the first section of which amends the previous act, and the second section repeals it. Another instance is given of an act passed in 1813, repealed in 1819, and twice afterward amended. A most amusing instance of "absurd legislation" is to be found in chapter 415 of the Laws of 1863 of the State of New York. The act provides that a convict in the State prison may gain, by good behavior, an abridgment of a certain number of days per year of the term of his sentence. A proviso is solemnly tacked on at the end of the section to the effect that "the provisions of this act shall not affect the case of any person who shall be under sentence of imprisonment for the *term of his natural life*." Is it not about time that every man elected to the office of law-maker should have some knowledge of the actual condition and practical workings of the existing laws; of how law really acts upon the concerns of life, in all its relations; why it should be altered, and how the alteration should be effected without being forced to take all such matters upon trust? Our physicians dare not attempt to administer the simplest physic, our surgeons to perform the commonest operation on the human body, without having first learned the difference between diseased and healthy structure and function — without having seen and studied all its inward parts, devoting to the most secret and minute their profoundest attention; but our State physicians will administer the most potent medicines, our State surgeons perform the most capital operations, without having even affected to learn the plainest principles of State medicine, pathology or surgery, or devoted a single moment to dissection!

Chancellor Kent was an excellent judge, but a very poor prophet. If his life had been continued through the past decade, he would have retracted his prophecy that we should have too little law. In his day a comparatively small volume was sufficient to contain all the acts of a session of the Legislature, but in these latter days it requires two over-grown and bulky volumes. The fact is, we are too much governed. Every man elected to the Legislature holds it to be his bounden duty to act and enact. Whether action is necessary, is seldom considered. To get at least one bill through on *some* subject is held to be the "chief end" of a legislator; no matter how trivial, no matter how it affects private rights or relations; no matter whether or not there be the slightest need of the enactment; no matter how completely the existing laws accomplish the same purpose—only get a bill through. It is a relief to know that there is *one* man in office that has recorded a protest against this perversion of law-making. Governor Hoffman, in his recent Message to the New York State Legislature, says: "This multiplying of laws is a serious evil, and in my judgment unnecessary." He recommends that the general laws be carefully examined, and so amended as to do away with the great majority of applications for special legislation. This is wise and well, but will hardly prove physic strong enough for the disease. The vice is inherent in representative democracies. Make the general laws broad enough to cover every subject, and special legislation will be almost as common. Every year our statute books are swelled by scores of special acts that are entirely covered by the general laws. Legislators newly elected believe that they will be blamed and ridiculed if they do not do something, and doing something means getting an act passed. The remedy rests chiefly with the Executive. Let him sternly set his face against all unnecessary legislation, and veto every special act the purpose of which can be accomplished by a general law, and the general laws will very soon be properly amended and extended, and legislators come to a healthier knowledge of the duties of a lawgiver.

The recent Congress of Lawyers in Germany suggests the necessity of a similar movement in this country. Although every State but one, and the General Government also, derive their fundamental law from one source, we doubt if there is more diverse legislation among the different nations of Europe than among our several States. And this not merely concerning matters of local application, but about such as need not be influenced by time, circumstances or place. The codes of law governing marriage and divorce are as numerous as the divisions of our territory, and conflict in their provisions one with all the rest. Some States favor marriage and almost prohibit divorce, some make marriage difficult and divorce easy, while others afford equal facility for both performances. Here, there should certainly be a uniformity in the law. Not less varied are the laws concerning the rights of married women. The usury laws differ one from another somewhat as the stars do. (We think they should be made uniform by repealing them altogether.) These are but single instances of an evil which the public to a certain extent comprehend, but which constantly embarasses the practicing lawyer. Most of the subjects of this conflicting legislation are exclusively under State jurisdiction. Left to themselves, the State Legislatures will not remedy this evil, but will rather increase it. The only way in which it can be met seems to be by the united action of the bar of the whole country. If a convention could be held similar in some respects to the German one, we believe that its suggestions in this direction would not only be listened to by our lawyers, but would be acted upon. Such a convention would be beneficial in other ways, both to the profession and the public.

The Hon. J. C. Churchill, Member of Congress from New York, has introduced in the House a bill reorganizing the United States Judicial Districts of New York, and creating a new district to be called the Middle District. It does not change the Eastern District.

The limits of the Southern District are confined to the city of New York and the counties of Dutchess, Orange, Ulster, Putnam, Sullivan, Rockland and Westchester. The Northern District is virtually abolished by the establishment of a Western District, to include the counties of Cayuga, Cortland and Broome, and all the counties lying west of them. The present officers of the Northern Districts are to be transferred to the Western. The residue of the State is constituted a new jurisdiction, to be called Middle District. Terms are provided to be held in the Western District at Auburn, Rochester, Canandaigua, Buffalo and Elmira. In the Middle District terms are provided to be held at Albany, Syracuse, Utica and Oswego, and at Ogdensburg and Plattsburg in alternate years. Some readjustment of districts is certainly necessary, and we presume that proposed by Judge Churchill is as good as any could be. It is certainly a great improvement on the present arrangement. The Northern District covers too broad an area, including, as it does, the entire State north and west of Columbia and Greene counties. The expenses to litigants and witnesses are made needlessly burdensome by reason of the great distance many of them are compelled to travel to attend court. The proposed changes will, in a measure, remedy this evil, and will facilitate the dispatch of business by adding a new District Court.

Corruption in office, as well as an ignorant performance of duties, sometimes results in far greater injury than the loss of character which necessarily happens to the guilty officer. We wonder if members of boards of supervisors of counties, and of common councils of cities, ever had the idea occur to them that the misappropriation by them of a single dollar invalidates the whole assessment which includes the misappropriated dollar. Yet such is the law as held in numerous decisions. As a necessary result, every tax title is void which is based upon such invalid assessment. Generally, by statute, the *onus probandi* is upon a party attacking a tax title, to show the facts which constitute the illegality. But persons who have taken pains to look behind the scenes know that in nearly every tax levied there is the taint which corrupts the whole if the requisite testimony could be found to reveal the truth. It seems to have become a general custom with county boards in secret session to vote themselves extra compensation, and to secure success in their operations they add an appropriation to the county treasurer, and the only record of their misdeeds is a "contingent account," the items of which are never exposed to the public. In one county in this State we are informed that there has been a wholesale indictment of the members of the board of supervisors for taking extra compensation. The surest remedy, however, and one which will be apt to astound speculators in lands sold for the non-payment of taxes, will be the exposure of the wrong in an action testing the right of a collector to collect the tax, or in resistance to the claimant under a tax sale.

We very much doubt the wisdom of Governor Hoffman's recommendation that a law be passed "forbidding the granting of injunctions or the appointment of receivers in cases affecting monied and other corporations on *ex parte* applications." We see no propriety in making distinctions between corporations and individuals so far as relates to this matter. Injunctions are frequently sought in matters demanding the immediate interference of a court, and where the delay incident to a notice would defeat the remedy. Although, under the present law, the court has the undoubted right to grant the order on an *ex parte* application, yet in cases of importance or doubt, it usually provides for giving the defendant notice by means of an order to show cause. Such has been the practice for a half century or more, and with few exceptions, has worked well. That a few judges have departed from this rule, and have used the discretion vested in them in an arbitrary and unjust manner, is hardly ground for changing the law. If any change be made, it should extend no further than to require an order to show cause on granting an injunction *ex parte*. So far as relates to receivers, the necessity for a change of law is even less. The courts have held with great unanimity, that a receiver should be appointed without notice only in special cases demanding immediate action. In such cases it would certainly be a hardship to compel the applicant to take the risks and injuries that would flow from delay.

There is a prevailing opinion among members of the bar and the bench, as also in the laity, that a poor prisoner on trial for crime is absolutely entitled to have assigned to his defense counsel, whose services can thus be required without compensation. It is probable that the provision of the Constitution of the United States giving to a person accused of crime the right "to have the assistance of counsel for his defense," was intended merely to abrogate the old common law rule, under which the prisoner must conduct his own defense, until, in later times, counsel might "speak to matters of law." Such, in one case at Special Term of the New York Supreme Court, has been the construction given to the above clause of the Constitution. While, however, it is but right that a prisoner, in all cases, should have the assistance of counsel, it is also right that some compensation should be accorded for the services in his behalf. This might be effected if in each county there should be appointed, with a moderate salary, some officer charged with the duty of rendering such services, or if the courts at the close of the trial might make an order for the payment of a reasonable counsel fee for the defense. There are objections to these plans, but, it seems to us, not more weighty than to the present system. Some plan can certainly be devised to pecuniarily reward the assigned counsel, especially where his services are necessarily great, and his labors arduous.

It is a singular fact that, while during the first thirty years of this century there were three revisions of the statutes of this State, during the forty subsequent years we have had none. Yet in this latter period there have been more important and sweeping alterations in our civil policy than during the whole former period of our history. The Court of Chancery has been abolished, the whole judicial system has been remodeled, a new system of practice has been adopted, radical changes in

matters of the gravest importance have been effected by the Constitution of 1846, and many acts have been passed affecting the provisions of previous laws. These changes, so numerous and important, and the multiplication of laws extending through at least fifty volumes, together with the careless manner in which the present Revised Statutes have been amended, create great difficulty and uncertainty in ascertaining the exact state of the law. There never was a time when a revision was so necessary, and we hope the Legislature will act upon the suggestion of Governor Hoffman, and pass an act providing for the purpose.

In order to make of practical value the provision in the new judiciary article increasing the jurisdiction of the County Courts, the Legislature should increase the costs in those courts to an amount equal to that allowed in the Supreme Court. At present it is optional with one attorney having a claim under $1000 to bring his action in either court, and he will be very likely to select the court giving the largest costs.

It is questionable whether a trial by jury is the best method of determining controversies between private persons. It is certainly as tedious and as expensive a way as could be devised. And it does not have the merit usually claimed for it, of being impartial. A body of men gathered promiscuously from all classes and serving oftentimes unwillingly, certainly cannot be depended upon to give as unbiased and correct a decision upon matters of fact as a person who has made the practical application of justice his study for years. And in cases of a certain character, the decisions of juries are uniformly and notoriously unjust. Another evil is that there is usually no appeal from the finding of a jury, and when one is allowed and is successful, it only operates to send the case before another and perhaps a worse jury. The feeling of the profession, as well as litigants, in this matter, is shown by the large number of causes referred, at every term of court. Many of these, it is true, involve the examination of accounts, and must be referred, but in a majority of instances the delay and uncertainty attending a jury trial, is the controlling reason. In fact, a jury trial is seldom pressed unless one of the parties hopes to obtain some advantage from the prejudice known to exist in the jury box against certain suitors.

Judge Smith having rendered a decision, in the case of the *People* v. *The Susquehanna Railroad Company*, adverse to the legality of the election of the directors popularly known as "the Fisk directors," the latter have given notice that they will move, at a Special Term of the Supreme Court to be held at Albion, in the county of Orleans, on the third Monday of January, 1870, to set aside all proceedings upon the judgment of Judge Smith, and to require Robert L. Banks, the receiver, to retake possession of the property. The chief grounds for the motion are that the judgment is not a final determination of the rights of the parties in the action, was entered without due notice to any of the parties adversely interested, and that it fails to determine the validity of the 9,500 shares of stock subscribed by Ramsey and others in August, 1869, as also who were the stockholders entitled to vote at the election of September last, and the validity of the contract made with Groesbeck & Co. for 2,400 shares of stock. The affidavits are numerous and lengthy. Among them is one from John H. Martindale, who charges that the action of Judge Smith in refusing, notwithstanding his promise to the contrary, to afford the attorneys of the Church directors an opportunity to be heard on settling the facts, and his actual settlement of the facts with the aid of Mr. Moak, one of the counsel of the Ramsey directors, prejudiced the parties represented by him in the same degree as though such action had been prompted by a desire to deceive and mislead. There are also affidavits testifying to the service of orders, staying proceedings under the judgment, issued by a Justice of the Supreme Court.

Two bills of considerable importance were introduced in the State Senate on the 6th inst. The first provides for the election of Judges of the Court of Appeals, and also of the New York Court of Common Pleas, in pursuance of the new judiciary article. Its provision is in substance as follows: A Chief Judge and six Associate Judges of the Court of Appeals shall be chosen by the electors of the State on the third Tuesday of May next, pursuant to the amended judiciary article. At same election there shall be chosen by the electors of New York county, three additional Judges of the Court of Common Pleas—the latter judges to enter on duty next July. The other bill provides for abrogating the existing General Term of the Supreme Court after May 1, and the tranfer of all causes to the new General Term, to be organized according to the seventh section of the new article of the Constitution. The counties of New York, Kings, Queens, Suffolk, Richmond and Westchester, shall constitute the First Department; Dutchess, Putnam, Rockland, Orange, Ulster, Greene, Columbia, Sullivan, Albany, Rensselaer, Schenectady, Delaware, Scoharie, Otsego, Montgomery, Herkimer, Fulton, Hamilton, Saratoga, Washington, Warren, Essex, Clinton, Franklin, St. Lawrence, Lewis and Oneida, the second; Jefferson, Oswego, Madison, Chenango, Broome, Cortland, Onondaga, Cayuga, Tompkins, Tioga, Chemung, Schuyler, Seneca, Wayne, Ontario, Steuben, Yates, Livingston, Monroe, Alleghany, Orleans, Cattaraugus, Genesee, Wyoming, Niagara, Erie and Chautauqua, the third. Prior to May 1 there shall be established in each department a branch of the Supreme Court, to be composed of a Presiding Justice and two Associate Justices; and the first designation for such Justices shall be made by the Governor from the whole bench of Justices of the Supreme Court.

OCCASIONAL NOTES.

The annual delay in printing the Session Laws is a source of serious annoyance and inconvenience to the profession. The law provides for their speedy publication, but for several years past, nearly or quite six months have elapsed after the adjournment of the Legislature, before the Laws have been given to the public. The result has been that for the better portion of the year the lawyer is at a loss to know precisely what the law is on any subject liable to legislative change. A case recently happened within our

own knowledge where an attorney commenced proceedings under the Mechanics' Lien Law as it existed prior to the amendment of 1869. On the publication of the Session Laws of that year, he discovered that his proceedings were void, and the time having expired within which to file a lien, lost his claim. Numerous instances of this kind occur every year. To obviate this difficulty we shall publish in the pages of the LAW JOURNAL all laws of a general nature, directly after their passage.

The reception with which the first number of the LAW JOURNAL met was flattering beyond our expectations, and confirms us in the opinion, with which we began, that a publication of the kind was needed. We shall spare no pains to continue to deserve the same favor. We design to devote especial attention to the digesting of decisions, and have made such arrangements as will enable us to give the earliest possible notice of the decisions of the Courts of every State in the Union. Besides giving an abstract of the Court of Appeals cases, we shall hereafter give a digest of all the decisions of the several general terms of this State, directly after they are pronounced.

The series of articles on "Law and Lawyers in Literature," begun in the first number of the LAW JOURNAL, will be continued for several numbers and until the subject has been exhausted. They are written in a style that cannot fail to interest and please. We would state that these articles are secured by copyright, and will be published in book form after their appearance in the JOURNAL.

BOOK NOTICES.

Criminal Pleadings and Practice: with Precedents of Indictments and Special Pleas, and an Appendix of Special Pleadings and Practical Suggestions. By James Bassett, Counsellor at Law. Chicago: E. B. Myers & Co. 1870.

This book, though mainly based upon the Illinois law, is, nevertheless, adapted to, and will be of use in other States. The criminal laws of the various States have undergone far less change than the civil; and, having a common origin, are more uniform, so that a work of this character may be successfully used "from Maine to Georgia." Precedents of indictments for every indictable offense known to the law are given, in connection with a brief reference to the decisions relating to each fact or statement necessary to be set forth or made in the indictment. Besides these are a large number of special indictments and pleas of defendants, valuable, but not elsewhere readily accessible. The author has not confined himself to the decisions of the courts of Illinois, but has drawn largely from the decisions of other States, as well as from those of England. A compilation of accurate precedents of indictments was a desideratum, and, as such, we can commend the work before us.

A Treatise on Proceedings in the United States Courts: designed for the use of Attorneys and Counselors Practicing therein; and also for the Deputies of the United States Marshals, and other officers of the United States. With Practical Forms and an Appendix. By James Andrew Murray. Albany: Weed, Parsons & Co. 1869.

Mr. Murray has done good service to the profession and to the officers of the United States courts, in the preparation of this little book. It is thoroughly practical, well arranged, and sufficiently full to be a guide in all matters to which it relates. The great beauty of the book is its attention to details; those little, though weighty, matters of practice that are so apt to escape the attention; the when, and where, and how a thing is to be done. These matters are stated in plain and concise terms, so that one is not compelled to go through a dozen pages to obtain the information sought, and are supported by copious reference to decisions. The Appendix of Forms is unusually full and minute; and, so far as we have been able to examine, accurate. In short, the lawyer practicing in the United States courts will here find a great many things that he ought to know, and which he will find nowhere else, except from experience—a teacher which, in such matters, is not always the best.

COURT OF APPEALS ABSTRACT.

Edward P. Fuller et al., Resp., v. *James S. Cone et al., Executors, Apps.* Not reported.

The testator of the defendants received a draft from the Genesee Railroad Company, with the understanding that he was to apply the proceeds to the payment of a note made by the plaintiffs for the accommodation of the company. After the collection of the draft, it was levied on by the sheriff, on an execution against the company, but no receipt taken from the sheriff.

The court held that this was a trust operating for the benefit of the plaintiffs, and that the fund was neither subject to levy on an execution against the company, nor could the testator pay the money to the sheriff on any execution under the section of the Code allowing a debtor to make payment to an execution creditor.

The following is the substance of the opinion:

The money sought to be recovered came to the hands of the defendant's testator in trust for the benefit of the plaintiff. Accepting the trust was equivalent to an express promise to the beneficiary to pay the money as directed when received. (*Weslin* v. *Barker*, 12 J. R. 276.)

After accepting the trust and receiving the money, the trustee could not evade the obligations of the trust, nor escape its responsibilities, short of performance or release by the beneficaries. He must ascertain, before he parts with the trust-fund, who are the parties legally entitled to it. If, through any misapprehension on his part, the trust property is diverted into another channel, he will be responsible to the party to whom it belongs. But the proceeds of said draft were not liable to levy and sale on execution. It was not the property of the execution debtor; it had never come to his hands; there was no pretense that the bills levied upon by the sheriff were the identical bills received for the draft. Even if the sum had been passed to the credit of the company, it then became a debt against the testator, and not liable to levy and sale on execution. (*Dubois* v. *Dubois*, 6 Cow. 494.)

Nor can the payment be sustained by section 293 of the Code, authorizing any person indebted to a judgment debtor to pay to the plaintiff the amount of said debt. It was not a debt due the company from the testator, and hence, the testator did not occupy the relation specified by the Code.

John A. Canter, Plff. in Error, v. *The People, etc., Defts. in Error.* To appear in 38 How.

Where a defendant on the trial of an indictment against him for a criminal charge is acquitted on the ground of a *variance* between the indictment and the

proof, such acquittal forms no bar to the trial of a second indictment against him for the same offense. To sustain the plea of a former acquittal it must appear that the party was "put in jeopardy" by the formal trial. Thus, if the indictment upon which he has already been tried was so defective that no judgment could have been given upon it, it would not at common law constitute a bar. (Cases cited, *People* v. *Barrett*, 1 Johns. 66; 1 Russell on Cr. 836; *Burns* v. *People*, 1 Parker Cr. Rep. 182.) The Revised Statutes provide that an acquittal on the ground of variance between the indictment and the proof shall not bar a subsequent trial and conviction for the same offense. 2 R. S. 725, § 24, Edmonds' Ed.

Lee v. *Decker*. To appear in 6 Abb.

Upon a contract which liquidates the amount of a debt and provides that the payments are to be arranged after the consummation of another contract to be made by the debtor with a third person, the creditor may maintain an action for an immediate payment although no such other contract has been made, if it appears that the defendant, on being requested to pay the amount due, or to make some arrangement in reference to the debt, absolutely refused to do anything about it. (Case cited, *Hanna* v. *Mills*, 21 Wend. 90-92.)

The People ex rel. Inman S. Lowell v. *Board of Town Auditors of the town of Westford*. To appear in 38 How.

On the 24th of March, 1864, at a town meeting held in the town of Westford, a resolution was passed "That there be paid the sum of $300 to each man drafted and not exempted, and the same be raised by a tax upon the taxable property of the town." The relator was subsequently drafted under the call of the President, of Sept., 1863; he paid $300 as commutation under the act of Congress, and was discharged from further liability under that draft.

In 1865 the Legislature legalized the acts of all legally convened town meetings in the several towns in the counties of Herkimer and Otsego, relating to the payment of bounties to volunteers, substitutes, drafted men, &c. In 1867, the relator presented to the Board of Town Auditors his claim for the sum of $300 as provided by the resolution. The board refused to allow the same; a peremptory mandamus requiring the defendants to audit and allow the claim was granted at Special Term and approved at General Term (53 Barb. 555). An appeal being taken to this Court, it was held that the relator was within the provision of the resolution and was entitled to the sum of $300 therein provided, and affirmed the decision of the Court below.

Slocum v. *Freeman*. To appear in 6 Abb.

The plaintiff had recovered judgment against the defendant, and had afterward agreed to compromise and settle the judgment for a less sum, to be secured by the note of the defendant, payable at a certain time, with interest. To carry out said agreement, plaintiff executed a satisfaction-piece of the judgment, and delivered it to a third party, to be delivered to the defendant on receipt of the said note. The third party delivered the satisfaction-piece to the defendant, on receipt from him of a note, which he supposed to be in conformity to the agreement. The note was drawn without interest, and as soon as the plaintiff discovered this, he returned the note to the defendant for correction, who refused to correct it or to return the satisfaction-piece. The action was to cancel the satisfaction and restore the judgment. *Held*, that the plaintiff was entitled to have the satisfaction-piece canceled, and the lien of said judgment restored, except as to *bona fide* purchasers or incumbrancers since said judgment was canceled of record.

Markham v. *Jaudon*. Not Reported.

The action was brought by Markham against the Joudons, brokers, who had bought stock for him upon margin. The stock fell until the margin was exhausted. The brokers notified Markham that if he did not make his margin good they would sell him out. He did not make it good, and they sold the stock and brought him in debt. They did not give Markham any notice of the time and place of the sale of the stock. The stock afterward rose, and Markham sued the Jaudons for wrongfully selling his stock, and recovered at the trial before Judge Foster. The defendant appealed, and the Supreme Court reversed the judgment, the court holding that the brokers could sell without notice when the margin was exhausted. The plaintiff then appealed to the Court of Appeals. The Court held,—

First.—That when a broker buys stock for a customer and agrees to pay for it and carry it, on receiving a deposit of a margin of money or stock, he holds the stock so purchased as a pledge for the repayment of the money he has advanced, and cannot sell it even if the value of the stock falls so as to exhaust the margin, without giving notice of the time and place of the sale.

Second.—That evidence of the custom of brokers cannot be received to change these rights and relations of the parties to such transaction.

Third.—That the broker who sells out his customer's stock after his margin is gone, but without giving him notice of the time and place of the sale, is liable to the customer for the highest price of the stock down to the time of the trial, the customer being the owner of the stock, and the act of the broker a wrongful conversion.

LEGAL NEWS.

Ohio courts divorced 1,003 couples last year.

There are two ladies studying law at the St. Louis Law School; one a resident of St. Louis, and the other of Massachusetts.

Judge Alphonso Taft, of Cincinnati, gave Yale College a Christmas present of $1,000, to be used in any way President Woolsey might direct.

The Abbott Brothers, of New York, are engaged upon a digest of the laws of Indiana, which is shortly to be published by Messrs. Callaghan & Cockroft, of Chicago.

Hon. Lewis B. Woodruff, the newly appointed United States Circuit Judge, will hold the Circuit Court in Albany on the 18th inst., to dispose of the business on the calendars.

The Philadelphia *Legal Gazette* says that Callaghan & Cockroft, the enterprising Chicago law publishers, have offered the Morrissons, of Washington, lawbooksellers, $10,000 for a large collection of legal anecdotes and facetiæ, collected by them during their long intercourse with the members of the bar.

The Hon. John Olney, County Judge of Greene county, died on Thursday night, 30th ult. He was a prominent lawyer and a nephew of the Hon. J. Olney, late Controller of Connecticut.

Governor Palmer declined to commission Mrs. Myra Bradwell, of Chicago, a Notary Public, for the reason that an official bond would be necessary, and being a married woman, she is legally incapable of giving the bond required.

Hon. Theophilus Parsons has declined to withdraw his resignation as Professor in the Harvard Law School, saying that he has held the office more than twenty years, and that, even if he might hope his services would continue to be welcome for a short time longer, it could only be for a short time.

Chief Justice Dillon rendered his last opinion in the Iowa Supreme Court on the 31st ult., and retired from the State Bench to accept his appointment to a seat in the United States Court. He has served twelve years, six as District Judge, and six years as Supreme Judge, and was re-elected last fall.

Albert R. Hatch, a lawyer of Portsmouth, N. H., has instituted a suit for libel against Stephen S. Scammon for publishing an advertisement charging that several notes collected of him by complainant were forgeries; also against Frank W. Miller and George W. Marsten, publishers of *The Chronicle*, for publishing said advertisement.

Among the anecdotes on rings and mottoes given on admission, is the following: On the admission to the United States Courts of James Rock (colored), of Boston, the entry in the docket is as follows: "At this term, on motion of the Hon. Charles Sumner, of Massachusetts, James Rock, Esquire, an American gentleman of African descent, was called to the degree of sergeant here, and gave rings with the motto "*Hic Niger est.*"

The Troy *Daily Press* says that Hon. Jacob Hardenburgh, State Senator from the Fourteenth District, has drawn up a bill setting forth specifically the provisions of the Judiciary article, and pointing out the way in which they should be carried out. This bill Senator Hardenburgh will introduce into the Senate, and it will probably pass. The *Press* adds: "It is proper that these recommendations should come from Mr. Hardenburgh, inasmuch as he was the father of the article in the Convention, and it was owing to his advocacy of it that it passed that body."

It has been discovered, from the experiences of the United States Supreme Court Judges, that the judicial circuits as at present organized are unequal in the amount of business which they produce for adjustment by the justices. The Pennsylvania Circuit, for example, furnishes very little business, as at present organized, while others supply more than can be done. The Southern Circuit, in consequence of the large amount of business arising out of the war, brings forward more business than any two other circuits. In view of these facts, a prominent member of the Judiciary Committee of the House will present a bill proposing a re-assignment of States in the circuits, as follows: First Circuit, Massachusetts, Rhode Island, New Hampshire, Vermont, and Maine; second, New York, Connecticut, and New Jersey; third, Pennsylvania, Delaware, Maryland, Virginia, and North Carolina; fourth, Arkansas, Mississippi, Louisiana, and Texas; fifth, South Carolina, Georgia, Florida, Alabama, and Tennessee; sixth, Ohio, Michigan, West Virginia, and Kentucky; seventh, Indiana, Illinois, and Wisconsin; eighth, Minnesota, Iowa, Nebraska, Kansas and Missouri; ninth, California, Oregon and Nevada.

TERMS OF THE SUPREME COURT FOR THE COMING WEEK.

January 17—*Circuit and Oyer and Terminer*, at Ballston Spa, Saratoga county, by Justice Potter; Oswego, Justice not assigned; Orleans, by Justice Talcott.

January 18—*Circuit and Oyer and Terminer*, at Plattsburgh, Clinton county, by Justice James.

THE EDITOR OF THE CHICAGO LEGAL NEWS.—A correspondent of the New York *World* gives the following gossipy description of Mrs. Myra Bradwell, editor of the *Chicago Legal News:*

"I went to the office of Myra Bradwell—'Our Myra,' the lawyers call her. She is the much-esteemed wife of Judge Bradwell, and the editor of the *Legal News*. I found her after going heavenward some number of flights in the cosiest nest imaginable—pretty, bright room papered with vines and roses, a Brussels carpet on the floor, a rosewood desk of dainty dimensions, a tete-a-tete sofa, an easy chair, a bird in its cage, and all the attributes of true womanhood about her. She is bright and pretty and piquant; kisses you affectionately—if you are a woman, of course—and does not talk strong-minded a bit. 'I need not be a ghoul if I am for woman's rights,' she says pleasantly. She is of medium size, with huge dark curls, hazel eyes, mobile mouth, and an arch look that is very winning, and is probably twenty-eight years old. In this office hung a mirror—not a bit of quicksilver ten inches square to see a pair of whiskers in, but a good-sizable gilt-edge glass. An interior apartment held the Judge's books and papers, and was used as his study. Mrs. Bradwell has passed examination, and is admitted to the bar to practice law. Judge Hammond, the Principal of the Iowa State Law University, wroto her a very pretty letter, in which he compliments her for doing more for woman than any of her co-laborers. Her paper is of great use to lawyers, on account of the reported decisions of the Supreme Court, which it gets in advance of the reports."

The statement that Mrs. Bradwell has been admitted to the bar is slightly inaccurate. She has passed an examination, and filed her application, but the court has not yet rendered a decision in the matter.

BAR WIT.—The New Haven *Register* says: "A pungent little incident occurred in an argument before the Supreme Court, on Friday last, between Messrs. H. B. Harrison and T. E. Doolittle, Esqs., counsel in the matter of the Derby Railroad injunction. Mr. Harrison was contending that, inasmuch as the Legislature did, only six days before the expiration of the charter, execute important legislation in reference to the completion of the Derby Railroad, it was ridiculous to argue that its charter could be forfeited by the old terms of non-completion at a certain period, or that the Legislature could possibly expect the railroad to be completed in six days. At this point Mr. Doolittle (who was making a sharp fight on the other side) suggested that 'possibly brother Harrison had read of a little incident in sacred history, in which a work of nearly the size and importance of the Derby Railroad was completed in six days? He referred to the creation of the world.' (Responded Mr. Harrison), 'Ah, yes; that is very true; but brother Doolittle omits to mention a very important fact in that connection. He should remember that during the creation Satan was not hanging around with his pockets full of remonstrances and injunctions, impeding and obstructing the work.'"

DIGEST OF AMERICAN DECISIONS.

[To appear in the following State Reports: 23 Wis.; 59 Penn.; 55 Maine; 48 N. H.; also, unreported New York State decisions. Cases marked N. R. are not reported.]

ACTION.

Where C. has obtained and collected a judgment against X. for damages for the taking and conversion of property alleged to belong to C., D. cannot compel C. to pay over the amount to him, on the ground that the property, in fact, belongs to him. *Dent* v. *Catzhausen*, 23 Wis.

AMENDMENT.

Of pleading.—An amendment should not be allowed either *at* or *before* trial, which entirely changes the cause of action sued upon. *Stevens* v. *Brooks*, 23 Wis.

BILLS AND NOTES.

1. *Laches in presentment.*— Where a sight draft on New York, indorsed to plaintiff in this State, was not mailed to New York to be presented for payment, until after *fourteen* days, when it was miscarried, and the second of exchange subsequently sent forward was protested, the delay in mailing the first was *prima facie* evidence of *laches*. 23 Wis.

2. *Secured by mortgage.*—The holder of a mortgage may transfer by indorsement one of several promissory notes secured thereby, without passing any interest in the mortgage, where that is the agreement between the parties in such transfer. *Rolston* v. *Brockway*, *ib.*

3. Such agreement may be evidenced by a memorandum upon the mortgage to the effect that the note negotiated has been "paid in full," and proof that such memorandum was made by the mortgagee at the time of the transfer, in presence of the indorsee, and with his knowledge and assent. *Ib.*

BREACH OF PROMISE.

An action for breach of promise of marriage will not be made to survive by proof that the promisee had a child born out of wedlock, now living, and that the defendant is the father of said child. *Hovey* v. *Page*, 55 Maine.

BUILDING CONTRACTS.

Risk of builder.—Where a building, erected under an entire contract, is burned before its completion, it is the builder's loss, unless the other party have actually accepted the building before the fire. *Eaton* v. *School District No.* 3, 23 Wis.

CHATTEL MORTGAGES.

Fraudulent.—An oral agreement between mortgagor and mortgagee of chattels, that the former shall retain possession of the goods, and sell them in the regular course of his business, and apply the proceeds to his own use in the support of his family and otherwise, renders the mortgage fraudulent in law and void as to creditors of the mortgagor. *Steinart* v. *Deuster*, 23 Wis.

COMMERCIAL LAW.

1. *When holder of note protected.*—One who takes a negotiable note in extinguishment of an antecedent indebtedness is protected as a holder for value. *Kellogg* v. *Puncher*, 23 Wis.

2. *Bona fide holder.*—One who takes, in payment of the individual note of A for his private debt, notes of third parties running to A, but which are in fact the property of a copartnership of which A is a member, is protected as a *bona fide* holder for value, if he was ignorant of the existence of such copartnership. *Ib.*

3. *Notice of, pending suit affecting.*—In case of commercial paper not due, persons not having *actual* notice are not bound to take notice of any pending suit affecting it. Otherwise, if it is past due. *Ib.*

COMMON CARRIERS.

Liability for loss of baggage.—Where the plaintiff having bought a ticket and engaged a state room on board of a steamboat, left a small valise in his state room, locked the door, and went away for a few moments, and on returning found his valise gone, *held* in an action against the owners of the boat to recover the value of the stolen property; that the defendants were liable as common carriers for their passengers' baggage; and though they have the right to make reasonable regulations as to where baggage shall be left, they must bring such regulations to the knowledge of the passenger to become a defense, and that a regulation preventing passengers from retaining with them articles of daily use would not be reasonable. *N. Y. Com. P., Gen. T.*, 1870; *Macklin* v. *The New Jersey Steamboat Company*, N. R.

CONTEMPT.

1. *Commitment for.*—If a party is held in custody for contempt plainly charged in the commitment, he cannot be discharged for informality in the drawing up of the precept. In a matter of this kind, a court is not bound to strictly lay down the entire form of a commitment in the very words; if the substantial form of the writ is there, this is sufficient. *N. Y. Super. Ct. Sp. T.*, 1869, *Leepsiger* v. *Castelle*, N. R.

2. If the commitment is one which the court would have been authorized to make under any circumstance, all judicial matters of regularity are to be presumed. This is the doctrine entertained in *The People* v. *Nevens*, 1 Hill, 154; and also in the case in 2 Johnson's Ch. R., 198. The only inquiry that can be raised under a *habeas corpus*, in cases of contempt is, first, the jurisdiction of the tribunal by which the party is committed; second, the form of the commitment. *Ib.*

CONSTITUTIONAL LAW.

Invalidity of local statute.—Chapter 569 of the Laws of 1869, "An act in relation to the fees of the sheriff of the city and county of New York, and to the fees of referees in sales in partition cases," being a local bill, and embracing more than one subject, is within the provision of section 16, article 3, of the Constitution, which provides that "no private or local bill, which may be passed by the Legislature, shall embrace more than one subject, and that shall be expressed in the title;" and the first section thereof is void. *Semble*, that the whole act is unconstitutional. *Sup. Ct. Sp. T. First Dis.* 1869; *Gaskin* v. *Anderson*, N. R.

CONSIDERATION.

Failure of.—Where a promissory note was given for fruit trees, with a verbal understanding that only those trees were to be paid for that lived: *Held*, that, the trees not living, the maker of the note could defend against the payee on the ground of failure of consideration. The payee being one of the copartners in whose name the suit was brought, the same defense was available against them. *Hubbard* v. *Galusha*, 23 Wis.

DEED.

1. *Conditional limitation.*—Deed granting land to husband and wife, their heirs and assigns forever, with a clause stating that it was made to her on condition that if she should not continue to live with him, not having good cause for a divorce, the land should vest in fee in the husband, his heirs and assigns forever. The *habendum* clause was to the grantees, their heirs and assigns forever; and there was a covenant of warranty. *Held*, that there was a valid conditional *limitation* of the wife's estate. *Smith* v. *Smith*, 23 Wis.

2. *Cloud upon title.*—After the wife ceased to live with the husband, not having any ground of divorce, the deed, so far as it related to the wife, constituted such a cloud upon his title, that equity will cancel it at his suit; and this, notwithstanding he has obtained a decree of divorce from her for willful desertion. *Ib.*

EXECUTORY CONTRACT.

To make and deliver goods.—In the case of an executory contract to make and deliver goods, the vendee may receive the goods and retain them long enough to give them a fair examination; and if they prove defective, may retain them, and recover any sum paid thereon, with interest. *Woodle* v. *Whitney*, 23 Wis.

EVIDENCE.

1. *Parol evidence to contradict village plat.*—Where land is marked on a village plat as "reserved for the proprietors," parol evidence is not admissible (in a suit by one succeeding to their title against the owner of an adjoining lot, for an alleged trespass), to show that it was reserved for the use of adjoining lot owners. The plaintiff in such action would not be bound by any statements as to the intended use of such reservation, made by such proprietors to persons purchasing of them such adjoining lots—no dedication to the public use being claimed. *Orton* v. *Henry*, 23 Wis.

2. *Opinion of witness.*—In an action for mason work upon a wall, where the defense was based on the alleged unskillful construction of the wall, a question put on the examination in chief of a witness for defendant (*not an expert*), "What was the condition of the wall at the time you examined it?" *held*, not to call for witness's *opinion* as to the *character* of the work, but to be admissible. 23 Wis.

3. *On sale of goods.*—Defendant's brothers, in New York city, wished to purchase goods of plaintiff there on credit, and proposed to give their note at four months with defendant's indorsement; and plaintiff agreed to these terms. Defendant, however, applied to plaintiff to change the arrangement, stating that he did not wish to indorse his brothers' note, because all his dealings were in cash, and proposing that plaintiff should deliver the goods to his brothers and take their note, and that he would call and pay the amount in cash, less the usual cash discount, and would take the note himself, but stating that he did not wish his brothers to know of the arrangement. Plaintiff assented, and delivered the goods to defendant's brothers, and took their note, made payable to *their own* order, and indorsed by them, the note being so drawn in order that it might be delivered to defendant without plaintiff's indorsement. An entry was made in the sales book as of a sale to defendant's brothers, showing the articles sold, with weights and prices, but not showing any *charge* against said brothers. Defendant did *not* call and pay the cash, and plaintiff's clerk wrote a note addressed to him at his brothers' place of business, requesting him to call "and indorse the note," making the request in that form, so that if the letter fell into the hands of defendant's brothers, they would not be informed of the new arrangement. Plaintiff afterward requested defendant *either* to pay the cash *or* indorse the note; and, subsequently, having notified defendant that he looked to him for payment, and requested him to remit, and he having neglected to do so, and requested plaintiff to call upon his brothers for payment, plaintiff presented the note to said brothers at maturity, and (payment not being made) notified defendant that it was not paid. *Held*, that, upon evidence tending to establish these facts, it was for the jury to determine whether the goods were not sold on defendant's credit; and it was error to *nonsuit* the plaintiff. *Oothaut* v. *Leahy*, 23 Wis.

4. *In an action upon a note.*—In such action, under a counterclaim for money had and received, defendant cannot prove payment of usurious interest and have the same allowed, without having alleged specifically the facts showing usury. *Martin* v. *Pugh*, 23 Wis.

EQUITY.

Interference with judgment.—The fact, that a party to a suit at law (or his counsel) was surprised at the ruling of the appellate court (holding that the reference of the cause to the judge of the court operated as a submission to arbitration, and refusing to review his decision), affords no ground for equitable interference with the judgment. *The Farmers' Loan and Trust Company* v. *The Walworth County Bank*, 23 Wis.

ESTOPPEL.

1. *In pais.*—In an action to compel defendant to account to plaintiffs for money subscribed and paid by them, and which he, as their agent, was to invest in lands to be owned by the subscribers as a company, the defendant is not estopped from denying that he has received the whole amount of said subscriptions, by the fact that in a report made to the subscribers he stated that he had received the whole; no one of them having advanced any money or changed his position in consequence of such statement. *Collins* v. *Case*, 23 Wis.

2. *As to boundary line.*—To estop A from denying a boundary line orally agreed upon between him and B, it is not necessary that he should have intentionally made false statements to B, by which the latter was induced to put improvements on his (A's) land; nor that, *knowing his rights*, he should have agreed to a line by which he relinquished a part of his land to B; but he is estopped where, *understanding that there is uncertainty about the true line*, he agreed to the one fixed, and allowed B to erect valuable improvements, which B would lose but for such estoppel. *Gove* v. *White*, 23 Wis.

HIGHWAY.

The land of one person, subject to a public easement as a highway, cannot be used by another person as a place to pile wood or store goods. *Orton* v. *Harvey*, 23 Wis.

HUSBAND AND WIFE.

1. *Conveyance of husband to wife.*—A conveyance by husband to wife of the homestead, which is exempt from execution, cannot be considered fraudulent as to creditors. *Pike and others* v. *Miles*, 23 Wis.

2. *Voluntary settlement.*—Where a voluntary settlement by husband on wife (of land other than that so exempt) was not unreasonable in its character in view of the property and situation of the husband at the time, and there was no fraudulent intent in fact, it cannot be impeached by subsequent creditors. *Id.*

3. *Evidence.*—In an action to set aside as fraudulent a conveyance of land from husband to wife, proof on the part of plaintiffs that since the commencement of the suit a mortgage had been executed by the husband and wife on said land, and the money raised thereby invested in other real estate in the wife's name, was inadmissible without a supplemental complaint, setting up the facts, and asking appropriate relief against such other real estate. *Id.*

INJUNCTION.

In actions for trespass.—To authorize an injunction under section 219 of the Code, the complaint must show the plaintiff entitled to an injunction as ultimate relief; and that a present preliminary injunction is necessary to avert intermediate injury. The injury alleged is a mere *trespass*, and a mere trespass is insufficient to authorize an injunction. "The principle of injunctive relief against a tort is, that whenever damage is caused or threatened to property, *admitted* or legally adjudged to be the plaintiff's by an act of the defendant admitted or legally adjudged to be an evil wrong, and such damage is not adequately remediable at law, an injunction may issue against the commission or continuance of the wrong." Thus three conditions are essential to injunctive relief against trespass: *First*, admission or adjudication of plaintiff's right; *second*, admission or adjudication of the defendant's wrong; and *third*, inadequacy of a remedy at law. If the trespass amount to an actual ouster, it is remediable by ejectment; if it fall short of ouster, then by trespass; and in neither of these cases will an injunction lie (*Thomas* v. *Oakley*, 18 Vesey, 184). There must be some special equity in the case, so as to bring the injunction under the head of quieting possession, or preventing irreparable injury, or inadequacy of compensation in damages (*Livingston* v. *Livingston*, 6 Johns. Ch. R. 497). That an injunction will not issue when the injury is remediable by damages, see *Marshall* v. *Peters* (12 How. 218); and it well establishes that it will not issue to restrain an apprehended trespass (*Mayor of New York* v. *Conover*, 5 Abb). *N. Y. Superior Court, Sp. T.*, 1869, *Gentel* v. *Arnaud*, N. R.

JUDICIAL POWER.

Consultation of judges.—At the common law, as well as by the statute, where a power, authority, or duty is confided to three or more persons or officers, and which may be performed by a majority of such persons or officers, all must meet and confer, unless special provision is otherwise made. The rule of the common law was applied only to persons or officers having a *public* duty to perform; in matters of a *private* nature, it required the whole body to be unanimous.

Whether the statute was intended to apply to judges of courts, *quære.*

To make such application would lead to differences of opinion in determining the meaning of statute, as to what would constitute a meeting of all.

Upon a motion to set aside a decision made by two judges, the third not having been consulted, and there not having been any meeting appointed, or held, for conference, *held*, in the doubt of the application of the statute to judges of courts, that the decision should not, for the reason stated, be regarded as irregular. But, as the order entered upon the decision was otherwise irregular, it should be set aside, and the appeal left to be decided by the justices who heard it. The propriety of consultations and conferences in relation to questions which a court is to decide, illustrated and recommended. *N. Y. Super. Ct. Gen. T.*, 1869, *Parrott* v. *The Knickerbocker Ice Co.*, N. R.

LIBEL.

Against Senator. — A publication by defendant states that a certain railroad project, important for the interests of Milwaukee, and requiring a grant of authority from the legislature, was opposed by a combination, of which one M. was at the head, and that what was most remarkable of all was, that the project was opposed by certain members of the State senate, including the plaintiff, and adds: "To those who know that M. is rich and unscrupulous, the reason why this is so need be no great secret. But it is a matter for the people, who are misrepresented by those faithless senators, to become enraged and apply a remedy. That money has been used to effect some of these railroad laws, we know. We have names, amounts and dates, so that there can be no mistake. How long shall the best interests of our city and our State be trifled with, and our citizens misrepresented by faithless and selfish senators?" etc., etc. *Held*, that these words charge plaintiff, *in his capacity as a senator*, with having been induced by pecuniary considerations to betray his public trust; and they are *prima facie* libelous. *Wilson* v. *Noonan*, 23 Wis.

MORTGAGES.

Subrogation of rights of. — To prevent an administrator's sale of the real property to pay debts of the estate, one J. agreed with H. and his wife (said wife being one of the heirs, and then supposed to be sole heir), and one P., who held a mortgage lien upon said property, that he (J.) would advance money to pay the other debts and also pay the amount of said mortgage, and take an assignment thereof, and a mortgage from H. and wife on all the real estate of which the intestate died seized, as security for the moneys so advanced. The agreement was executed in other respects, and the moneys so advanced actually applied to the payment of debts of the estate; but instead of an assignment to J., P. executed and delivered to J. a satisfaction piece, which recited that the money was advanced by J. At the same time P. delivered the mortgage and note to J. to be kept by him. Afterward J. assigned and transferred them to A. with the note and mortgage from H. and wife; and A., after the several obligations were due, demanding payment, H. applied to plaintiff to advance the money, representing that his wife was the sole heir, or if there were others they could not have the land without paying the claims then due, as they were for moneys owing by the intestate; and plaintiff advanced the money, taking an assignment from A. of all the securities held by him, and also a note from H. and wife secured by their mortgage on the same land covered by the mortgage of P. It was afterward found that there were several other heirs of the estate. *Held*, that plaintiff was entitled to be subrogated to the rights of P. under his mortgage, and to have the satisfaction thereof vacated. It was no objection to granting this relief, that plaintiff had acquired an administrator's deed to said real property upon a sale which was invalid. Plaintiff was entitled to have the money paid into court by him on such invalid sale refunded. After the payment to him of the amount secured by the mortgage to P., plaintiff should share with the other creditors of the estate ratably for the remainder of the amount advanced by him. *Morgan* v. *Hammett*, 23 Wis.

MARRIED WOMAN.

Right to employ husband as laborer on real property, and agent to invest her money. — A wife owning land as her separate estate may cultivate the same by means of the labor of her husband and their minor children, and the *legal title* to the products and proceeds thereof will still be in her, so that they cannot be levied upon under an execution against the husband. *Feller* v. *Adam*, 23 Wis.

NAVIGABLE RIVERS.

Navigation by rafts. — It is no defense to an action for injuries to a raft, occasioned by improper obstructions at a dam, that such a raft could not have navigated the river at all before the dam was built. A provision in an act authorizing a dam across a navigable river, which requires the persons maintaining it to keep "a good and sufficient slide, that will admit the passage of all such rafts as may navigate said river," *held* to refer to such rafts as could and should navigate the river after its condition should be improved by the dam. *Volks* v. *Eldred*, 23 Wis.

NAVIGATION.

1. *Rights of navigation.* — A city ordinance or an act of the State Legislature, forbidding vessels to drag their anchors in a navigable stream, would be invalid as far as it interfered with the rights of navigation secured by the ordinance of 1787. *The Milwaukee Gas Light Company* v. *The Schooner "Gamecock,"* 23 Wis.

2. *Injury to gas pipes in bed of river.* — The right of a city gas light company to lay its pipes across the bed of a navigable river within the city is subordinate to the right of vessels to the free navigation of such river. *Ib.*

NEGLIGENCE.

1. *Partners as tort-feasors; action against one.*—Plaintiff having been injured by a collision of teams, and defendant's team not having given a part of the middle of the street as required by the statute, it was not error to refuse an instruction to the effect that, if plaintiff's driver saw defendant's team while at a considerable distance, and from that time until they met, and there was ample and unobstructed space in the street on plaintiff's right to enable her team to pass safely, then the negligent or unskillful management of her team must have contributed to the injury, and she could not recover. The facts recited are not conclusive proof of negligence; especially as plaintiff had a right to presume that defendant would comply with the statute. *Wood* v. *Luscomb*, 23 Wis.

2. *In crossing railroad track.* — In an action for the killing of plaintiff's intestate by defendants' trains, while she was attempting to cross their two adjacent tracks, it appearing that the deceased must have seen and known that two trains were approaching on said tracks side by side, and, with the exercise of any care, must have known that they were running at a much greater rate of speed than usual, and the circumstances were such as would have prevented any prudent person from attempting to pass, the court should have set aside a verdict for the plaintiff and ordered a new trial. *Langhoff, Admr.*, v. *Milwaukee and Prairie Du Chien R. R. Co.*, 23 Wis.

3. *Injury by act of fellow-servant.* — When several persons are employed as workmen in the same general service, though in different parts of it, and one of them is injured through the carelessness of another, the employer is not responsible unless he had employed unfit persons for the service. *O'Donnell* v. *Alleghany Valley R. R. Co.*, 59 Pa.

4. *Who are employees.* — A carpenter working as such for a railroad company was carried on the company's cars to and from his work as part of his contract of hiring. He was not to be esteemed as employed in the same general service with the hands running the train or repairing the

track of the road so as to relieve the company from responsibility for injury to him from their negligence. *Ib.*

5. *Duty of master.*—The master is bound to use ordinary care in providing suitable structure, machinery, tools, &c., and in selecting proper servants, and is liable to other servants in the same employment, if they are injured by his own neglect of duty. *Ib.*

A railroad company is bound to furnish a safe and sufficient roadway to its servants, as well as to others traveling over it. The remote negligence of servants as to the roadway will not excuse the non-performance of such duty. *Ib.*

If the substructure of a road be suffered to lie until it has become rotten and unsafe, it is the negligence of the company. *Ib.*

Casualty from such cause is not an ordinary peril which one taking service in the company is presumed to incur. *Ib.*

6. *Riding in baggage car.*—In a suit by an employee of a railroad company who held the relation of a passenger, the Court charged, that the baggage-car is an improper place for a passenger to ride; whether the rule against it was communicated to him or not, if he left his seat in the passenger car and went into the baggage-car it was negligence which nothing less than a direction or invitation from the conductor would excuse; such invitation should not be inferred from his having ridden there frequently with the knowledge of the conductor, and without objection. Held, to be error. *Ib.*

The conductor is the person to administer the rules of the company, and apply them according to the circumstances. The passenger-travel is under his directions and should conform to them. From the nature of his position he must exercise some discretion. *Ib.*

7. *Injury to the person.*—Where there was evidence tending to show that a railroad train had come to a full stop, and that the persons waiting to get upon it were told to go on board by the persons in charge of it, and that the plaintiff below, in attempting to get aboard, was injured in consequence of the sudden starting of the train, it was not error to leave to the jury the question of the negligence of the parties. *The Detroit and Milwaukee Railroad Company* v. *Curtis and wife*, 23 Wis.

Nor were the facts that plaintiff below was told by the company's servants to get on the *hind* car, and that he was injured in trying to get on *another* passenger car, such conclusive proof of negligence on his part as to take the case from the jury. *Id.*

It was error to instruct the jury that if it appeared that in case the company had had an agent, wearing its badge, whose special duty it was to warn passengers not to go on board until the cars stopped, and to inform them into what cars to enter, etc., this would have prevented the injury, and that there was no such agent there, then defendant was guilty of negligence. *Id.*

8. *Liability for injury to person from failure to erect fence.*—Where an infant of eighteen months gets upon a railroad track in consequence of the failure of the railroad company to erect a fence as required by law, the parents being in the exercise of ordinary care, the company is liable to it for the injury. *Schmidt* v. *The Milwaukee and St. Paul Railway Co.*, 23 Wis.

9. *Negligence, in case of a young infant.*—An infant of that age is not itself capable in such a case of negligence that will defeat a recovery. *Ib.*

NEW TRIAL.

Where there is slight evidence to support the verdict, the appellate court will not interfere with the decision of the court below refusing a new trial; otherwise, where there is *no* evidence to sustain the verdict. *Eaton* v. *School District No.* 3, 23 Wis.

NOTICE OF ACTION.

Constructive notice.—Persons are not chargeable with *constructive* notice of an action after *service* of the summons and complaint and accompanying papers, but *before* any papers have been *filed;* nor will the *subsequent* filing render them chargeable from the time of such service. So *held*, where an *injunctional order* was served with the summons and complaint. *Kellogg* v. *Fancher*, 23 Wis.

PARTNERSHIP.

What constitutes.—Articles of agreement by which plaintiff leased to defendants certain lands, buildings and fixtures constituting a manufactory, and defendants agreed to use the same, putting in their money and personal labor, the net profits of the concern to be shared between the parties, *held*, to constitute a partnership. *Wood* v. *Beath*, 23 Wis.

PAYMENT.

In gold.—When a contract for services provides that payment is to be made in gold, payment in currency is not a compliance, and the court will enforce the contract according to its terms; following the decision of the Supreme Court of the United States in the case of *Brown* v. *Rodes*, in which it was *held*, that contracts for the payment of coin should be enforced. N. Y. C. P. Gen. T., 1870, *Mahoney* v. *Stewart*, N. R.

RAILROAD COMPANY.

1. *Agreement of freight agent to carry goods in specified time.*—A railroad company will be bound by its freight agent's agreement to carry goods in a specified time, if it be a reasonable time. *Strohn* v. *Detroit and Milwaukee Railroad*, 23 Wis.

2. *Non-delivery.*—The carrier does not in such a case become an *absolute* insurer of the goods, but their destruction within the prescribed time by the act of God or of the public enemy will excuse non-delivery. *Ib.*

3. *What constitutes such agreement.*—A mere statement by the agent that the ordinary time for transportation over the proposed route is a certain number of days does not constitute an agreement to carry in that time. *Ib.*

4. *Exception to instructions.*—Where the general charge consisted of about forty folios, defendant excepted generally; and also excepted "to the rejection of the instructions asked by it; to all that part of the charge wherein the instructions given at its request were in any wise qualified or against it; to all that part wherein the court commented on the evidence; and to all the remarks to the jury not relating to points raised or to the merits of the case." *Held*, that the exceptions were too general to raise any question except as to the correctness of the instructions asked by defendant and refused. *Ib.*

5. *Railroad company as carrier—excuse for failure to transport.*—A railroad company receiving goods in this State, to be carried by its own and connecting lines to Buffalo, N. Y., *held*, not to be excused for a failure to transport to the end of its own line (at Detroit), and deliver, or offer to deliver, to the next carrier (the Great Western R. R. Co.), merely by the fact, which its agents knew, that there was a block of freight at Suspension Bridge (over the Niagara river), which created a block at Detroit, and the further fact that there was no room for the goods in the defendant company's depot at Detroit; especially where it is not clear that the general block of freight for the east at the bridge would have prevented the transportation of plaintiffs' goods to Buffalo. Whether a notice to defendant from the next carrier that it would receive no more freight of any kind from defendant, would have been a sufficient excuse, is not decided. *McLaren and another* v. *The Detroit and Milwaukee Rdilroad Company*, 23 Wis.

RECEIPTS.

How far conclusive.—There is a distinction as to oral testimony, between solemn contracts *inter partes* in writing executed and delivered, and receipts, the acknowledgment of one party only. Receipts, when mere acknowledgments of delivery or payment, are but *prima facie* evidence of the facts, and not conclusive: the facts may be contradicted by oral testimony. Law, in our

equitable administration of it, is as efficient to prevent the fraudulent use of an instrument as equity is to restrain. *Batdorf* v. *Albert*, 59 Penn.

REVIVOR.

1. *Claims against estate.* — The presentation of a claim to the commissioners appointed to adjust claims against an estate is the prosecution of a new remedy, and does not operate as a continuance or revivor of a suit to enforce such claim pending against the decedent at the time of his death. *Jones* v. *Estate of Keep*, 23 Wis.

2. *Statute of limitations.* — Where the statute of limitations has otherwise run upon the claim, therefore it cannot be allowed by the commissioners. *Ib.*

3. *Revivor against personal representatives.* — Where one of several defendants to an action on their joint and several obligation dies, *it seems* that the action may be revived against his personal representatives *separately* (under sec. 16, chap. 101, and sec. 1, chap. 135, R. S.), but *not* against them *jointly* with the other defendants. *Ib.*

RIVER.

1. *Change of channel.* — When the channel of a river has been gradually changing for years, by wearing away the bank on defendant's side, and by adding and forming accretions upon the opposite shore owned by plaintiff, by slow and imperceptible degrees, the channel as so changed must be regarded as the rightful and accustomed channel, for the time being as between the different parties. *Gerrish* v. *Clough*, 48 N. H.

2. Such accretions become the property of the landowner upon that side of the river, and are as much entitled to protection as his original inclosure. *Ib.*

3. In such case the defendant may protect his banks from further encroachment by rubbling or other means, provided it do not cause a change in the (then) accustomed channel of the river, to the material or appreciable injury of other riparian owners; but he has no right to build a dam, breakwater, or other obstruction in the stream, which will raise the water upon the plaintiff's land or wash the same away. *Ib.*

4. The questions in regard to the right of a reasonable use of the stream, or in regard to ordinary care and prudence, in erecting such dam or obstruction, do not arise in such case. *Ib.*

SALE ON EXECUTION.

1. *Selling in parcels.* — The objection that land was not sold in separate parcels at an execution sale cannot be taken after the time for redemption has expired, by the judgment debtor himself, by one holding a mortgage of the land, or by a purchaser of foreclosure of such mortgage. *Raymond* v. *Holborn*, 23 Wis.

2. *Constructive notice.* — A purchaser at a foreclosure sale takes with constructive notice of any prior sale on execution. *Ib.*

3. *Right of purchaser.* — Where, on foreclosure of a second mortgage, the prior mortgagee is made a party, and his mortgage is first paid, pursuant to the decree, from the proceeds of the sale, the purchaser takes his rights as against the lien of a judgment intermediate between the two mortgages. *Ib.*

4. The purchaser at the execution sale has a right to redeem by paying the amount of the prior mortgage, or his equitable proportion thereof, where the lands sold on execution are only *a part* of those covered by the mortgage sale. *Ib.*

SPECIFIC PERFORMANCE.

When the defendant was induced to make the contract by plaintiff's false representations to his injury, specific performance will not be enforced. *Wells* v. *Millet*, 23 Wis.

STATUTE OF FRAUDS.

Retention of goods by vendor as bailee of purchaser. — On a sale of chattels which, without delivery, would be void by the statute of frauds, if the vendee constitutes the vendor his bailee of the goods, and the vendor thereafter holds them as such bailee, the delivery is complete, and the sale good *as between the parties*. *Janvrin* v. *Maxwell*, 23 Wis.

TITLE.

Effect of notice — Gerthorne Bulkley v. *I. Holly Platt et al.* — The doctrine in regard to effect of notice of prior incumbrances does not reach a title derived from another person, in whose hands it stood free from any such taint. A purchaser may safely purchase with notice, if he purchase from a vendor who himself bought *bona fide*, and without notice. The rule is necessary to enable a *bona fide* purchaser to sell his estate as security for its full value, and is well settled, and the exposition of the recording act in *Vanderhemp* v. *Shelton*, 11 Paige, 28, is correct, although a different opinion is expressed in *Hoyt* v. *Hoyt*, 8 Bos. 511. *Sup. Ct. Sp. T.*, 2 *dis.*, 1870, *Bulkley* v. *Platt*, N. R.

TRESPASS.

1. *Measure of damages.* — For trespass in putting dirt upon plaintiff's lot, he is entitled to *nominal* damages, although the lot was benefited and not injured thereby; but he is *not* entitled to damages "equal to the cost of removing the dirt." The question, whether the dirt, in such a case, is a benefit or an injury, must be determined by the jury with reference to the use for which the plaintiff designed the lot, if that is shown. *Murphy* v. *Fond du Lac*, 23 Wis.

2. It was error, in such a case, to refuse evidence for defendant tending to show that the filling of the lot increased its frontage, though not connected with any offer to prove that such increase was a benefit. *Ib.*

3. The jury would be at liberty to apply their general knowledge to the determination of the question whether an increase of frontage adds to the value of a lot. *Ib.*

TRIAL.

By referee. — A provision of law for the trial of causes by referees, with the *consent* of the parties, is not repugnant to the constitutional provision which vests the judicial power in *courts*. *The Home Insurance Co.* v. *The Security Insurance Co.*, 23 Wis.

USURY.

Lex Loci. — A note given in Illinois by a firm doing business in this state (place of payment not expressed), to take up a previous note executed in this state by the same firm, *held* to be governed by the laws of Illinois in respect to usury. The makers can avail themselves of the defense of usury only by pleading and proving the law of Illinois on that subject. There is no presumption that the usury laws of another state are the same as our own; especially when the latter are of a penal character. *Hull* v. *Augustine*, 23 Wis.

To recover usurious interest paid by him, the plaintiff must prove that he was legally liable to the defendant for the loan on which the interest was paid. *Holmes* v. *Gerry*, 55 Maine.

WILL.

Heirs of the body. — Devise to Matthew and Samuel, "and the heirs of their body," charged with keeping their mother for life and with certain legacies. "Matthew and Samuel have no privilege, nor can in no wise sell or dispose of the land during their mother's natural life, and then not without both be agreed to sell their parts; * * * but if either one of them dies wanting heirs of the body, the part that one owns falls to the other then, except he be married; and if both die before they marry, their estate is to be equally divided among all the legatees." Matthew and Samuel took an estate tail. "Heirs of the body" are strictly and technically words of limitation, and can be converted into words of purchase only by a clearly expressed intention of the testator. An estate tail may be followed by a limitation over on a definite failure of issue, and, like a fee, may depend for its continuance on the performance of a condition or the happening of a contingency; but, when once created, it remains an estate tail until the happening of the contingency or the breach of the condition. Either a contingent remainder, or an executory devise limited after an estate tail is cut off by a deed, under the act of January 16, 1799, to bar the tail. — *Linn* v. *Alexander*, 59 Pa.

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SOME BAR STORIES, OLD AND NEW.

It is a curious fact, well known to members of the bar, and probably to all who are engaged in public speaking, that after applying itself continuously for several hours to an argument or an oratorical effort, the brain becomes suddenly incapable of going on, the supply of nervous matter is exhausted, and the speaker "loses his head." This will sometimes happen even to the best men, unless they are wise in time, and take advantage of the short breathing space allowed by the court in the middle of the day, for bench and bar to recruit their energies. Of course, there are some men who *begin* by losing their heads; witness the case of the nervous young counsellor, who, having thrice enunciated the words, "May it please you, my Lord, and gentlemen of the jury," was desired to proceed, with the assurance which the bench gave him that thus far he had the court wholly with him. But the process of losing head through over-long tension of the brain is liable to occur to the most experienced practitioner; and where judges will not give a man back the thread of his argument, and say, "If I understood you aright, sir, you were contending that," etc., etc., this liability may lead to disaster in the case.

There is a good story, never before published, which was told to the writer by one of the most eminent of living judges, illustrating this fact, and showing the readiness with which the want of brain power was apprehended, and opportunity given for recovering the equilibrium, on a celebrated occasion.

Mr. Brougham (afterwards Lord Brougham) was junior with Mr. ——, a leading counsel of the day, in a cause *celebre* that nearly concerned the royal family. The leader, oppressed with the responsibility of his charge, and weary with his exertions, had been addressing the court with close argument for several hours, when it was apparent to every one that his mind had suddenly ceased to act in unison with his speech. Mr. —— became flurried, stammered, and began to plunge. Brougham saw what had happened, and instantly rose, interrupted his chief, and addressed the court. Wearing upon his face an expression of great suffering, he assured their lordships of his deep regret at having to trouble them at such a time with a matter personal to himself. He did it most unwillingly, but he was sure their lordships would forgive him if they only knew the agony he was then enduring in his right ear by reason of the killing draught that rushed through "that door leading into the Common Pleas." He was nearly mad with ear-ache. What he *should* do if the nuisance continued he could not tell. Might he, in the interests of his clients, entreat the interposition of the bench? The bench condoled with Mr. Brougham on his suffering, and at once ordered measures to be taken to stop the draught. "That door leading to the other court" was shut, but still the draught came; windows were examined, and sand-bags were placed against the openings in them, till the nuisance was abated,—till a good quarter of an hour had been consumed,—till Mr. Brougham's leader had had time to recover himself. It is, perhaps, needless to add that the "intelligent junior" had not an ache or pain in all his great body.

It used to be said of Brougham that he slept only once a week, viz.: from Saturday afternoon to Monday morning. Certain it is he was capable of undergoing the greatest bodily and mental fatigue, and, when occasion required it, could sit up night after night at work without appearing to be any the worse. This was no light matter, considering what was then the daily professional routine of a counsel in first-rate practice,—a routine to which few advocates would, or perhaps could, now submit. At nine A. M., at chambers; in court by ten; at chambers again by four for consultations; in hall for dinner at five; in chambers once more at seven, there to stay till twelve o'clock, and often later, preparing for court next day, or advising upon cases left for "counsel's opinion." Such was, in Brougham's time, the daily programme of a successful barrister's life in London. Circuit brought him briefs, but no relief from work, and that at a time when men had to ride round the circuit, and could not, as now, quietly read a whole bagful of briefs in the comfortable railway carriage, which transports them, without exertion or anxiety on their part, from London to York. Truly, there were giants in those days.

Counsel are sometimes—not by any means so often as they deserve—answered by witnesses in their own style. It was not a bad reply, that made by a witness in the Grenville-Murray perjury case. One of the counsel, after pressing a witness who had given information to tell him what certain persons had said about his having given this information, added, "They said you had split, in fact;" but the witness, no way cast down by the insinuation, replied, "They expressed themselves in much more gentlemanly language than that."

This reminds me of a counsel who had been bullying a witness, and asked him how far he had been from a certain place. "Just four yards, two feet and six inches," was the answer. "How came you to be so exact, my friend?" "Because I expected some *fool* or other would ask me, and so I measured it."

The writer remembered a counsel who mimicked a witness to his great annoyance, and when the witness, who was a north countryman, pronounced the word "waters" as if it had been "watters," inquired of him whether in his part of the country they spelt "waters" with two *t*'s. "No," said the witness, "but they spell 'manners' with two *n*'s."

Dunning (afterwards Lord Ashburton) wanted to get out of a witness why he had taken up his residence in the verge of the court—that is, in the sanctuary—and after pressing him a good deal, elicited the answer that it was "in order to avoid the rascally impertinence of *dunning*."

Some counsel, who are adepts in the art of cross-examination, and who think it desirable to discredit

every witness, are so unable to divest themselves of the habit that they intuitively try to discredit their own witnesses. The writer remembers hearing the case of *Kemp* v. *Neville*, in which a young woman sought to recover damages against the authorities of a university for having caused her to be "proctorized," she being, as alleged, a thoroughly respectable person. A nursemaid being produced as one of the witnesses was too fine a lady to say she was a nurse, and answered the question of counsel by saying that her occupation was to take charge of infants. Upon this came the further question — suggested, perhaps, by the nature of the case in court — "By infants, do you mean undergraduates under the age of twenty-one?" was put by the counsel. The laugh was, of course, against the nurse, and the barrister triumphed; but it is easy to see how a good reply to his observation would have turned his triumph into mortification. Juries are too often led away by seeming disputes between judge and counsel, and between counsel and witnesses, into a belief that what has strictly to do with those persons themselves has something to do with the case also; and the writer has known verdicts of the most astounding character given evidently because of some bias imparted to the case by an altercation that had nothing to do with it.

A few years ago these altercations between judge and counsel were the frequent occasions of duels, which were not looked upon with such disfavor as they might have been by the junior members of the profession. It used to be said of Lord Norbury, whose career was a rapid one, that "he shot up into promotion." Certain it is he fought a great many duels. Curran, who was a small man, was objected to on that account by his antagonist, a lawyer, who was a very big man; but Curran suggested, in order to make all right, that the size of his own figure should be chalked on his adversary's body, and that any shots outside the chalk lines should go for nothing.

It has sometimes happened that altercations of an unseemly kind have taken place between prisoner and judge, not only in Judge Jeffrey's day, but much more recently; and there are some anecdotes on record of almost brutal behavior on the part of the judge towards the prisoner. A justice of the Queen's Bench, whose name was associated with much that was indecorous and with all that was learned thirty years ago, was trying a man for his life. The prisoner, being found guilty, was asked the usual question whether he had any thing to urge why sentence of death should not be passed upon him, and thereupon called God to witness his innocence, inviting the Almighty to strike him dead where he stood if he were guilty. When the prisoner had done, the judge waited a minute or two, and then said: "Prisoner at the bar! since Providence does not seem disposed to interfere in the manner you have indicated, the sentence of the court is that you be taken from this place to the place whence," etc., etc., and the man was condemned to death in the usual manner.

A Scotch judge condemned a man to be hanged on the 28th of the month for sheep-stealing. As the poor convict was being removed, he exclaimed, "My lord, my lord, I haena got justice here the-day." The judge looked up from his papers and said — it was, doubtless, considered a good joke at the time — "Weel, weel, my man, ye'll get it on the 28th."

At one time it was the practice, though it was never legal, to punish juries by fine or imprisonment for verdicts which were not according to what the judge considered right. The Star Chamber arrogated to itself jurisdiction in the matter, and, sending for jurors who had dared to go contrary to the wishes of the court, rated them soundly, and often fined or imprisoned them. This was frequently the case in Tudor and Stuart times, the only justification for it being that then juries were notoriously bribed, or were deterred by fear of family or state influence from giving a true verdict according to the evidence. Had the court continued to the present day, it might have felt disposed to interfere in a case that actually occurred not long ago on the Oxford Circuit. The son of the squire at X——, in Worcestershire, was a barrister, and went the circuit. When the judges reached X——, a brief was put into the hands of the squire's son to enable him to conduct the defense in a case for trial in which there was no defense at all. The case proceeded upon evidence so clear and telling against the prisoner, that every one in the court expected the jury to turn round in their box and give a verdict against him. To the surprise of all, certainly of the counsel for the prisoner, the jury retired, and, coming into court again, returned a verdict of Not Guilty. A few days afterward the squire was riding about his land, and was accosted by a man who had been foreman of the jury with the remarkable words: "Uz fetched 'un aff, I reckon, th' other day, zur;" and on being questioned, explained that some of the jury at the trial "wur for givin' a vardict agin your zun, zur, but us knew our duty better than that." Truly the prisoner was fortunate in his choice of counsel.

It is exceedingly difficult in some parts of the country to get verdicts of guilty in cases involving capital punishment. The feeling is so strong against executions, and is probably influenced by some considerations of a religious nature as to the responsibility of sending a murderer to his account, that it is nearly impossible to get verdicts. The jurors prefer to do what they think the less evil, to break their oaths "a true verdict to give according to the evidence," to causing a man to be put to death. They have precedents enough in the juries who tempered the rigor of the bloody code that Romilly swept away by finding, when hanging was the punishment for theft of articles exceeding twelvepence in value, that the prisoner was guilty, but that the value of the article stolen, perhaps a watch or a trinket, was under twelvepence value.

THE ADMINISTRATION OF JUSTICE.

I.

There are so many complaints just now of the administration of justice, that we have thought it worth our while to hunt up a few cases of what it formerly was, and what it is now, so that we may try to be a little patient, if not content, with a progress toward perfection, even if perfection is not yet fully attained.

In the eighth century the *Judicium Crucis*, or Judgment of the Cross, prevailed. An instance is mentioned in Robertson's History of Charles V.

A controversy had arisen between the Bishop of Paris and the Abbot of St. Dennys concerning some land, and it was determined in this manner: Each produced a person, who, during the celebration of mass, stood before the cross, with his arms expanded, and he whose representative first became weary and altered his posture, lost the cause.

The following, from the same writer, is a case of the *Trial by Battle* in the tenth century:

The question was whether the sons of a son who had died before his father, should be reckoned among the children of the family, and succeed to the inheritance equally with their uncle.

The Emperor, "desirous of dealing honorably with his people and nobles," appointed the matter to be decided by battle between two champions.

The champion of the grandchildren was victorious, and it was established by a perpetual decree that they should hereafter share in the inheritance with their uncles.

Is it from this source that we derive our second canon of Descents in 1 Rev. St. 751, § 3?

The following case, in the eleventh century, is from the same author:

The question as to what kind of Ritual should be used in the churches was determined, first, by judicial combat, and next by throwing both books into the flames, and the one that remained untouched should be victor; and it is said that the Musarabic liturgy triumphed in both trials, because "it remained unhurt by the fire when the other was reduced to ashes."

So, if it was known that a witness was going to testify to a particular fact, he might be challenged to the combat by the party against whom his testimony would be given, and if he was defeated in the combat, he could not be a witness; for which this very satisfactory reason was given: "For it is just that if any one affirms that he perfectly knows the truth of any thing, and offers to give oath upon it, that he should not hesitate to maintain the veracity of his affirmation in combat."

These were cases occurring some eight or nine hundred years ago. To show the progress from that, we give some cases which occurred some one or two hundred years ago.

The manner in which our ancestors tyrannized under the forms of law, is very strongly shown in our reports.

The King v. *Whitmore*, reported in 1 W. Blackstone, 37; *The King* v. *Dawes*, id. The defendants were two young students of Oxford, who were convicted of speaking treasonable words in the street of Oxford, on 14th of February, 1748, and were sentenced to pay a fine of five nobles; to be imprisoned two years; to find security in £250 for good behavior for seven years; and to go around to all the courts in Westminster Hall with a paper on their foreheads denoting their crime; and, as the report adds, which punishment was strictly put in execution.

In the same volume, the next case that follows is connected with the same matter—*The King* v. *Dr. Purnell*, 1 W. Bl., 37; S. C. 1 Wils. 239. The Attorney-General filed an information against Dr. P., because that he, as Vice-Chancellor of the University of Oxford and Justice of the Peace, had not punished Whitmore and Dawes for their treasonable words. The Attorney-General moved for a rule directing the officers of the University to produce their records, and the matter was elaborately argued. Wilbraham, Henley (afterward Lord Northington), Ford, and Evans, all argued for the University. "Morton on the same side would not repeat."

On the other side, Ryder, Attorney-General; Sir John Strange; Murray, Solicitor General, and Sir R. Loyd, argued the motion. But it was denied, and the reporter adds, as a note:

"N. B. — As the University statute book really contains nothing which can affect the merits of the case in any degree, and as printed copies of it were numerous and easy to be met with, and as the custodian of the records might have been compelled to have attended with them on the trial, this extraordinary motion seemed only to have been intended as an excuse for dropping a prosecution which could not be maintained; and it was accordingly dropped immediately, *after having cost the defendant to the amount of several hundred pounds.*"

OBSERVANCE OF SUNDAY.

In *Swann* v. *Broome*, 3 Burrows, 1595, decided 28 Nov., 1764, Lord Mansfield says: Anciently the courts of justice did sit on Sunday. Spelman, chap. 3, p. 75, says the ancient Christians practiced it. * * * They had two reasons for it; one was in opposition to the heathens, who were superstitious about the observation of days and times, conceiving some to be ominous and unlucky and others to be lucky; and, therefore, the Christians laid aside all observance of days. A second reason they had also, which was by keeping their own courts always open to prevent Christian suitors from resorting to the heathen courts.

But in the year 517 a canon was made that no bishop or *infra positus* should presume to adjudge causes *die Dominico;* and this canon was ratified by Theodosius, who fortified it with an imperial constitution.

Another canon by the Council of Tribury, in 895, and another by the Council of Erxford, in 932, were to the same effect.

These canons were received and sanctioned by the Saxon kings, and particularly by Edward the Confessor; and were afterward confirmed by William the Conqueror and by Henry II, and so became part of the common law of England.

Potier v. *Croza*, 1 W. Blackstone, 48. On a question of privilege to an ambassador's servant of exemption from arrest, the judges mentioned some queer cases.

LEE, J., remembered a case where a man swore he was master of the horse and clerk to the kitchen of an ambassador, who had no horse and *only part of a kitchen!*

FORSTER, J., remembered the case of one who swore he was chaplain to the Morocco ambassador.

The King v. *Charles Radcliffe*, 1 W. Blackstone's Reports, 3; S. C., 1 Wilson, 150. The prisoner was the brother of the Earl of Derwentwater, who was executed for high treason in 1716, for "being out" for the Pretender.

The prisoner was in custody in Newgate in 1716, and made his escape out of the country, but was attainted for high treason. He went into the French service, and thirty years afterward, during the rebellion of 1745 (so celebrated by Walter Scott in his novel of Waverly), he was captured with other French officers and troops, in a vessel which was supposed to be bound for Scotland. He was now again committed to the Tower, and after being detained there about a year, the Attorney-General Ryder had him brought before the King's Bench to receive sentence on his conviction thirty years before. When thus brought up, the whole proceedings were marked by a ferocity and relentlessness that would shock modern sensibility.

Blackstone, in his report of the case, accuses Radcliffe of behaving with "some levity and indecency" in disclaiming the jurisdiction of the court, because he was a subject of France. But Wilson closes his report by saying: "The prisoner was beheaded on Little Tower Hill, 8th December, 1746, and behaved with great fortitude and Christian patience;" but adds, *ut audivi*, as I heard.

Radcliffe, when brought up, wanted to read his commission to show that he had been a French officer for thirty years, but the court refused to let him. He was then called upon to hold up his hand — which is usual on arraigning prisoners even at this day and among us — and is said in *Hall's Pleas of the Crown*, vol. 2, p. 219, to be of importance; "for, by holding up his hand, *constat de persona indictati*, and he owns himself to be of that name." Yet peers were exempt from doing so, as in Lord Stafford's case, in T. Raymond's Reports, 408.

Radcliffe refused to hold up his hand. The Attorney-General replied that that was mere matter of form, and insisted that he should be arraigned without it, and LEE, Chief Justice, requested Radcliffe to comply with it as a "usual ceremony." But Radcliffe refused, saying, if it was mere matter of form, it might be dispensed with in the case of a stranger; if a point of moment, he was determined to do nothing that might argue a submission to the jurisdiction.

He was then asked what he had to say why sentence should not be pronounced against him, on this conviction of thirty years old, and he was told that, if he did not answer, he should be forthwith sentenced.

He desired that counsel might be assigned him, which was done, and the 24th of November was fixed to bring him up again.

His counsel moved for leave to have access to him, but Ryder, the Attorney-General, objected!

Ryder's whole conduct was marked with the subserviency of the politician to superior power, and he had his reward. In 1754 he was made Chief Justice of the King's Bench in the place of Lee, who died.

On the application of Radcliffe's counsel to have access to him, Murray, the Solicitor-General, behaved differently. He said that permission for such access had already been granted; so the court did nothing on that motion.

This Murray became Chief Justice of the King's Bench in 1756, when Ryder died, and was afterward famous as Lord Mansfield.

On 24th November Radcliffe was again brought into court, and began reading a cartel which stipulated that all officers of what nation soever should be exchanged, etc. But, as Blackstone reports, "the court took no notice of this."

Wilson adds to his report: "NOTE. — The prisoner insisted he was an officer in the French King's army, and offered his commission, but the court refused to read it. He also insisted on a cartel between the two crowns now at war, but the court said they could take no notice of either."

Radcliffe then, in answer to the question what he had to say, etc., pleaded, "without holding up his hand," as the report says, that he was not the person named in the record of conviction. The Attorney-General averred he was, and demanded an instanter trial on that issue.

Wilson reports that when counsel was assigned to Radcliffe, they desired to have a copy of the record and to see it. But the court refused, saying there was no instance or precedent of it! But the court kindly, at the counsel's request, ordered the clerk to read it over again.

On the Attorney-General's demand for an instanter trial of the issue of identity, the prisoner asked for time to get two witnesses from abroad, he having for thirty years been abroad and not in England, except during the year he was a prisoner in the Tower, and his counsel read an affidavit that they were necessary witnesses.

The Attorney-General objected to receiving the affidavit, because it was not entitled, a paltry quibble in a matter of life and death. He also objected that the prisoner had described himself as the Count De Derwentwater instead of Charles Radcliffe.

Then the Attorney-General, the Solicitor General, and their associates, Sir John Strange, the author of Strange's Reports, and Sir Thomas Bootle, all united in objecting to any postponement, unless Radcliffe would make oath that he was not the same person. It was in vain that his counsel urged the maxim *nemo tenetur scripsum accusare;* that to insist upon that would be to force him into self-accusation by his silence, or else into perjury by taking it, and that the prisoner had been confined more than a year without being brought to trial, or knowing what charge would be brought against him, and that the Crown had taken the whole twelvemonth to seek after evidence, and would not allow the prisoner a term, or even a week or a day.

The court refused any delay, unless he would make such oath, and he refused. So the court proceeded in the design on the life of a man whose offense had been committed thirty years before; who had ever since remained out of the country, and who now refused to falsify his word even to save his life.

Blackstone says that then a jury was impaneled on the spot by the under sheriff of Middlesex, who attended for that purpose; but Wilson goes farther, and says the jury was ready, waiting in the hall, in order to try any issue that might be joined between the king and the prisoner.

It will be remembered that this was a proceeding *in banco*, where there was no regular jury drawn impartially, but one could be summoned by the sheriff from whomsoever he pleased; and, as the sheriff was an appointee of the Crown, it is not difficult to judge

what his course would be in a case where the Crown evinced such a determination to have the prisoner executed.

So the trial of identity went on. Blackstone reports that four witnesses were examined for the Crown, of whom the principal was General Williamson, the Lieutenant of the Tower, who testified to the confessions of the prisoner while in his custody.

Such testimony would not now be received at all without due previous warning, but was then the main reliance for the prosecution.

The old idea was that confession was the strongest evidence of guilt, because the product of remorse of conscience, but modern times have shown us that such confessions are more frequently caused by fear and alarm, and are often untrue; and so we have the rule that when one is in custody on an accusation, his confession then made will not be received, unless there is evidence to show that it was entirely voluntary and not caused by fear or inducements held out by others. See Joy on Confessions, *passim*, 1 Cow. and Hill's Notes to Ph. Evidence, 232, 238; *King* v. *Watkins*, 4 Car. and Payne, 548.

Wilson, in his report, gives more of the details of the evidence. Two of the witnesses identified the prisoner as having been in the rebellion of 1715, but did not identify him as the one who was tried and convicted in 1716. The third witness testified that he shaved Charles Radcliffe when a prisoner in 1716, but he did not believe the prisoner now at the bar to be the same person. Still the verdict was against him, and that upon testimony which would not now be admissible.

There were one or two other points showing the partial character of the trial.

It is a rule that in all capital cases where life is in jeopardy, the prisoner may peremptorily challenge a certain number of jurors, and thus set them aside at his pleasure without reason given.

Radcliffe interposed such a challenge in his case, but the court refused it on the ground of a citation from Hall's Pleas of the Crown, vol. 2, 267, that such challenges are not allowed in collateral issues.

The remarkable feature of this ruling is, that in the very next paragraph to that cited, Lord Hale says that a peremptory challege is allowed in a case of a plea of not guilty, *or any other matter* where life is at stake.

So the court in their oppression of Radcliffe not only disregarded the general rule allowing a peremptory challenge in capital cases, but disregarded, or garbled, or were ignorant of the very authority on which they rested their decision.

Another feature was this: When the testimony was closed the counsel for the prisoner observed upon it to the jury, after which the Attorney-General (contrary to all practice, as no evidence was given by the prisoner) insisted upon his right to reply, and was permitted to do so. In his remarks he told the jury that the prisoner had refused to make oath, as before mentioned — a fact which had not been proved, on which he had no right therefore to comment, or even mention, and in regard to which the prisoner was thus deprived of all opportunity of explanation.

The prisoner offered one witness, the envoy of the King of the Two Sicilies, to prove how long he had been in the French service, but the court refused to permit him to give the evidence.

Blackstone says the jury was out only three minutes deliberating. Wilson says it was half an hour.

Blackstone reports that "a faint attempt" was made to plead a pardon, "but the foundation of the plea being very slender, it was dropt."

Wilson reports that when the jury rendered their verdict, one of the prisoner's counsel moved for leave to plead the general pardon of the third of George II, but the judges refused in this wise: "It cannot now be done, for the defendant has been asked what he had to say, etc., and he has relied upon his not being the same person, etc., and this plea comes too late, *for the court cannot ask him twice* what he has to say," etc. Whereupon the court awarded execution, and that day fortnight was appointed for that purpose at the prayer of the Attorney-General.

In the case in Blackstone it is said that when execution was awarded the prisoner took his leave of the court with this speech: "I hope your lordship will allow me time enough to send to Lord Morton (then a prisoner) at Paris, for we are to set out upon the same journey together."

Wilson's report is silent as to that, and what was the precise meaning cannot now probably be ascertained.

Thus ended this cruel farce of a trial, this one instance among many prevalent in that day, of judicial murder under the forms of law.

One cannot read the accounts of such trials without being thankful that our lot has fallen in better days, or without feeling for those people. *Odi accipitrem qui semper vivet in sanguine.*

But there is a precedent for even this case in the execution of Walter Raleigh in the time of the elder Stuart.

(*To be Continued.*)

LAW AND LAWYERS IN LITERATURE.

III.

GREENE.

In Robert Greene's "London and England," we find a client "fain to lay his wife's best gown to pawn" for a lawyer's fees. Thrasibulus borrowed forty pounds of an usurer, "whereof he received ten pound in money and thirty pound in lute strings, whereof he could by great friendship make but five pound." By the obligation the money was to be repaid between three and four o'clock of a certain afternoon, but the usurer held the debtor with "brabbling" (quarrelling) "till the clock strook." Held that the debtor lost his lands which he had "bound in recognizance" for the loan. So Alcon lost his cow which he pledged to the usurer, because he broke a day. In this instance the interest was eighteen pence a week and the "usury" was the cow's milk.

In the same dramatist's "James the Fourth," a lawyer, a merchant and a divine rate one another as being responsible for the civil disorders of the time. The divine tasks the lawyer:

"Why devise you
Clauses, and subtle reasons to except?"
"It is your guise
To coin provisos to beguile your laws,
To make a gay pretext of due proceeding,

When you delay your common pleas for years."
"You fleece them of their coin, their children beg,
And many want, because you may be rich."
"The law, say they, in peace consumed us,
And now in war we will consume the law."

SWIFT.

Gulliver, in the "Voyage to the Houyhnhnms," gives the following caustic account of law and lawyers:

"There was a society of men among us, bred up from their youth in the art of proving, by words multiplied for the purpose, that white is black, and black is white, according as they are paid. To this society all the rest of the people are slaves. For example, if my neighbor has a mind to my cow, he has a lawyer to prove that he ought to have my cow from me. I must then hire another to defend my right — it being against all rules of law that any man should speak for himself. Now, in this case, I, who am the right owner, lie under two great disadvantages; first, my lawyer, being practiced almost from his cradle in defending falsehood, is quite out of his element when he would be an advocate for justice, which is an unnatural office he always attempts with great awkwardness, if not with ill-will. The second disadvantage is, that my lawyer must proceed with great caution, or else he will be reprimanded by the judges, and abhorred by his brethren, as one who would lessen the practice of the law. And, therefore, I have but two methods to preserve my cow. The first is, to gain over my adversary's lawyer, with a double fee, who will then betray his client by insinuating that he has justice on his side. The second way is, for my lawyer to make my cause appear as unjust as he can, by allowing the cow to belong to my adversary; and this, if it be skillfully done, will certainly bespeak the favor of the bench. Now, your honor is to know that these judges are persons appointed to decide all controversies of property, as well as for the trial of criminals, and picked out from the most dexterous lawyers, who are grown old or lazy; and, having been biased all their lives against truth and equity, lie under such a fatal necessity of favoring fraud, perjury, and oppression, that I have known some of them refuse a large bribe from the side where justice lay, rather than injure the faculty by doing any thing unbecoming their nature or their office. It is a maxim among these lawyers, that whatever has been done before may legally be done again; and therefore they take special care to record all the decisions formerly made against common justice and the general reason of mankind. These, under the name of precedents, they produce as authorities to justify the most iniquitous opinions; and the judges never fail of directing accordingly. In pleading, they studiously avoid entering into the merits of the cause; but are loud, violent, and tedious in dwelling upon all circumstances which are not to the purpose. For instance, in the case already mentioned, they never desire to know what claim or title my adversary has to my cow; but whether the said cow were red or black; her horns long or short; whether the field I graze her in be round or square; whether she was milked at home or abroad; what diseases she is subject to, and the like; after which they consult precedents, adjourn the cause from time to time, and in ten, twenty, or thirty years come to an issue. It is likewise to be observed, that this society has a peculiar cant and jargon of their own, that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have confounded the very essence of truth and falsehood, of right and wrong; so that it will take thirty years to decide whether the field left me by my ancestors for six generations belongs to me or a stranger three hundred miles off. In the trial of persons accused for crimes against the State, the method is much more short and commendable; the judge first sends to sound the disposition of those in power, after which he can easily hang or save a criminal, strictly preserving all forms of law."

JOHN HILL BURTON,

In "The Book Hunter," takes a similar view of this "peculiar cant and jargon" of the Scottish law, as contrasted with that of the English:

"When one has been at work among interlocutors, suspensions, tacks, wadsets, multiplepoindings, adjudications in implement, assignations, infeftments, homologations, charges of horning, quadrennium utiles, vicious intromissions, decrees of putting to silence, conjoint actions of declarator and reduction-improbation — the brain, being saturated with these and their kindred, becomes refreshed by crossing the border of legal nomenclature, and getting among common recoveries, demurrers, quare impedits, tails-male, tails-female, docked tails, latitats, avowries, nihil dicits, cestuis qui trusts, estoppels, essoigns, darrien presentments, emparlances, mandamuses, qui tams, capias ad faciendums or ad withernam, and so forth. After vexatious interlocutors in which the Lord Ordinary has refused interim interdict, but passed the bill to try the question, reserving expenses; or has repelled the dilatory defences, and ordered the case to the roll for debate on the peremptory defences; or has taken to avizandum; or has ordered re-revised condescendence and answers on the conjoint probation; or has sisted diligence till caution be found, judicio sisti; or has done nearly all these things together in one breath — it is like the consolation derived from meeting a companion in adversity, to find that at Westminster Hall, 'In fermedon, the tenant having demanded a view after a general imparlance, the demandant issued a writ of petit cape — held irregular.'"

We are glad this was so held, for if such such things are regular and normal we should pity the English lawyers.

SCOTT.

Of the administration of justice in Scotland, Walter Scott, himself a lawyer, gives a most humorous picture in "Redgauntlet." In this admirable novel, the character of the elder Fairford, a brisk, smart, pedantic, shrewd, learned, fussy attorney, is drawn to the life. His son, Allen Fairford, is designed for the bar, and the old gentleman finds an excellent opportunity to put him forward in his debut. Peter Peebles, "an insane beggar — as poor as Job, and as mad as a March hare," has for fifteen years had a suit against one Plainstanes, "et per contra." To use his own words, "if he is laird of naething else, he is *dominus litis*." It is this suit, to which no parallel was ever framed in fiction save the honored case of Jarndyce, which

old Fairford tells his son he must be ready to argue before the Lords at three or four days' notice. When his son fears that he should spoil any cause thrust on him so hastily, the old man replies: "The chirurgeons have a useful practice by which they put their apprentices and *tyrones* to work upon senseless dead bodies, to which, as they can do no good, so they can certainly do as little harm. Ye cannot spoil it, Alan. As there have been about ten or a dozen agents concerned, and each took his own way, the case is come to that pass that Stair or Armiston could not mend it, and I do not think that even you, Alan, can do it much harm — ye may get credit by it, but can lose none." Peebles being a suitor in *forma pauperis*, Dumtoustie, one of the poor's lawyers and nephew to one of the lords, had been assigned to the conduct of the case, "but as soon as the harebrained goose saw the pokes" (process-bags) "he took fright, called for his nag, lap on, and away to the country is he gone." The Lord, his uncle, being much mortified at this defection, old Fairford offered his son Alan to fill the gap, an offer eagerly embraced by the runaway's uncle and by the crack-brained client himself. The account is contained in a letter from the young attorney to his friend Darsie Latimer. "My father called to James Wilkinson to bring in the two bits of pokes he would find on his table. Exit James, and presently re-enters, bending under the load of two huge leathern bags, full of papers to the brim, and labeled on the greasy backs with the magic impress of the clerks of court, and the title *Peebles against Plainstanes*. This huge mass was deposited on the table, and my father, with no ordinary glee in his countenance, began to draw out the various bundles of papers, secured by none of your red tape or whip-cord, but stout, substantial casts of tarred rope, such as might have held small craft at their moorings." The crazy client is then introduced upon the scene, and Alan continues: "Such insane paupers have sometimes seemed to me to resemble wrecks lying upon the shoals on the Goodwin Sands, or in Yarmouth Roads, warning other vessels to keep aloof from the banks on which they have been lost; or rather such ruined clients are like scare-crows and potato-bogles, distributed through the courts to scare away fools from the scene of litigation." Peter made the terrifying proposition to state the case himself to Alan, but the old gentleman came the rescue, — "I am your agent for the time," resumed my father, "and you, who are acquainted with the forms, know that the client states the cause to the agent — the agent to the counsel." "The counsel to the Lord Ordinary," continued Peter, once set a going, like the peal of an alarm-clock, "the Ordinary to the Inner House, the President to the Bench. It is just like the rope to the man, the man to the ox, the ox to the water, the water to the fire." Old Fairford then goes on to explain the causes to his son. Peter Peebles and Paul Plainstanes had been partners, who having dissolved the partnership by consent, their affairs at length came into court, and "branched out into several distinct processes, most of which have been conjoined by the Ordinary. There is the original action of *Peebles* v. *Plainstanes*, convening him for payment of £3,000, less or more, as alleged balance due by Plainstanes. 2dly. There is a counter-action, in which Plainstanes is pursuer, and Peebles defender, for £2,500, less or more, being balance alleged *per contra* to be due by Peebles. 3dly. Mr. Peebles' seventh agent advised an action of compt and reckoning at his instance, wherein what balance should prove due on either side might be fairly struck and ascertained. 4thly. To meet the hypothetical case, that Peebles might be found liable in a balance to Plainstanes, Mr. Wildgoose, Mr. Peebles' eighth agent, recommended a multiplepoinding to bring all parties concerned into the field." This last form of action is highly approved by poor Peter, who declares it "the safest *remedium juris* in the whole form of process," and that he has "known it conjoined with a declarator of marriage." Peter also confirms old Fairford's statement of the case, but suggests that he has "omitted to speak a word of the arrestments, or of the action of suspension of the charge on the bill, or the advocation of the sheriff-court process." There were also other actions branching out of the main cause, such as when Peter "compelled the villain Plainstanes to pull his nose within two steps of King Charles' statue in the Parliament Close." This, however, proved a "stumper." "Never man could tell me how to shape that process — no counsel that ever selled wind could condescend and say whether it were best to proceed by way of petition and complaint, *ad vindictam publicam*, with consent of his Majesty's advocate, or for action on the statute for battery *pendente lite*, whilk would be the winning my plea at once, and so getting a back door out of court." But Peter's "pet process of all" was when he had the good luck to provoke his antagonist to pull his nose at the very threshold of the court — a grevious offence. One counsel was for making it out *hamesucken*, the essence of which is to strike a man in his dwelling place, on the theory that the court was Peter's dwelling place.

With the aid of his father, young Fairford succeeded in understanding this complicated cause, and was in the midst of a convincing argument in court when an untoward accident happened. His father, who was selecting and giving to him, for the purpose of reading them to the court, various letters from the correspondence of the parties, by oversight, handed him a letter relating to his friend Darsie Latimer, which had arrived pending Alan's examination of the cause, and which his father had suppressed for fear it might take Alan away from his duty; — this letter informed Alan that Darsie had got into a scrape down the country, and, on perusing it, Alan flung down his brief and rushed out of court, leaving his client in the lurch, and himself liable to the imputation made upon him with Dumtoustie by one of their lordships, of having lost his wits. "In the meanwhile," says Scott, "although the haze which surrounded the cause or causes of that unfortunate litigant had been, for a time, dispelled by Alan's eloquence, like a fog by the thunder of artillery, yet it seemed once more to settle down upon the mass of litigation thick as the palpable darkness of Egypt, at the very sound of Mr. Tough's voice, who, on the second day after Alan's departure, was heard in answer to the opening counsel. Deep-mouthed, long-breathed, and pertinacious, taking a pinch of snuff betwixt every sentence, which other-

wise seemed interminable, the veteran pleader prosed over all the themes which had been treated so luminously by Alan; he quietly and imperceptibly replaced all the rubbish which the other had cleared away, and succeeded in restoring the veil of obscurity and unintelligibility which had for many years darkened the case of Peebles against Plainstanes; and the matter was once more hung up by a remit to an accountant, with instructions to report before answer." The case went, as old Fairford said, "just like a decreet in absence, and was lost for want of a contradictor."

Peter, true to his habit, served both Fairfords with a petition and complaint for malversation in office. Not content with this, he pursues Alan down the country, and we next meet him in an amusing scene before Squire Foxley and his clerk Master Nicholas — a scene which, perhaps, furnished Dickens with the ideas of his Justice Nupkins and clerk Jinks in "Pickwick Papers" — in which he inquires: "Is't here they sell the fugie warrants?" His purpose is "to apprehend a young lawyer that is *in meditatione fugæ*," and whom he has "run ower to the English side." In answer to the Justice's inquiry if he had robbed him, Peter replies: "He has robbed me of himself — of his help, comfort, aid, and assistance, whilk, as a counsel to a client, he is bound to yield me, *ratione officii*." The warrant is granted, and afterward answers the purpose of mixing the plot up just as well as if it had been legal, for Alan is arrested on it and temporarily restrained of his liberty.

Any lawyer who has noted the importance that petty litigants arrogate on account of their lawsuits, will appreciate the force of poor Peter's words: "It's very true that it is grandeur upon earth to hear one's name thundered out along the long-arched roof of the Outer-House — '*Poor* Peter Peebles against Plainstanes *et per contra*;' a' the best lawyers in the house fleeing like eagles to their prey; some because they are in the cause, and some because they want to be thought engaged; to see the reporters mending their pens to take down the debate; the lords themselves pooin' in their chairs, like folk sitting down to a gude dinner, and crying on the clerks for parts and pendicles of the process. To see a' this, and to ken that naithing will be said or dune among a' thae grand folk, for maybe the feck of three hours, saving what concerns you and your business, oh, man, nae wonder that ye judge this to be earthly glory!" To this he thinks there are some offsets. "To see ane's warldly substance capering in the air in a pair of weigh-banks, now up, now down, as the breath of judge or counsel inclines it for pursuer or defender" — this he deems a drawback.

The delays of the Scottish law are slyly satirized in a speech of Mackitchinson, the host, to the Antiquary: "I thought ye had some law affair of your ain to look after; I have ane myself — a ganging plea that my father left me, and his father afore left to him. It's about our back yard; ye'll maybe hae heard of it in the Parliament House, Hutchinson against Mackitchinson; it's a weel kenn'd plea — it's been four times in afore the fifteen, and deil onything the wisest o' them could make o't, but just to send it out again to the outer-house. O it's a beautiful thing to see how lang and how carefully justice is considered in this country!"

STEVENS.

In a curious little book entitled "A Lecture on Heads, by Geo. Alex. Stevens, with Additions by Mr. Pilou, as delivered by Mr. Charles Lee Lewes," published in London A. D. 1802, and adorned with woodcuts after Thurston's designs, we find the following chapter on law, illustrated with cuts of the respective counsel for the Bull and the Boat:

"Law is law, law is law, and as in such and so forth, and hereby and aforesaid, provided always, nevertheless, notwithstanding. Law is like a country dance, people are led up and down in it till they are tired. Law is like a book of surgery; there are a great many terrible cases in it. It is also like physic; they that take the least of it are best off. Law is like a homely gentlewoman, very well to follow. Law is also like a scolding wife, very bad when it follows us. Law is like a new fashion; people are bewitched to get into it; it is also like bad weather; most people are glad when they get out of it.

"We shall now mention a cause called 'Bullum *versus* Boatum.' It was a cause that came before me. The cause was as follows: There were two farmers — farmer A. and farmer B. Farmer A. was seized or possessed of a bull; farmer B. was seized or possessed of a ferry-boat. Now the owner of the ferry boat, having made his boat fast to a post on shore with a piece of hay, twisted rope-fashion, or, as we say, *vulgo vocato*, a hay band. After he had made his boat fast to a post on shore, as it was very natural for a hungry man to do, he went up town to dinner; farmer A.'s bull, as it was very natural for a hungry bull to do, came down town to look for a dinner; and observing, discovering, seeing and spying out some turnips in the bottom of the ferry-boat, the bull scrambled into the ferry-boat; he ate up the turnips, and, to make an end of his meal, fell to work upon the hay band; the boat, being eaten from its moorings, floated down the river, with the bull in it; it struck against a rock; beat a hole in the bottom of the boat, and tossed the bull overboard; whereupon the owner of the bull brought his action against the boat for running away with the bull. The owner of the boat brought his action against the bull for running away with his boat. And thus notice of trial was given, Bullum *versus* Boatum, Boatum *versus* Bullum.

"Now the counsel for the Bull began with saying: 'My lord, and you gentlemen of the jury, we are counsel in this cause for the bull. We are indicted for running away with the boat. Now, my lord, we have heard of running horses, but never of running bulls before. Now, my lord, the bull could no more run away with the boat than a man in a coach may be said to run away with the horses; therefore, my lord, how can we punish what is not punishable? How can we eat what is not eatable? Or how can we drink what is not drinkable? Or, as the law says, how can we think on what is not thinkable? Therefore, my lord, as we are counsel in this cause for the bull, if the jury should bring the bull in guilty, the jury would be guilty of a bull.'

"The counsel for the boat observed that the bull should be nonsuited, because, in his declaration, he had not specified what color he was of; for thus wisely and thus learnedly spoke the counsel: 'My lord, if

the bull was of no color, he must be of some color; and if he was not of any color, what color could the bull be of?' I overruled this motion myself, by observing the bull was a white bull, and white is no color; besides, as I told my brethren, they should not trouble their heads to talk of color in the law, for the law can color any thing. This cause being afterward left to a reference, upon the award both bull and boat were acquitted, it being proved that the tide of the river carried them both away; upon which I gave it as my opinion, that as the tide of the river carried both bull and boat away, both bull and boat had a good action against the water bailiff.

"My opinion being taken, an action was issued, and upon the traverse, this point of law arose, how, wherefore, and whether; why, when, and what; whatsoever, whereas, and whereby, as the boat was not a *compos mentis* evidence, how could an oath be administered? That point was soon settled by Boatum's attorney declaring that for his client he would swear any thing.

"The water bailiff's charter was then read, taken out of the original record in true law Latin; which set forth in their declaration, that they were carried away either by the tide of flood or the tide of ebb. The charter of the water bailiff was as follows: '*Aquæ bailifi est magistratus in choisi, sapor omnibus fishibus qui habuerunt finnos et scalos, claws, shells, et talos, qui swimmare in freshibus vel saltibus riveris, lakos, pondis, canalibus, et well-boats, sive oysteri, prawni, whitini, shrimpi, turbutus solus;*' that is, not turbots alone, but turbots and soals both together. But now comes the nicety of the law; the law is as nice as a new-laid egg, and not to be understood by addle-headed people. Bullum and Boatum mentioned both ebb and flood to avoid quibbling; but it being proved that they were carried away neither by the tide of flood nor by the tide of ebb, but exactly upon the top of high water, they were nonsuited; but such was the lenity of the court, upon their paying all costs, they were allowed to begin again, *de novo*."

ON THE STUDY OF FORENSIC ELOQUENCE.

III.

Chesterfield, in his letters to his son, said "manner is of as much importance as matter;" and that this has been the opinion of all great orators, may be gathered from the vast labor expended by them on the cultivation of expression and delivery. How much stress was laid upon this by the greatest of all orators, Demosthenes, appears from a noted saying of his related by both Cicero and Quintilian; when, being asked what was the first point in oratory, he answered, action; and being asked what was the second, he answered, action; and afterward what was the third, he still answered, action. And Plutarch said of him that "he thought it a small matter to premeditate and compose, though with the utmost care, if the pronunciation and propriety of gesture were not attended to. Esteeming delivery of such vast importance to the orator, there is no wonder that he should have labored for months together in his subterranean study to form his action and improve his voice.

To the superficial thinker, the study of gesture and of the management of the voice may appear to be but "vanity of vanities"—gaudy tinselry and worthless decoration; but the experience of all time has proved that they are powerful to pursuade and strong to convince. We all know how much meaning—how much expression—how much power there may be in a look, in a tone of the voice, or in a motion. The impression they make on others is frequently much stronger than any that words can make. They are the language of nature, and are understood by all far better than words, which are only the arbitrary conventional symbols of ideas. The speaker who should use bare words, without aiding their meaning by proper tones and accents, would make but a feeble impression, and leave but a misty and indistinct conception of what he had delivered.

It is surprising, indeed, to see how perfectly persons practiced in the art of gestures can communicate even complicated trains of thought and long series of facts, without the aid of words. This fact was known and appreciated by the ancient Greeks and Romans, who made the subject a study far more than have subsequent nations. Cicero informs us that it was a matter of dispute between the actor Roscius and himself, whether the former could express a sentiment in a greater variety of ways by gestures, or the latter by words. During the reign of Augustus, both tragedies and comedies were acted by pantomime alone. It was perfectly understood by the people who wept and laughed, and were excited in every way as much as if words had been employed. It seems, indeed, to have worked upon their sympathies more powerfully than words; for it became necessary, at a subsequent period, to enact a law restraining members of the Senate from studying the art of pantomime—a practice to which, it seems, they had resorted in order to give more effect to their speeches before that body.

There have been volumes written on this subject of delivery, but they are little better than a "vexation of spirit." The tone of the voice, the look, the gesture, suited to express a thought or emotion, must be learned from experience and the example of living speakers and masters. Curran and many others have made it a practice to speak before a glass that they might themselves judge of the propriety of their gestures, and correct those at fault. A more condensed or sensible treatise on the subject cannot be found than Hamlet's direction to the players:

"Speak the speech, I pray you, as I pronounce it to you—trippingly on the tongue; but if you mouth it, as many of our players do, I had as lief the town crier spoke my lines. Nor do not saw the air too much with your hand; but use all gently, for in the very torrent, tempest, and (as I may say) whirlwind of your passion, you must acquire and beget a temperance that may give it smoothness. Oh, it offends me to the soul, to hear a robustious, periwig-pated fellow tear a passion to tatters, to very rags, to split the ears of the groundlings; who, for the most part, are capable of nothing but inexplicable dumb shows and noise. . . . Be not too tame neither, but let your own discretion be your tutor; suit the action to the word, the word to the action; with this special observance that you o'erstep not the modesty of nature; for any thing so overdone is from the purpose of playing, whose end, both at the first and now, was, and is to hold, as 'twere, the mirror up to nature; to show virtue her own feature, scorn her own image, and the very age and body of the time, his form and pressure. Now, this over-done or come tardy off, though it make the unskillful laugh, cannot but make the judicious grieve; the censure of which one must, in your allowance, o'erweigh a whole theatre of others."

The student who shall follow these directions, which are as applicable to the speaker as to the player, will not go very far wrong.

The first consideration of a speaker must be to make himself heard by all those to whom he speaks. This, though often neglected, is of the first importance, and is a matter that rests mainly in the management of the voice and not in any strength of lungs. Nor is it, as many suppose, a natural talent, for the voice is susceptible of the greatest culture, and may be formed after almost any model. To make oneself audible it is not necessary that the voice should be pitched on a high key. Strength of sound does not depend upon the key or note on which one speaks, but on the proper management of the voice. A speaker may render his voice strong and full while speaking in a middle or conversational tone, and will be able to give the most sustained force to that pitch, as it is the one to which in conversation he is accustomed. The conversational key is the one that the advocate should, with rare exceptions, adopt; otherwise he will exhaust himself and be heard with pain by his audience. Grattan tells us that he heard Lord Chatham speak in the House of Lords; and it was just like talking to one man by the button-hole, except when he lifted himself in enthusiasm, and then the effect of the outbreak was immense; and of Harrison Gray Otis it is said that when you met him in the street and heard him talk, you heard the orator Otis almost as much as if he were in Faneuil Hall talking about politics.

In the next place the student of advocacy must study to articulate clearly and distinctly. On this, as much as on the quantity of sound, depends the capacity to make oneself heard.

We need say nothing with regard to emphasis, pauses, tones and gestures. Every one who goes about his work in earnest will devote proper attention to these matters, and will gain more from experience and observation than from the rules laid down in the books. One thing, seldom laid down in the books, is of the highest importance to the advocate: that is, to study always to *feel* what he speaks. Unless he do this his oratory will be little more than an empty and puerile flow of words. "The author who will make me weep," says Horace, "must first weep himself." "In reality," adds Henry Fielding, "no man can paint a distress well which he doth not feel while he is painting it; nor do I doubt but that the most pathetic and affecting scenes have been writ with tears." In Shakespeare's Richard II, the Duchess of York thus impeaches the sincerity of her husband:

"Pleads he in earnest? Look upon his face,
His eyes do drop no tears; his prayers are jest;
His words come from his mouth; ours, from our breast;
He prays but faintly and would be denied;
We pray with heart and soul."

No kind of language is so generally understood, or has such force and weight, as the language of feeling. The advocate must be in downright earnest before he can impress his hearers.

It only remains for us to add that the student of oratory must exercise himself continually in both writing and speaking. Writing is said by Cicero to be "the best and most excellent modeller and teacher of oratory;" "for," he continues, "if what is meditated and considered easily surpasses sudden and extemporaneous speech, a constant and deligent habit of writing will surely be of more effect than meditation and consideration itself." Write with as much pains as possible, and write as much as possible. It is even as Quintilian said: "It is not by writing rapidly that you come to write well, but by writing well you come to write rapidly." In mental culture, as in the culture of the earth, the seed sown in the deepest furrows finds a more fruitful soil, is more securely cherished and springs up in its time to more exuberant and healthful harvest. Without this discipline the power and practice of extemporaneous speech will yield only an empty loquacity—only words born on the lips. In this discipline, deep down there are the roots, there the foundations; thence must the harvest shoot, thence the structure ascend; there is garnered up, as in a more sacred treasury, wealth for the supply of even unanticipated exactions. Thus, first of all, must we accumulate resources sufficient for the contests to which we are summoned and inexhaustible by them. In writing, seek for the best; do not eagerly and gladly lay hold on that which first offers itself; apply judgment to the crowd of thoughts and words which fill your mind, and retain those only of which your judgment deliberately approves. Nor should every word be allowed to occupy the exact spot where the order of time in which it occurs would place it. Seek rather by a variety of experiments and arrangements to attain to the utmost power and eloquence of style. There is nothing like the Pen to correct vagueness of thought and looseness of expression. Every argument, every speech should, so far as possible, be carefully written out. It is not necessary, nor is it even advisable, to commit it to memory, save in rare instances. The mind should be left untrammeled by any set speech to take advantage of the inspiration of the moment. But the simple act of carefully composing and writing down an argument will fix in the mind the general order and sequence of facts and illustrations, and will greatly aid in a clear and forcible arrangement. The night before Alexander Hamilton delivered his celebrated speech, which more than any thing else led to the establishment of a liberal and more just law regarding libel and slander in the State of New York, he wrote the argument all out and then deliberately tore it up.

Besides frequent practice in writing, the student must have constant practice in speaking, which is of more real value than all the precepts of the masters.

It is sometimes said that men by speaking succeed in becoming speakers, but it is just as true that men by speaking badly succeed in becoming bad speakers. It is frequently the case that students do nothing more in practice than to exercise their voice, and not even that skillfully—and try their strength of lungs and volubility of tongue. Such practice is but a waste of breath. The student should make it a cardinal rule always to do his best even while practicing in his room; to speak on subjects that he has deliberately considered, and in such a style as he would adopt were an audience before him. Of course that kind of speaking will be most advantageous to the advocate which is most in accordance with the business of his life. Eminent advocates in every age have, while developing their powers, made it a practice to propose a case similar to those brought in the courts, and to make arguments thereon as nearly as possible as they would

were it an actual case in court. Cicero followed this plan two thousand years ago, as he himself has told us, and Curran and Choate were both indefatigable in this practice.

Such are the means, such the labors by which the student may make himself an advocate. It is not the work of an hour or a day or a year, but of years — years of application and of industry — of patient plodding and painful study. It is not by starts of application and intermittent labor that any thing valuable can be achieved. It is the outgrowth of well directed and persistent effort. In nothing more than oratory are the lines of the poet true:

> "The Father of our race himself decrees
> That culture shall be hard."

It has been the glory of the great masters of the art to confront and to overcome; and all the wisdom of these latter days has discovered no other road to success.

THE NEW YORK TIMES AND LEGAL ETHICS.

The recent attacks of the New York *Times* upon the Bench and Bar of the State may appear to some to be but the gloomy resentment of disappointed professional aspirations, but we prefer to place them to the account of a superficial knowledge and an honest, unreflecting indignation, in which the writer's "cooler judgment and natural politeness" had no concern. If its allegations of evil and corruption had been supported by any tolerable appearance of either facts or arguments, we should have thought our time not ill employed in an examination of the matter; but, however highly we may regard the usual probity and honesty of that journal, we must still hold its bald assertions and passionate denunciations as of very little weight. We have heretofore in these pages expressed, in very distinct terms the opinion that the standard of professional honor was quite as high among lawyers as the standard of either commercial or clerical honor, and we may be allowed to add to the list editorial honor.

But the *Times*, in a recent article headed "Does a Fee license Counsel to Defend Dishonesty," has so confounded right and wrong — has so misconstrued and misinterpreted matters touching the profession, that we feel justified in noticing the matter.

In this article the following question, or complication of questions, is propounded: "The defects of our judicial system being what they are, and the character of judges being what it is, what is the duty of counsel in the matter of using these defects, and the bad character of the judges, in aid of the schemes of notorious scoundrels? To come down to particulars — or, as Lord Bacon says, to clothe our case in circumstance — is it, or is it not, the duty of leading men at our bar to place their professional services at the disposal of Fisk, Gould & Co., and in consideration of cash down, use all the ability they possess, and all the advantages the admitted faults of our law, and the admitted dishonesty of our judges, give them, to help these worthies in carrying out any attacks on the property of other people which may suggest themselves to them?"

A lyceum committee in the wilds of Oregon could not have constructed a question in a more inartistic manner, if truth were its object; nor a sophist more skillfully to mislead and deceive. If it is intended to ask whether counsel have a moral right to aid by trick or dishonesty the *schemes of notorious scoundrels*, we answer, emphatically, *no*. No one, except Puffendorff, ever claimed that they had. Again, if the question be, has a lawyer a moral right to accept a cause that he knows to be wrong and unjust? We answer again, *no*. But if the question intended was, whether counsel are justified in advocating a cause for Fisk, Gould & Co., dishonest and unscrupulous though they may be, we say, with equal emphasis, *yes*. Counsel have nothing to do with "the defects of our judicial system," or "the character of judges." They are bound to take the law as they find it, and to presume that every judge will honestly administer the law as it exists. Nor have counsel any thing to do with the character or practices of Messrs. Fisk, Gould & Co. They are not called upon to defend their character, but their cause. Evil men have rights, and are entitled to the protection of the law; and it is the duty alike of judges and lawyers to see that this protection is not withheld. Very few cases are brought to an attorney for litigation, that have not at least a show of plausibility; and there is no rule, moral or legal, that requires him to make himself the judge of the *merits* of a case laid before him *ex parte*, one side of which only he is required to advocate, and that consistently with the rules of law. It is an accepted tenet of Legal Ethics, that an advocate may use "all fair arguments arising on the evidence." It is only when he goes beyond this, and asserts his belief that his cause is just when he believes it unjust, or uses means to deceive; or, in short, seeks to accomplish his end by any other means than a *fair trial in open court*, that he offends against Truth and violates alike the laws of morality and of the land.

Now, the *Times* conveys, and intended to convey, the impression that the counsel for Messrs. Fisk, Gould & Co. have been guilty of using dishonest and illegal means "in aid of the schemes of notorious scoundrels." An assertion of that kind, unsupported as it is by a single fact, can have no effect, except to lead all right-minded men to condemn its author. The characters of the counsel in question, both socially and professionally, are too well established to be injured by any such assertion. We quite agree with the *Times* that there are "faults" in our law. If there were not, public journals would never be allowed to thus villify with impunity the character of citizens.

But, perhaps, the most astonishing ground of lamentation contained in the article is the following: "And there is no denying it, good men have been not a little pained and shocked to see that Fisk and Gould have been able to find their legal agents among the foremost jurists in the country, and *even among the members of Henry Ward Beecher's church.*" The italics are ours. There may be something very shocking in the fact that "members of Henry Ward Beecher's church" have acted as counsel for Fisk and Gould; but we have grave doubts whether the majority of "good men" in the country at large will feel the shock as sensibly as the "good men" of the *Times* appear to

have done; or will fully appreciate the moral depravity which the fact would seem to disclose. Will the *Times* enlighten the "good men" of the country so that they also may feel the shock? Is "Henry Ward Beecher's church" a sort of "seventh heaven" all alone by itself, or are the members of Henry Ward's congregation a little higher than other men, and about on a level with the angels? What are the reasons that render the advocacy of a cause by the members of that church a more heinous offense than the same act by the members of any other church? If there *are* reasons, "the people ought to know of it in time," and we call upon the *Times* to disclose.

We will make but one more extract, which alleges a state of affairs new to most of us, and quite as shocking as the Beecher matter. It sounds to us very like the "melancholy madness" of prophecy without its inspiration: "In ordinary times we might treat their relations with their legal advisers as an incident which, however regretable, possessed no great importance for the public. But these times are not ordinary. We are approaching in this State one of the gravest crises a civilized community has ever had to encounter, and grave crises call for plain speaking;" but they call for *honest* speaking, also, and not for vague assertions and sophistries, strung together for the purpose of exciting the passions and prejudices of the people.

CURRENT TOPICS.

Bank robberies have become so numerous and successful that some plan has become very desirable to secure the absolute safety of securities left with banks for safe keeping. It is well settled that the banks are not liable for the loss of such securities, unless they have been guilty of negligence. The *Solicitors' Journal* suggests the following plan:

That an arrangement between depositors of securities and the bankers be made by which the bankers should *insure* the safety of the securities—*i. e.*, should agree to indemnify the owners for any loss, however caused. The depositor would then be safe from any danger, except the inability of the bank to discharge its liabilities.

There ought to be very little difficulty in establishing an arrangement of this sort, which might be equally beneficial to depositors and bankers.

The depositor might pay a small percentage on the value of his securities as an insurance, in return for which the bankers might insure the safety of the securities. Few depositors would object to pay such an insurance, as its advantages would be so obvious. They would then be absolutely safe, while on the other hand the bankers would be equally safe, because by charging a low rate of insurance on all securities deposited with them they could easily raise a fund amply sufficient to compensate them for any occasional loss.

This is a question that ought to attract more public notice than it has yet received, and we hope it will not be forgotten until some satisfactory course of business has been settled upon.

By the report which we published in the first number of the LAW JOURNAL it appears that no less than 176 gentlemen were admitted to the bar in this State at the fourth general terms in seven of the judicial districts. If we could justly presume that all of these new-fledged attorneys and counsellors at law possessed any thing resembling a competent knowledge of the law, we might congratulate the State on this accession of men likely to do it some service. We might also congratulate the gentlemen themselves on the prospect before them, notwithstanding the supposed "over-crowded" condition of the profession. But knowing as we do the reckless and improvident manner in which certificates are granted, we are not at liberty to indulge any presumption of the kind. The fact is, that men are admitted all over the State who are ignorant of the very first principles of legal science, and who have devoted no more time to the study of "the gathered wisdom of a thousand years" than would have been necessary to enable them to keep a set of books. Our present system, or want of system, of examinations and admissions can but make the "judicious grieve." In fact we believe that an examination at best is but a superficial and unreliable test of a student's knowledge. Men differ so much in their ability to impart their knowledge; one man may study for years and become a proficient in the law, and yet fail through confusion or otherwise to acquit himself creditably, while another, who has only picked up a few scattered principles, may so use his knowledge as to come off with honor. We believe in the old rule of a term of study, and that at least a part of that term should be spent in the office of a practicing attorney; and we believe also that at the expiration of that term the student should be admitted only on a certificate from his instructor that he is qualified for the office, and that the instructor should be held strictly accountable for the verity of his certificate. Some change from the present plan of admissions is not only necessary to preserve the dignity and character of the profession, but is due to the student himself. Every lawyer who has turned his attention to the matter will coincide with the following opinion of James Otis: "Early and short clerkships and a premature rushing into practice, without a competent knowledge in the theory of law, have blasted the hopes, and ruined the expectations formed by the parents, of most of the students in the profession who have fallen within my observation for these ten or fifteen years past. I hold it to be of vast importance that a young man should be able to make some *eclat* at his opening which it is in vain to expect from one under twenty-five; missing this is very apt to discourage and dispirit him, and what is of worse consequence, may prevent the application of clients ever after. It has been observed before I was born, if a man don't obtain a character in any profession soon after his first appearance he hardly will ever obtain one."

An almost incredible example of the state of semi idiocy into which ignorance and distrust of law may plunge people, was recently reported from Paris. A gentleman committed suicide by stabbing himself with a dagger. His wife, hearing him fall, jumped out of bed, and, discovering what had happened, called aloud for help. A servant appeared, but when he

saw the dagger planted in the body, he refused to remove it or try to staunch the blood; he fled, terror-stricken, and aroused the concierge. The latter took fright, too, and declared that the body must not be touched until the arrival of the police, otherwise they would all be accused of murder together. The unfortunate wife meanwhile had fainted. After a while two sergeants du ville arrived, and it is then that the episode became tragically grotesque. The two functionaries, without stooping to see whether there was any remnant of life in the senseless body, declared that not a finger must be laid upon it until the commissaire arrived. At length this representative of public authority made his appearance, just one hour and a half after the catastrophe. So that even had the unhappy man been still alive when his wife first called for help, which is not at all improbable, he had had time to die fifty times over in the interval. This occurrence calls to mind the conduct of a French apprentice, who, finding his master suspended by the neck and struggling violently, rushed off to fetch a policeman, but left his master hanging. When asked why he had not cut down the body, he answered, weeping, that if his master had died after being cut down, he —the apprentice—would have had to prove that he had not killed him. The *Pall Mall Gazette* adds an instance, almost the exact counterpart of the French story, which recently occurred in England. A young boy was drowned while boating, but his brother succeeded in getting his body into his boat again, and gave the alarm at a farm house close by. Several farm men and one of their wives came and lifted the body out of the boat, but, instead of carrying it into the house and doing what they could to resuscitate it, they merely stood by doing nothing until some of the family arrived, more than half an hour afterward. On being asked why they had acted in this apparently heartless manner, they replied, evidently in perfect earnest, that they understood that they might not move the body until the coroner had seen it; and this although one of them believed that the child was alive when taken from the boat. Actually, too, when the mother arrived, they tried to stop her from taking him in her arms, saying she must not touch it till the coroner had come. This is a very general belief, not only among Englishmen and Frenchmen, but in our own country, and instances similar to those narrated above are not uncommon. It would be interesting to know from what law this widely prevalent and very mischievous notion has been derived.

A rather unusual case has recently come before the New York Supreme Court at General Term. It was a motion to set aside an order made at a previous General Term of that court reversing a judgment entered upon a report of a referee, on the ground that such order was made without consultation or conference with one of the justices—there not having been any meetings appointed or held by the three justices to consult and confer upon the decision. The court, although evidently inclined to the opinion that the grounds of the motion were substantial, left this question undecided, and granted the motion on the ground of technical irregularity in the order. We are not aware that the question has ever before come directly before a court for adjudication. The Revised Statutes provide that whenever any power, authority, or duty is confided by law to three or more persons, and whenever three or more persons or officers are authorized or required by law to perform any act, such act may be done, and such power, authority, or duty may be exercised and performed, by a majority of such persons or officers *upon a meeting of all the persons or officers so intrusted or empowered, unless special provision is otherwise made.* 2 R. S. 255, § 27. This statute has been frequently applied to *quasi* judicial officers. In *Downing* v. *Rugar* (21 Wend. 178), where one of two overseers applied for a warrant, COWEN, J., used the following language: "The rule seems to be well established, that in the exercise of a public as well as a private authority, whether it be ministerial or judicial, the persons to whom it is committed must confer and act together, unless there be a provision that a less number may proceed." In *Crooker* v. *Crane* (21 Wend. 211), where four out of fifteen commissioners to receive subscriptions to, and make distribution of, the capital stock of a railroad company, did not attend the meeting of the commissioners, the court held that the distribution of the stock was a *judicial* power vested in all the commissioners, and that where a statute constitutes a board of commissioners or other officers to decide any matter, but makes no provision that a majority shall constitute a quorum, all must be present to hear and consult, though a majority may then decide. In *Lee* v. *Parry* (4 Denio, 125), an apportionment of a school tax made by two trustees, the third not having been consulted, was declared void; and in *Keeler* v. *Frost* (22 Barb. 400), an assessment of a school tax, made by two trustees, was held void, although it had been carried to the third trustee who signed it. The court used the following language: "The statute and common law both require the apportionment to be made upon the joint consultation of all the trustees, and not that the warrant shall be signed by all." The same doctrine was held in *Horton* v. *Garrison* (23 Barb. 176). In the case of *Corning* v. *Slosson* (16 N. Y. R. 294), an appeal had been heard by three justices of the Supreme Court. Subsequently, a decision was rendered by a court composed of two of the justices who had heard the appeal and another judge, who did not hear the argument. The case turned upon the construction of section 2 of 2 R. S. 275, prohibiting any judge from deciding or taking part in a decision of any question which shall have been argued in the court when *he was not present and sitting therein as a judge.* The Court of Appeals held that the court was properly constituted; that it would *presume* that the judges who heard the argument had agreed to the decision, and it was proper for the two who sat and who had heard the appeal to render the decision, the other judge, who had not heard the appeal, taking no part in the decision, and sitting merely as one of the three necessary to constitute the court.

But the opinion of the court contains this dictum: "It was the duty of the three judges who heard the argument to consult together in relation to the decision of the questions involved in the motion, in order that each might have the benefit of the views of his brethren to aid him in arriving at a proper conclusion, and doubtless such consultation was had; it is to be

presumed that they discharged their duty in that respect."

At common law the rule was the same as that laid down by the statute above cited. *Ex parte Rogers* (7 Cow. 526); *Green* v. *Miller* (6 Johns. 39). But in *People* v. *Valker* (23 Barb. 304), courts of justice were excluded from the provisions of the act. It was held, that, "where a public authority is conferred on individuals (*not on a court*), who are to act judicially, all must confer together." The decision was made at Special Term, and the learned judge gave no reasons for thus excluding courts from the operations of the statute. For our own part, we can discover no valid reason why they should be thus excluded. It not unfrequently occurs that the views of a majority of a court are changed at consultation meetings, by the results of the more careful and thorough investigations of one judge, and to require them to meet and confer on all cases can prove no hardship, but will be of great value to the judges themselves, to the parties litigant, and to the public.

BOOK NOTICES.

Reports of Select Cases: decided in the Courts of New York not heretofore reported, or reported only partially, By John W. Edmonds, formerly Justice of the Supreme Court of New York. Vol. I. Diossy & Company.

This volume contains a report of the most important cases tried before Judge EDMONDS, at circuit and oyer and terminer, during the many years that he occupied a seat on the Supreme Bench of the State. In most of the cases a full history of the trial is given,—exceptions, rulings, points and authorities of counsel, and the opinion or charge of the judge.

The Reporter says in his Preface, "Some of the cases he has deemed of value as settling matters of practice; some as the foundation or cause of the settlement of grave questions in the courts of last resort; some as delineations of human action in anomalous positions, and some as matters of history." He has, therefore, occasionally departed from the ordinary form of modern reports, and, like the "State Trials" of England in the olden time, given the cases a more narrative form, yet never losing sight of the legal principles involved. Although the rulings and opinions of a judge at *nisi prius* cannot be regarded as very high authority on questions of doubt or difficulty, being usually made or delivered in the midst of a trial, without time for reflection and investigation, yet there have men occupied seats on the supreme bench of such ability and legal knowledge that their rulings at *nisi prius* had quite as much intrinsic value as a decision of a court *in banco*. Among these Judge EDMONDS may justly claim a place. That his reports will prove of service to the legal profession we do not doubt. Many points of practice at circuit and oyer and terminer, for a settlement of which we may in vain search the regular volumes of reports, are here settled. The authorities cited by counsel will be of great use in making up briefs on kindred subjects, and the opinions and charges of the judge are at least valuable as the opinion of one of the ablest jurists and most thorough lawyers in the State.

The Assessors, Collectors and Town Clerks' Manual: containing a full and accurate exposition of the Law relating to the powers and duties of these officers, with an Appendix of Forms. By Isaac Grant Thompson, Counsellor at Law, Author of "Law of Highways," "Supervisors' Manual," etc. Albany: John D. Parsons, Jr. 1870.

The annoyances which constantly beset town officers in attempting to discharge their duties arise chiefly from an inadequate knowledge of what the law requires from them. The statutes governing these duties are not only scattered through a large number of volumes, but are oftentimes confused and contradictory. Most of the persons chosen to fill the offices are men with no previous professional and very little general education. They have not access to the volumes containing the law under which they act, and if they had they would not possess the ability to digest its various provisions. It is true that they are usually furnished at the public expense with compilations from the statutes, but these compilations are loosely and carelessly put together and oftentimes mislead, and besides contain nothing but the statute law.

We welcome, therefore, this little manual, containing, as it does, not only the enactments of the Legislature carefully systematized, but also the various decisions of the courts explaining them. In many instances where there has been no adjudication, the comments of the author fully illustrate the meaning of the statutes. These comments appear to have been carefully considered, and can be safely followed by those whose duty compels them to construe the law practically.

The manual is evidently designed both for the profession and for those officers concerning whose duties it treats. It will prove a valuable addition to the library of every lawyer who is called upon to give counsel to town officers or in relation to town affairs, and will save a vast amount of time that would otherwise be spent in searching the statute books and the reports. To say it would be a benefit to any collector or town clerk who might possess a copy would not be enough. It is a *necessity* to every town officer who wishes to perform his duties in a manner profitable to his constituents and safe to himself. We are confident that a few hours' study upon that portion of the work devoted to his office by any town clerk, collector or assessor, would save him many times the value of the book in the expense of litigation avoided, to say nothing of the annoyance during his term of office.

The forms contained in an appendix, some forty in number, meet, so far as we can see, every want in this direction.

As to comparing this manual with other works of the kind we cannot do so, as it has, so far as we know, no competitor covering the same ground. It is designed to meet a want felt in this State, and is confined exclusively to New York law; but we believe it will be found useful in other States whose statutes are the same or similar to those of our own. C.

Reports of Practice Cases: determined in the Courts of the State of New York. By Benjamin Vaughn Abbott and Austin Abbott. Volume 7, New Series, No. 1. New York: Diossy & Company.

The Practice Reports of the Messrs. Abbott are too well known to require any comment. Seventeen practice cases, some of them of considerable importance, are reported in this number. A new feature has been added by way of a list of amendments to General Laws made by the acts of 1869. These amendments are printed on one side of a sheet which may be cut into slips and pasted into the Session Laws in connection with the statute amended. The idea is a good one and will prove of service.

SALARIES OF THE ENGLISH JUDGES.

We had occasion in the last number of the LAW JOURNAL to refer to, and approve of, the bill recently introduced into the United States Senate to increase the salaries of the Judges of the Supreme Court. The following statement will show the difference between the salaries paid to Judges in this country and those in England:

Court of Chancery.	
One Lord Chancellor,	£10,000
Two Lord Justices of the Court of Appeal, 6,000*l* each,	12,000
One Master of the Rolls,	6,000
Three Vice-Chancellors, 5,000*l* each,	15,000
Court of Queen's Bench.	
One Chief Justice,	8,000
Four Puisne Judges, 5,000*l* each,	20,000
Court of Exchequer.	
One Chief Baron,	7,000
Four Barons, 5,000*l* each,	20,000
One Judge of the High Court of Admiralty,	4,000
One Judge of the New Court of Probate,	5,000
Bankruptcy Court.	
Four Commissioners in London, at 2,000*l* each,	8,000
Eight Commissioners in the country, at 1,800*l* each,	14,400
County Courts.	
Twelve Judges at 1,500*l* each,	18,000
Two " 1,350*l* each,	2,700
Forty-six " 1,200*l* each,	55,200
In Chancery Department.	
Two Masters in Lunacy, 2,000*l* each,	4,000
One Visitor of Lunatics,	1,500
Three Commissioners in Lunacy, 1,500*l* each,	4,500
In the Office of Land Registry.	
One Registrar,	2,500
One Assistant Registrar,	1,500

LEGAL NEWS.

A Schenectady justice recently decided that a verbal contract requires a stamp.

An Oswego court has decided that shaving on Sunday is not a work of necessity.

The Episcopal church, in Vermont, petitions the Legislature to reform the divorce laws.

A Minnesota juror addressed a note to the judge, in which he styled him "Onarable juge."

The Common Pleas in General Term have decided that the new judiciary article took effect January 1st, 1870.

Abbie Pulsifer has just been appointed short-hand reporter of Judge Danforth's Court, at Norridgenock, Maine.

Hon. Theophilus Parsons delivered his farewell address before the students in the Harvard Law School, on the 14th inst.

Judge Woodbury Davis, a well known jurist, has just been nominated for the position of Postmaster of Portland, Maine.

In fifty libel suits instituted against newspapers during the last ten years, the gross amount of money collected was only $3,000.

We see it stated in an exchange that David Dudley Field has done $132,000 worth of lawyer's work for the Erie Railway the past year.

It is said that the divorce record at Chicago has become so bulky that the papers now refuse to publish it, owing to "lack of room."

James A. L. Whittier, librarian of Harvard Law School, has been appointed non-resident lecturer on law, in Norwich (Ct.) University.

President Woolsey, of Yale College, asserts that for the last thirty years, eleven per cent of the marriages in Connecticut have resulted in divorce.

Gov. Haight, of California, has appointed Jackson Temple, of San Francisco, as a Judge of the State Supreme Court *vice* Judge Sanderson, resigned.

Governor Hoffman has appointed Hon. A. Melville Osborne, of Catskill, county judge of Greene county, to fill the vacancy caused by the death of Hon. John Olney.

William P. Weeks, a prominent lawyer, of Canaan, N. H., committed suicide on Sunday, the 2d inst., by hanging. Deceased graduated at Dartmouth College in 1826.

It is currently reported and believed that Judge Strong, of Pennsylvania, will be nominated by the President for the seat in the Supreme Court vacated by Justice Grier.

The grand jury of Los Angelos, California, has indicted the members of the late city council of that place, including the Mayor, for an alleged fraudulent issue of city scrip.

It is said that McFarland's counsel intend to set up a plea of insanity as his defense for the murder of Mr. Richardson. The trial takes place in March before Judge Ingraham.

Governor Hayes, of Ohio, recommends that counties and municipal corporations be permitted to aid in the construction of railroads, and that judges of the courts be appointed instead of elected.

It is proposed to place in the list of causes which shall be entitled to preference in the Court of Appeals, such as would involve the construction of wills, on the ground that the greatest good is to be promoted by a rapid settlement of estates.

It appears from the annual report of the New York State Library that the whole number of volumes in the Law Department of the Library is 21,248, and that only four volumes are needed to make the series of American Law Reports complete.

In the suit brought by the Delaware and Hudson Canal Company, against coal dealers in Providence, R. I., to restrain them from selling Pittston and Scranton coal as Lackawanna coal, Judge Blatchford has decided that the company have no exclusive right to the trade mark.

Hon. P. Shelton Root, at one time clerk, and subsequently, for a period of fourteen years, judge of Oneida county, died at his late residence at New Hartford, in this State, on Thursday, the 13th inst. He was a man of marked abilities, of clear and broad views, and of an unsullied integrity.

The Hon. Reverdy Johnson has given an opinion that the act of the Maryland Legislature, which requires the Baltimore and Ohio Railroad to pay into the Treasury of that State one-fifth of the gross proceeds from passenger travel of the Washington branch of the road, is unconstitutional.

Mr. William Rhinehart has sent from Rome to Baltimore his model of the statue of the late Chief Justice Taney, to be erected at Annapolis, in accordance with an act of the Maryland Legislature. The Chief Justice is represented in his official robes, with a scroll in his right hand. The figure is designed to be of heroic size and in a sitting posture.

Gustave Fischer, the Sheriff of Chicago, left for parts unknown on December 15. He took with him a favorite son about four years of age, and between $15,000 and $20,000 borrowed money. He also drew about $8,000 in fees due to his office, and neglected to pay over the share due to his deputies. Nothing has been heard of him since he left.

On the 12th of January, 1849, a lawsuit was commenced in which it was alleged that an insurance company, then doing business in this State, was organized and in defiance of law transacted business, and, as alleged by counsel, swindled the community. For upwards of twenty years the suit has been contested from one court to another, until it is now in the court of appeals. Wednesday, January 12th, 1870, it was argued, twenty-one years from the day the litigation was commenced.

THE VALUE OF CONFESSIONS.

The Detroit *Post* gives the following illustration of the value as evidence of a confession:

A few years ago, a man residing in Vermont, by the name of Bourne, was convicted of murder on his own confession. He was sentenced to death, but the execution was prevented by the arrival at the scene of execution of the man whom it was supposed he had murdered.

A case of imprisonment once occurred in this State in which the circumstances of the conviction were somewhat similar to those of the case above referred to, and, the writer believes, were never before published. The victim was a poor and ignorant man, who may be called Pennel, somewhat addicted to intemperate habits, who resided in one of the western counties. He had a wife and several children dependent upon him for support, and had purchased and nearly paid for, a few acres of land, on which he had erected a small house.

A man of wealth in the neighborhood had lost two fat hogs that were running at large in the woods. A place was found some two miles distant where two hogs had been killed and dressed, and the conclusion was that they were the missing animals. Pennel being a poor and rather worthless fellow, suspicion rested on him as the criminal. He was arrested, but as there was no proof to convict him, it was deemed an important step to get him to confess. Pennel at first strenuously denied the accusation, asserting that he had no hand in killing the hogs, and knew nothing about it. A strong pressure was brought to bear on him, however, it being understood that the reward would be paid if he could be induced to plead guilty. He was told that he would certainly be convicted and sent to the State prison for five years, but that if he should plead guilty he would get off with two or three months' imprisonment in the county jail. The condition of his family was alluded to and for their sake he was urged to plead guilty, and get off with the promised light sentence. He finally consented to accept the advice so strongly urged upon him, and when the day of trial came entered a plea of guilty.

The result, however, was quite different from what he had been led to expect; for, instead of getting two or three months in the county jail, he was sentenced to five years' hard labor in the State prison. Thus the evil he sought to avoid by that confession came upon him and his poor family. He lost what he had paid on his place, with the improvements he had made upon it, and his wife, broken down with grief, want, and sickness, was thrown upon the county as a public charge.

The sequel was that after Pennel had spent two and a half years in prison, the truth in regard to the missing hogs came to light, it being simply that another man who had two hogs running in the same woods, had by mistake for his own, killed those which Pennel had been accused of stealing.

WITNESSES TO CHARACTER.

The doubtful value of testimonials to character has been remarkably exhibited at the present Middlesex Sessions. A man, reports the *Law Times*, called Goodwin, was convicted, on the clearest testimony, of an indecent assault upon a gentleman in a urinal. The police-sergeant of the division stated the prisoner to have been known to him for many years as haunting urinals for improper purposes, and that he was one of a gang who made a business of it. On this, the presiding judge, Mr. Serjeant Cox, sentenced him to seven years' penal servitude. On the following day, application was made by counsel to the judge to suspend the sentence until the next sessions, as the convict could produce undoubted testimony that the police had been mistaken as to his previous character. Accordingly, at the following sessions, several witnesses were called of great respectability, who proved that they had known the prisoner for some years, and that his conduct, so far as they had seen it, was decent; and a clergyman of distinction wrote purposely to say that he had him under his eye fo. a long time, and that his behavior had been always praiseworthy. This mass of testimony to his conduct by day was met by overwhelming proof that he was quite a different personage by night. In the first place, there was no doubt that he was guilty of the offense of which he had been convicted, for he was seized upon the spot. This proved a certain degree of depravity. But the police of the neighborhood swore that they had known him for three years as one of a gang who frequented urinals for an infamous purpose — as the companion of a fellow who had been convicted in that court on the previous day as a rogue and a vagabond, haunting Regent street with painted cheeks, and assuming the name and language of a woman; that he was not known at the addresses he had given, and special inquiries made at his haunts left no doubt whatever what he was; he was at once recognized by his companions as a "doctor," a cant term for a character not to be named. So much for the value of evidence of character. All who spoke of his good conduct spoke only as to what they saw of him *by day*. The police and his companions saw what he was *by night*. May not this kind of transformation account for many contradictions between reputation and fact? And may not the respectability of noon be a mask for the rascality of midnight more often than we are wont to suspect?—*Public Opinion.*

COURT OF APPEALS ABSTRACT.

Kate F. Fake, administratrix, v. *John C. Smith and Hiram R. Wood.* To appear in 7 Abbott's Reports.

Plaintiff purchased a note of defendants upon which he prosecuted the makers, who set up the defense of usury. He served a copy of the summons, complaint and answer upon defendants, with a request that they assume the prosecution of the action, which they neglected or refused to do. It was referred and tried, the defendants being sworn as witnesses on behalf of the plaintiff. The referee reported in favor of the makers, upon which report judgment was perfected. Plaintiff paid the costs recovered against him, and also his own attorney; served a copy of the report and judgment upon defendants, demanding the amount of the note, the costs recovered against him by the makers thereof, and the amount of statutory costs paid his own attorney. *Held:*

1. There was an implied warranty by defendants on the sale of the note, that there was no legal defense to an action upon it.

2. That having had notice of the defense interposed, and an opportunity to prosecute the action to judgment, they were estopped from showing on the trial of the action upon such warranty that the note was not in fact usurious.

3. A *plaintiff* may avail himself of the right to cast the burden of an action upon his vendor in the same manner as a *defendant.*

4. That the judgment upon the report of the referee was equally as binding upon defendants as if plaintiff had not consented to a reference of the action, but had tried the issues at the circuit before a jury.

5. That plaintiff was entitled to recover the several items claimed.

The People v. *Town Auditors of Westford.* January Term, 1869.

The court held in this case, on a motion that the cause be placed upon the preferred calendar, that subdivision *four* of section eleven of the Code, passed in 1867, did not repeal or affect subdivision *four* of said section, passed in 1865; that the two were not inconsistent and were both in force.

N. C. MOAK, for the motion; J. E. DEWEY, opposed.

[The diamond or vest-pocket Code published by the Transcript Association omits the amendment of 1865, on the theory, we suppose, that it was repealed by that of 1867. The small limp covered "Code as it is," by Mr. Townsend, has both correctly printed together as subdivision four.]

People, Plffs. in Error, v. *John Park et al., Defts. in Error.*

The defendants in error were tried and convicted at the Rensselaer Sessions on an indictment for burglary. On the trial one Corbin was offered as a witness for the prosecution, and objected to as incompetent, it being shown that he had been previously convicted and sentenced for the crime of burglary in the third degree, and had never been pardoned or restored to his rights as a citizen. It also appeared that at the time of such conviction said Corbin was under the age of sixteen years, and was sentenced to the House of Refuge. The prosecution insisted that the term "felony," for which crime only persons are disqualified as witnesses (2 R. S. 707, § 23), meant only such crimes as are punishable by death or imprisonment in State prison (2 R. S. 707, § 30), and that as the witness offered was under sixteen, and therefore not liable by law to imprisonment in State prison, he had not been convicted of a felony and was competent. The objection was overruled and the witness admitted. *Held*, that the objection was well taken; that whether or not an offense is a felony does not depend on the personal status of the criminal or his personal exemption from a particular punishment by reason of age or mental incapacity; and that the term "felony" means any crime which is punishable by death or by imprisonment in the State prison without reference to the personal exemptions or exceptions of the criminal.

John Fulton v. *Francis S. Staats.*

This was an action against the defendant for false imprisonment. The defendant was a policeman, and having received information that led him to believe that plaintiff was committing a felony, proceeded to arrest him. The plaintiff resisted an arrest and was very violent and abusive. Evidence was introduced by the plaintiff tending to show that the defendant used unnecessary violence in making the arrest. Defendant offered evidence to show that the plaintiff had, on the way to the station house, threatened to murder any one who arrested him. The offer was excluded. *Held*, that such evidence was competent and the exclusion erroneous. Whatever occurred between the place of arrest and the station house was part of the transaction, and whatever was then said or done was competent evidence for either party.

TERMS OF THE SUPREME COURT FOR THE COMING WEEK.

January 24—*General Term*, Sixth District, at court house in Broome county.

January 25—*Special Term*, at Albany, by Justice Hogeboom.

U. S. CIRCUIT COURT.

Notice to the Bar.—Judge Woodruff will take up the calendar of admiralty appeals on the first day of February, and it will then have precedence. He will also then hear, if there be time, all other cases and matters except the trial of civil and criminal cases by a jury. A new calendar of appeals and admiralty will be made up, for which notes of issue must be filed by the 27th of January.

DIGEST OF RECENT ENGLISH DECISIONS.

[Q. B. refers to the Queen's Bench, C. P. to the Common Pleas, Ex. to the Exchequer, and L. J. R. to the Law Journal Reports.]

ARREST.

Privilege of person accused of criminal charge out on remand.—The privilege from arrest on civil process of a person whose attendance in court is required for the due administration of justice, extends to the party accused of a criminal charge when out on bail on remand, as well as to the prosecutor and witnesses. *Gilpin* v. *Benjamin*, Ex. 38; L. J. R. 50.

ATTORNEY.

Lien for costs.—The lien of an attorney for costs is confined to cases where there are fruits of the litigation actually acquired, such as a clean verdict or a judgment or an acknowledgment of a debt; but the court will not interfere to cause it to attach where after verdict and before judgment a rule for a new trial has been obtained, so as to prevent a settlement of the action between the parties, without a prior satisfaction of the attorney's costs. *Sullivan* v. *Pearson*, Q. B. 38; L. J. R. 65.

APPRENTICE.

Covenant for personal services: performance impossible by act of God.—A covenant in an apprenticeship deed that the apprentice will honestly remain with and serve his master for a certain term is, though in terms absolute, subject to an implied condition that the apprentice shall continue in a state of ability to perform his contract. To an action, therefore, by the master for breach of the covenant, a plea that the apprentice was prevented by the act of God, to wit, permanent illness, which arose after the making of the deed and before breach, is good. *Boast* v. *Firth*, C. P. 38; L. J. R. 1.

BARON AND FEME.

Chose in action: money received for use of wife.—Defendant received money for the use of a married woman, and wrote offering to forward it to her if required. The wife shortly afterward died, and there was no evidence that her husband, who survived her, had in any way interfered, either to allow his wife to have the control of the money, or to prevent her from dealing with it. The wife's administratrix having brought an action against defendant for money had and received to the use of the wife: *Held*, by the majority of the Court (Channell, B., Keating, J., Montague Smith, J., and Cleasby, B.), that plaintiff was entitled to recover, as the right to the money was a chose in action, like a bond or promissory note, and had never been reduced into possession by the husband. But *held*, by Kelly, C. B., that plaintiff was not entitled to recover, as the husband and wife could not have joined in an action for money had and received against defendants, and because no action could be maintained by the representative of a married woman in respect of a chose in action where the wife's interest did not appear on the face of the record. *Fleet* v. *Perrins* (Ex. Ch.) Q. B., 38 L. J. R. 257.

BILLS AND NOTES.

1. *Presentment: notice of dishonor: reasonable expectation of payment.*—The drawer of a cheque, the state of whose account with the drawee is such that he has no reasonable expectation that the cheque will be paid on presentment, is not entitled to notice of dishonor before being sued by the holder of the cheque. *Carew* v. *Duckworth*, Ex. 38; L. J. R. 149.

2. *Notice of dishonor, where excused: ostensible place of business.*—A bill of exchange was accepted by a joint-stock company and indorsed by defendant, who was a director of the company. The bill was accepted and indorsed at the office of the company, which defendant was in the habit of attending. A notice of dishonor was sent by the holders to defendant, addressed to him at the office of the

company, but as he had ceased to attend the office it did not reach him until some time afterward. The holders also made inquiries, as to defendant's private residence, of other directors of the company, and at an office with which the company had had dealings, but not at the office of the company itself: *Held*, that there had been sufficient notice of dishonor. *Berridge* v. *Fitzgerald*, Q. B. 38; L. J. R. 335.

3. *Acceptor charged in execution by holder after payment by indorser: indorser's remedy over against acceptor.*—The drawer or indorser of a dishonored bill of exchange becomes entitled, by paying the amount of it to the holder, to an immediate right of action against the acceptor, although the holder continues to retain the bill as security for costs; and the right of such drawer or indorser to sue the acceptor is not affected by the circumstance that the holder, after receiving the amount and before payment of his costs, has charged the acceptor in execution for the amount of the bill and then released him from custody. *Woodward* v. *Pell*, Q. B. 38; L. J. R. 30.

4. *Signature obtained by fraud without negligence: action by bona fide holder.*—In an action by a *bona fide* holder for the value of a bill of exchange against defendant as indorser, the Judge directed the jury that if defendant's signature was obtained upon a fraudulent representation that the instrument was a guarantee, and defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if defendant was not guilty of any negligence in so signing, he was entitled to the verdict: *Held*, a right direction. *Foster* v. *Mackinnon*, C. P. 38; L. J. R. 310.

5. *Principal and agent.*—A promissory note, in form "On demand I promise to pay Messrs. A. £1,500, with legal interest until paid, value received," was signed, "For the M. Railway Company, J. S, Secretary." It was proved at the trial that the money had been applied to the purposes of the company: *Held*, that J. S. was not personally liable on the instrument. *Alexander* v. *Sizer*, Ex. 38; L. J. R. 59.

CARRIERS BY RAILWAY.

1. *Different rates of charge made to different persons for carriage of the same class of goods.*—Plaintiff, a carrier, was in the habit of collecting small parcels and sending them together in large packages by defendants' railway. Defendants charged different rates of carriage for different classes of goods, the highest charge being for packed parcels. A declaration was required from plaintiff as to the description of his parcels. He declared them as "packed parcels," and was charged and paid accordingly. Plaintiff, finding that other firms sent packed parcels, from whom no declaration was required, and who were charged for them at a less rate, sued the company to recover the alleged excess as for money had and received. On the trial he gave evidence that the practice of the other firms in sending "packed parcels" was notorious. *Held*, affirming the judgment of the Court of Exchequer Chamber, that the evidence produced was admissible, and was sufficient to show that defendants knew of the practice of other firms to pack their parcels, and that with such knowledge they had improperly charged plaintiff with a higher rate of charge, and had thus infringed the equality clauses; and that plaintiff was entitled to recover the amount so charged in excess in an action for money had and received. *Great West. Rail. Co.* v. *Sutton* (House of Lords), Ex. 38; L. J. R. 177.

2. *Loss of passenger's luggage: special contract: foreign line: through ticket.*—Plaintiff was booked through from London to Paris by defendants, who were carriers, by their railway from London to Dover. He traveled on their railway to Dover, from thence to Calais by steamboat, and from Calais to Paris by a French line of railway. He registered his luggage at the London station of defendants, who thereupon took possession of such luggage. Upon the through ticket, which he received from defendants, was the following: "The English railway companies are not responsible for loss or detention of, or injury to, luggage of the passenger traveling by this through ticket, except while the passenger is traveling by their trains or boats, and in this latter case only when the passenger complies with the by-laws and regulations of the companies; and in no case for luggage of greater value than 5*l*. Each company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies, such through-booking being only for the convenience of the passengers. Nor will the companies be responsible for the trains or boats being delayed, or not meeting the trains in correspondence, nor for any consequences that may result to a passenger thereby." This ticket was not signed by plaintiff. The luggage was lost upon the French railway. *Held*, in an action brought by plaintiff to recover damages in respect of such loss, that defendants were protected from responsibility by this special contract, and that they did not lose such protection by reason of its not being signed by plaintiff, the provision to that effect in the Railway and Canal Traffic Act, 1854, only applying to the receiving, forwarding or delivering of goods upon the line belonging to or worked by, the company making the special contract. *Zunz* v. *The Southeastern Rail. Co.*, Q. B. 38; L. J. R. 209.

3. *Contract with passengers: latent defect in carriage: warranty and insurance.*—Plaintiff, a passenger for hire on defendants' railway, suffered an injury in consequence of the carriage in which he was traveling getting off the line and upsetting. The accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking. *Held*, affirming the judgment of the Court of Queen's Bench, that the company were not liable in respect of such injury, there being no contract of warranty and insurance in the case of passengers that the carriage should be, in all respects, perfect for its purpose; that is to say, free from all defects likely to cause peril. *Readhead* v. *Midland R. R. Co.* (Ex. Ch.) Q. B. 28; L. J. R 109.

CONSIGNOR AND CONSIGNEE.

Acceptance of bill of exchange with bill of lading: condition precedent to vesting of property.—Plaintiff, a merchant, at Manchester, sent an order to P. N. & Co., at Pernambuco, to purchase on his account cotton, upon certain terms. P. N. & Co. accordingly purchased and shipped cotton in the defendants' vessel, and wrote to plaintiff, saying, "Inclosed please find invoice and bill of lading of 200 bales of cotton. We have drawn upon you in favor of our agents, to which we beg your protection." The invoice, which was headed "on account and risk of S. & Co." (plaintiff), was sent to plaintiff as stated in the letter; the bill of lading, however, which made the cotton deliverable to order or assigns, was not inclosed therewith, but was sent to the agents of P. N. & Co., together with a bill of exchange drawn for the price of the cotton. The agents thereupon wrote to plaintiff inclosing the bill of lading and the bill of exchange, for which they requested protection. Plaintiff retained the bill of lading, but returned the bill of exchange unaccepted, on the grounds of non-compliance with the terms of the order. On presentment of the bill of lading to defendants they refused to deliver the cotton, having been advised of the circumstances under which plaintiff became possessed thereof, who thereupon sued them in trover:—*Held* (affirming the judgment of the Court of Queen's Bench upon a case embodying the above particulars and empowering them to draw inferences of fact), that the acceptance of the bill of exchange was a condition precedent to the passing of the property, and that this having been refused, defendants were justified in withholding the cotton. *Shepherd* v. *Harrison* (Ex. Ch.) Q. B. 38; L. J. R. 177.

CONTRACT.

1. *Restraint of trade: action for consideration of executed agreement: divisibility of contract.* — An action was brought to recover arrears of an annuity, the consideration for which was an agreement by the annuitant, a commercial traveler in the hop trade, "that he would not, at any time thereafter, either on his own account or on account of any other person or persons whomsoever, excepting the defendants, solicit orders for hops from any of the customers in the west of England or in South Wales or any district whatsoever." *Held*, without deciding whether the restraint of trade, so far as it regarded the west of England and South Wales, could be enforced, that the plaintiff, who had performed his part of the contract, was entitled to recover the consideration due in respect of it. *Bishop* v. *Kichin*, Q. B. 38; L. J. R. 20.

2. *Detinue for bank note deposited to secure payment of money advanced for immoral purposes.* — To a declaration containing two counts, the first for the breach of a contract to redeliver a bank note to the plaintiff, the second, detinue for the same note, the defendant pleaded that it was deposited by way of pledge to secure the repayment of money advanced to the plaintiff. Replication, that the money was knowingly advanced for immoral purposes. Upon the trial the facts were proved as stated in the pleadings. *Held*, that upon the whole record the defendant was entitled to judgment, as it was impossible that the plaintiff could recover, except through the medium and by the aid of an immoral transaction to which he was himself a party, so that the maxim *In pari delicto potior est conditio possidentis* was applicable. *Taylor* v. *Chester*, Q. B. 38; L. J. R. 285.

3. *Construction of, as to right to determine it on an event happening according to opinion of architect.* — By a builder's contract the contractor was to do certain works for a burial board by a certain time for a specified sum, subject to certain conditions, by one of which the architect had power to give such further drawings as might appear to him proper. By another of such conditions the architect was empowered to grant an extension of time, if by reason of any additions to the works or other cause the contractor should, in the opinion of the architect, have been unduly delayed in the completion of his contract; and by another of such conditions, it was provided that it should be lawful for the burial board, in case the contractor should fail in the due performance of any part of the undertaking, or should become bankrupt or compound with his creditors, or should not, in the opinion and according to the determination of the said architect, exercise due diligence and make such due progress as would enable the works to be effectually completed at the time contracted for, to determine the contract and take possession of the works. *Held*, that the burial board was entitled to determine the contract, and take possession of the works upon the certificate of the architect, that in his opinion the contractor had so failed to exercise due diligence and make due progress, although he had been prevented from making such progress by delay in supplying him with the necessary plans and in defining roads which had to be made, the opinion of the architect being conclusive and binding on the contractor in the absence of fraud and collusion. *Roberts* v. *The Bury Improvement Commissioners*, C. P. 38; L. J. R. 367.

COVENANT.

1. *"Assigns": land taken by railway company under compulsory powers: repeal of covenant by operation of laws.* — A landowner who has covenanted in the usual form that neither he nor his "assigns" shall build upon his land, is discharged from his covenant after selling the premises to a railway company under their compulsory powers, as the company become assignees of the land, not by the voluntary act of the former owner, but by compulsion of law. *Baily* v. *De Crespigny*, Q. B. 38; L. J. R. 98.

2. *Not running with the land: covenant not to carry on a business within a certain distance from demised premises.* — A demise of certain premises for the purpose of being used as a beer-shop and public-house, contained a covenant by the lessor, for himself and his assigns, not to build, erect, or keep, or be interested or concerned in building, erecting or keeping, any house for the sale of spirits or beer within half a mile of the demised premises: *Held*, that the covenant did not run with the land, and could not therefore be sued upon by an assignee of the lease. *Thomas* v. *Hayward*, Ex. 38; L. J. R. 175.

DAMAGES.

1. *Measure of: vendor and purchaser: power of transferring property, and default in delivering possession: profit on resale.* — Where the lease of a house was sold by auction the conditions of sale providing that possession should be given on the completion of the purchase, and the vendors, who were mortgagees of the property and entitled to convey it, failed to give possession because of their unwillingness to incur the expense of an ejectment against the mortgagor, who refused to quit the premises,—*Held*, that the ordinary rule limiting the damages in sales of real property did not apply, and that the purchaser could recover, not only the amount of the deposit and the expense of examining the title, but the loss of the profit on a resale of the premises, and the cost of the conveyance to the subvendee. *Engell* v. *Fitch* (Ex. Ch.), Q. B. 38; L. J. R. 304.

2. *Proximate cause: negligence.* — Defendants were commissioners under an act of parliament for improving the drainage of the fen lands, and in consequence of their negligence, the western bank of a cut made by them under their act gave way, and through the breach in the said bank the waters of a tidal river overflowed the lowlands lying west of the cut. Plaintiff was possessed of land on the eastern side of the cut, the water from which land used to drain to the west side through a culvert of defendants, which by their act of parliament they were to maintain open for a free passage of such water. After the bank had given way, but before the waters of the flood had reached the culvert, plaintiff stopped up the culvert, but the occupiers of lands on the west side of the cut, considering that the stopping of the culvert would be injurious to their lands, by preventing the great body of advancing water from finding an outlet there, removed the stoppage and the result was that the flood waters passed through the culvert from the western to the eastern side of the cut, and reached and inundated plaintiff's land. In an action by plaintiff for the damage sustained by his land being so inundated, *Held*, that plaintiff was entitled to recover such damage, notwithstanding it arose in part by the opening of the culvert after plaintiff had stopped it up, as such damage was the natural result of defendants' negligence. *Collins* v. *The Middle Level Commissioners*, C. P. 38; L. J. R. 236.

DEVISE.

Construction: estate tail by implication: failure of "issue:" power of appointment to children. — By will, taking effect before the Wills Act, lands were devised to the testator's grandson without words of limitation, and it was provided that if he should die without issue, the property should return to the testator's family, but if he should live to have children, he should have power to make a will of it to his children. *Held*, that "without issue" meant "without children," and not an indefinite failure of issue; and therefore that the testator's grandson took only an estate for life, and not an estate in tail by implication. *Eastwood* v. *Avison*, Ex. 38; L. J. R. 74.

FISHERY.

Tidal river: change of its course: non-user. — The tidal river Eden in the seventeenth century deserted its old channel, called the Loop, and formed a new channel, since called the Goat. The plaintiffs, having had a several fishery in the Loop created before Magna Charta, claimed a right to a several fishery in the Goat, as representing their several fishery in the Loop: *Held*, that their right was confined to a right to fish over the soil of the Loop, and was not transferred from the old to the new channel. *The Mayor, Aldermen and Citizens of Carlisle* v. *Graham*, Ex. 38; L. J. R. 226.

FIXTURES.

Trade fixtures; mortgagor and mortgagee.—The fixtures, though annexed to the freehold for the more convenient use of them, and not to improve the inheritance, and capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the lands to the mortgagee. *Climie* v. *Wood* (Ex. Ch.), Ex. 38; L. J. R. 223.

FREIGHT.

Bill of lading: freight payable before delivery of goods: readiness to deliver.—The defendants shipped a quantity of Portland cement on the plaintiffs' ship to be carried from London to Sydney, under a bill of lading by which "freight was to be paid within three days after the arrival of the ship, and before the delivery of any portion of the goods." After the arrival of the ship at Sydney, and before the expiration of such three days, the ship was obliged to be sunk in order to extinguish an accidental fire which had occurred in her hold. When the ship was afterward raised, the defendants' goods were found to be no longer existing as cement, and the consignees accordingly refused to accept them or to pay freight: *Held*, that as the plaintiffs were not during the three days after the arrival of the ship at Sydney ready and willing to deliver the goods, they could not recover freight. *Duthie* v. *Hilton*, C. P. 38; L. J. R. 93.

INFANT.

1. *Contract during infancy: subsequent recognition of debt: construction of document.*—To a declaration for goods sold and delivered, defendant pleaded infancy, and plaintiff replied a ratification of the debt after majority: in support of the replication a copy of the items of the account was put in evidence, at the foot of which defendant, after he came of age, had written, "Particulars of account to end of year 1867, amounting to 162*l.* 11*s.* 6*d.* I certify to be correct and satisfactory," with the addition of his signature. *Held*, not a sufficient recognition of the debt to satisfy 9 Geo. IV, ch. 12, § 5; and that the construction of the document was for the court and not for the jury. *Rowe* v. *Hopwood*, Q. B. 38; L. J. R. 1.

2. *Necessaries: evidence: question of mixed law and fact.* An infant (the son of a baronet, and having an income of 500*l.* a year, with the prospect of 20,000*l.* on attaining his majority) bought on credit a pair of solitaires, or shirtsleeve studs, composed of crystals adorned with diamonds and rubies, and a silver goblet, for presentation to a friend, at whose house he had been staying. No evidence was given of any thing peculiar in the defendant's station rendering it exceptionally necessary for him to have such articles. The jury, in answer to the questions put to them, found that the articles were necessaries, and suitable to the defendant's station and degree. *Held*, that, as the onus was on the plaintiff, and he gave no evidence to show that the articles were necessaries, the question ought not to have been left to the jury. *Ryder* v. *Wombwell* (Ex. Ch.), Eq. 38; L. J. R. 8.

The question in all such cases is one of mixed law and fact, the preliminary question being (as in all other cases), whether there is any evidence on which the jury could properly find for the party on whom the onus of proof lies. The judge (who must be supposed to know as well as a jury can know without evidence, what is the usual and normal state of things, and whether any particular article is of such a description that it may be a necessary under such usual state of things), must determine, first, whether the case is such as to cast on the plaintiff the onus of proving that the articles in question are necessaries, and then whether there is any sufficient evidence for the jury to satisfy that onus; and if there is not, he ought to direct a nonsuit. *Ib.*

LANDLORD AND TENANT.

Implied contract for delivery of possession: under-tenant holding over: damage: ejectment: amendment: payment into court.—Defendant held a house and premises as tenant of plaintiff, but without any lease or written agreement. He let part of the house to T., and, having received notice to quit on the 25th of December, 1866, he gave notice to T. to quit on the 21st of December. T. refused to go out; defendant did all in his power to give up possession. Plaintiff brought an action of ejectment against him and T.; judgment was signed on the 21st of May, 1867, and on the 29th of May possession was given by the sheriff to plaintiff:—*Held*, that plaintiff was entitled to recover rent for one-half year, and also the costs of the ejectment, on the ground that there was an implied contract that defendant would deliver up the absolute possession of the house and premises at the expiration of the tenancy. *Henderson* v. *Squire*, Q. B. 38; L. J. R. 73.

LIBEL.

1. *Privilege: presumption as to absence of malice.*—Where a letter containing defamatory words is written upon a privileged occasion, surrounding circumstances are to be considered in determining whether the words used are so much too violent for the occasion as to rebut the presumption of the absence of malice arising from the privilege of the occasion; and if from surrounding circumstances it appears that the words are capable of two constructions, one of which is compatible with the absence of malice, then the presumption of the absence of malice which existed in the first instance from the privilege of the occasion should be allowed to prevail throughout. *Spill* v. *Maule* (Ex. Ch.), Ex. 38; L. J. R. 188.

2. *Privileged publication: parliamentary debates: articles commenting upon parliamentary debates.*—The publication of a faithful report of a debate in either House of Parliament is privileged, so that the publisher is not responsible for defamatory statements made in the course of the debate so reported and published; and the publication of articles fairly commenting upon the debate so reported and published is equally privileged. *Wason* v. *Walter*, Q. B. 38; L. J. R. 34.

3. *Privileged communication: publication of auditors' report by a company.*—Plaintiff was the agent of defendants, a trading company, and it was part of his duty to furnish them with an account of his transactions, to enable them to prepare the balance-sheet for the inspection of the shareholders. This balance-sheet was duly referred to auditors, who reported that there was a deficiency for which plaintiff was responsible, and that his accounts had been badly kept. There was evidence that an explanation had been offered to the auditors, which they had disregarded; but no evidence that they had any knowledge of this explanation. The directors, after laying the accounts before a general meeting of the shareholders, caused a letter containing the part of the report which affected the character of plaintiff to be printed and forwarded to the absent shareholders: *Held*, first, that such letter was published on a privileged occasion, as it was the duty of defendants to communicate to all the shareholders any part of the report of the auditors which materially affected the accounts of the company; secondly, that there was no intrinsic or extrinsic evidence of malice to be left to the jury, as the report of the auditors was published without comment; that the explanations offered to the auditors did not come before the defendants, and that causing the letter to be printed was a reasonable and necessary mode of publishing it to the absent shareholders. *Lawless* v. *The Anglo-Egyptian Cotton and Oil Co.*, Q. B. 38; L. J. R. 129.

4. *In newspaper charging ingratitude: explanation accompanying charge.*—A charge of ingratitude is actionable as libel; and, although facts be stated as the ground of the charge which do not warrant the opinion founded on them, the charge may still be libelous by raising a doubt whether there are not other facts justifying the charge. Therefore, though the charge be coupled with statements tending to explain it, it is still a question for the jury whether the words were used under such circumstances as to make them libelous. *Cox* v. *Lee*, Ex. 38; L. J. R. 219.

(*Balance next week.*)

☞ All communications intended for publication in the LAW JOURNAL should be addressed "Editor Law Journal, Albany, N. Y.:" and the name of the writer should be given, though not necessarily for publication.

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The Albany Law Journal.

ALBANY, JANUARY 29, 1870.

THE ADMINISTRATION OF JUSTICE.
II.
THE CASE OF SIR WALTER RALEIGH.

Sir Walter was one of the eminent men of the day who were opposed to the succession of James of Scotland to the throne of England. The consequence was that, in 1603, in the first year of the reign of James, a charge of treason in conspiring with Lord Cobham to raise the Lady Arabella Stuart to the throne was made against Raleigh.

A commission of Oyer and Terminer was appointed by the Crown to try him on the charge. The commission consisted of six members of the king's government, and four of the judges of the higher courts.

This mode of organizing the highest criminal court in the realm was invented in order to secure to the Crown the power of having a majority of the court on its side in its trials of persons of whom it complained. The invention descended to us with other of the laws and customs of England, and even to this day there is a law on the statue book of New York to the same effect, though I am not aware that it has been used since Seward was Governor.

We have a full report of the trial, but without going into its details, we can extract enough to see how justice was administered some 250 years ago.

Sir Edward (afterward Lord) Coke was Attorney-General, and as such conducted the prosecution for the Crown.

The report says that in opening the case to the jury Coke used this language:

"I shall not need, my lords, to speak any thing concerning the king, nor of the bounty and sweetness of his nature, whose thoughts are innocent, whose words are full of wisdom and learning, and whose works are full of honor, although it be a true saying, *nunquam ~~nimis~~ quod nunquam satis.* But to whom do you bear malice? to the children?"

Raleigh: To whom speak you this? You tell me news I never heard of.

Coke: Oh, sir, do I? I will prove you the notoriest traitor that ever came to the bar. * * *

Raleigh: Your words cannot condemn me; my innocense is my defense. * * *

Coke: Nay, I will prove all; thou art a monster; thou hast an English face, but a Spanish heart. * * *

[It must be borne in mind that in those days parties tried on accusations against them by the Crown could not have the aid of counsel.]

After Coke had got through with his opening to the jury, Raleigh said:

"I will wash my hands of the indictment, and die a true man to the king."

Coke: You are the absolutest traitor that ever was.

And so all through the trial Coke, who, after the English practice, is called "Mr. Attorney," was profuse in his vituperation of the prisoner.

We give some specimens:

THE ATTORNEY-GENERAL'S OPENING SPEECH TO THE JURY.

Attorney: * * * You, my masters of the jury, respect not the wickedness and hatred of the man; respect his cause; if he be guilty I know you will have care of it for the preservation of the king, the continuance of the Gospel authorized, and the good of us all.

Raleigh: I do not hear yet that you have spoken one word against me. Here is no treason of mine done. If my Lord Cobham be a traitor, what is that to me?

Attorney: All that he did was by thy instigation, thou viper; for I thou thee, thou traitor.*

Raleigh: It becomes not a man of quality and virtue to call me so. But I take comfort in it, it is all you can do.

Attorney: Have I angered you?

Raleigh: I am in no case to be angry.

Chief Justice Popham (instead of reproving Coke for his impropriety of language) said: Sir Walter Raleigh, Mr. Attorney speaketh out of the zeal of his duty for the service of the king and you for your life; be valiant on both sides.

The testimony offered against Raleigh was the examination of Lord Cobham, taken before the Privy Council, not signed by him, nor taken in Raleigh's presence.

Raleigh complained: You try me by the Spanish Inquisition if you proceed only by the circumstances without two witnesses.

Attorney: This is a treasonable speech.

Raleigh then quoted scripture, both Old and New Testament, and the civil and common law, and demanded to be confronted with the witness.

Attorney: Scientia sceleris est mera ignorantia. You have read the letter of the law but understand it not. * * *.

Raleigh: If I ever read a word of the law or statutes before I was a prisoner in the Tower, God confound me.

After some wrangling on the subject, in the course of which the Chief Justice gave a decision against Raleigh,

Lord Cecil (one of the court) said: Now that Sir Walter Raleigh is satisfied that Cobham's subscription is not necessary, I pray you, Mr. Attorney, go on.

Raleigh: Good Mr. Attorney, be patient and give me leave.

Lord Cecil: An unnecessary patience is a hindrance; let him go on with his proofs and then repel them.

Raleigh: I would answer particularly.

Lord Cecil: If you would have a table and pen and ink, you shall.

* This trial was in 1603. Between 1596 and 1601 it was that Shakspeare wrote "Twelfth Night," in which he makes Sir Toby say to Sir Andrew, when about to challenge Viola:

"If thou thouest him some thrice it may not be amiss."

Then paper and ink were given him.

In the course of some of Raleigh's denials of the charges against him, he used this expression: "Let me be pinched to death with hot irons if I ever knew there was any intention to bestow the money on discontented persons."

On one occasion this scene occurred:

Raleigh: Good my lords, let my accuser come face to face and be deposed.

Lord Chief Justice: You have no law for it. God forbid any man should accuse himself upon his oath.

Attorney: The law presumes a man will not accuse himself to accuse another. You are an odious man, for Cobham thinks his cause the worse that you are in it.

At another time this scene:

Attorney: Now let us come to those words "of destroying the king and his cubs," (which were used in the indictment.)

Raleigh: O, barbarous! If they, like unnatural villains, should use those words, shall I be charged with them? * * * Do you bring the words of these hellish spiders, Clark Watson and others, against me?

Attorney: Thou hast a Spanish heart, and thyself art a spider of hell. * * *

And at another time this:

Attorney: My lords, I must complain of Sir Robert Wroth; he says this evidence is not material.

Sir R. Wroth: I never spake the words.

Attorney: Let Mr. Sergeant Phillips testify whether he heard him say the words or no.

Lord Cecil: I will give my word for Sir R. Wroth.

Sir R. Wroth: I will speak as truly as you, Mr. Attorney; for, by God,* I never spake it.

And here is the closing scene:

Raleigh: You have not proved any one thing against me by direct proof, but all by circumstances.

Attorney: Have you done? The king must have the last.

Raleigh: Nay, Mr. Attorney; he which speaketh for his life must speak last. False repetitions and mistakings must not mar my cause. You should speak *secundum allegata et probata.* I appeal to God and the king in this point, whether Cobham's accusation be sufficient to condemn me.

Attorney: The king's safety and your clearing cannot agree. I protest, before God, I never knew a clearer treason.

Raleigh: I never had intelligence with Cobham since I came to the Tower.

Attorney: Go to. I will lay thee upon thy back for the confidentest traitor that ever came at a bar. * * *

Lord Cecil: Be not so impatient. Good Mr. Attorney, give him leave to speak.

Attorney: If I may not be patiently heard, you will encourage traitors and discourage us. I am the king's sworn servant, and must speak. If he be guilty, he is a traitor; if not, deliver him. [Here Mr. Attorney sat down in a chafe, and would speak no more until the commissioners urged and entreated him. After much ado, he went on and made a long repetition of all the evidence for the direction of the jury; and at the repeating of some things, Sir Walter Raleigh interrupted him and said he did him wrong.]

Attorney: Thou art the most vile and execrable traitor that ever lived.

Raleigh: You speak indiscreetly, barbarously, and uncivilly.

Attorney: I want words sufficient to express thy viperous treasons.

Raleigh: I think you want words, indeed; for you have spoken one thing half a dozen times.

Attorney: Thou art an odious fellow; thy name is hateful to all the realm of England for thy pride.

Raleigh: It will go near to prove a measuring cast between you and me, Mr. Attorney.

Attorney: Well, I will now make it appear to the world, that there never lived a viler viper upon the face of the earth than thou.

The report continues its tale by saying the jury were not out a quarter of an hour, and returned with a verdict of guilty.

Thereupon the Lord Chief Justice pronounced judgment, and in the course of his remarks to Raleigh, said: "Your conceit of not confessing any thing is very inhuman and wicked. In this world is the time of confessing that we may be absolved at the day of judgment."

The sentence he pronounced was in these words:

"That you shall be had from hence to the place whence you came, there to remain until the day of execution, and from thence you shall be drawn on a hurdle through the open streets to the place of execution, there to be hanged and cut down alive, and your body shall be opened, your heart and bowels plucked out, and your privy members cut off and thrown into the fire before your eyes, then your head to be stricken off from your body, and your body shall be divided into four quarters to be disposed of at the king's pleasure, and God have mercy upon your soul!"

The whole evidence against Raleigh was an unsworn and unsigned declaration of Lord Cobham, who was not produced as a witness on the trial; against which Raleigh produced Cobham's recantation, in which, among other things, he said, "God have mercy upon my soul, as I know no treason by you." But all in vain. Raleigh was convicted, and "Mr. Attorney-General" Coke was in due time appointed by the king "Lord Chief Justice of England."

Another practice of those days, in order to enable the Crown to retain control of judicial proceedings, was that no such sentence should be executed except under warrant issued by the monarch. King James did not issue such warrant, but kept Raleigh a close prisoner in the Tower 14 years, and then appointed him Admiral of a fleet to explore Guiana in search of gold.

The expedition was unsuccessful, and on Sir Walter's return home, he was arrested and arraigned before the court of King's Bench, in 1618, on a motion that execution be awarded on this judgment.

Coke was then on the bench as Lord Chief Justice, and retained enough of his old manner to say to Sir Walter, with a sneer, when awarding execution, "I

*Using profane language was not very uncommon in those days. In the course of the trial, Lord Cecil said to Raleigh: "Excepting your faults (I call them no worse), by God I am your friend. The heat and passion in you, and the Attorney's zeal in the king's service, makes me speak this."

know you have been valiant and wise, and I doubt not but you retain both these virtues, for now you shall have occasion to use them."

And sure enough! This was on the 28th October, 1618. On the same day the king signed the death warrant, and on the next day Sir Walter Raleigh died on the scaffold, in execution of a sentence which had been suspended for 15 years, and during which time he had received from the king a commission as admiral, which Lord Chancellor Bacon declared was "a sufficient pardon for all that is passed already."

The King v. *The Inhabitants of Wigan*, 1 W. Blackstone, 47. There was a hunting match at Newtown, in Lancashire, at which some of the gentlemen in attendance proclaimed the Pretender, and invited the people to enlist in his service. Thereupon the inhabitants of Wigan met at beat of drum and quelled the disturbance, in doing which they broke open and rifled houses and "committed several unwarrantable acts on the road."

A motion was made for an information against them for a riot, but the court refused it.

LEE, C. J., said people rising in this manner with a view to support the government, are not to be blamed.

WRIGHT, J., said that every subject was bound by his allegiance to do as these people had done.

It is rather difficult for us, removed at this distance from the excitement of those days, to discover why these men were not just as guilty of a riot, in thus taking the law into their own hands, as the other side were.

The decision seems to me to be a direct sanction to private war, and shows the subserviency of the courts to power, for they would hardly have so decided if the motion had been against the other side.

Ever since the Roman Conquest of Great Britain imprisonment for debt was a part of the administration of justice in England. At no time probably was it more than during the time of the Stuarts. Under the Protectorate of Cromwell a report upon the subject was made, from which it appeared that of 393 inmates of the Upper Bench prison all but three or four were for debt. Several had been in prison 14 years, one 21 years, one 23 years and one for 38 years!

But it was not in England alone that there was this strange administration of justice. In the days of "Salem Witchcraft," there were extraordinary things done under its name. We give a few cases.

In Calif's "Wonders of the Invisible World," page 295, it is said: "The most remarkable of the trials was of Sarah Duston. She was a woman of about seventy or eighty years of age. To usher her into her trial, a report went before that if there was a witch in the world, she was one as having been so accounted of for twenty or thirty years. * * * There were a multitude of witnesses produced against her; but what testimony they gave in seemed wholly foreign, as of accidents, illness, etc., befalling them or theirs after some quarrel. * * * The spectre evidence was not made use of, so that the jury soon brought her in not guilty. * * * After she was cleared, Judge DANFORTH admonished her in these words: '*Woman, woman, repent; these are shrewd things come in against you.*' She was remanded to prison for her fees, and there in a short time expired."

Page 296: "April 25, 1693. The first Superior Court was held at Boston for the county of Suffolk; the judges were the Lieutenant-Governor, Mr. Danforth, Mr. Richards, and Mr. Sewall, Esquires. * * * The most remarkable was what related to Mary Watkins, who had been a servant and lived about seven miles from Boston." * * * The grand jury, though sent out again and again by the court, persisted in refusing to find an indictment. "She was continued for some time in prison, etc., and at length was sold to Virginia."

In an Appendix to that work, there is the following report of an examination before a committing magistrate:

GILES CORY.

"The examination of Giles Cory at a court at Salem village, held by John Hathorn and Jona Curwin, Esqs., April 19, 1692.

Giles Cory, you are brought before authority upon high suspicion of sundry acts of witchcraft; now tell us the truth in this matter.

I hope, through the goodness of God, I shall; for that matter, I never had no hand in, in my life.

Which of you have seen this man hurt you?

Mary Wolcott, Mercy Lewis, Ann Putnam, Jr., and Abigail Williams, affirmed he had hurt them.

Hath he hurt you, too? (Speaking to Elizabeth Hubbard. She, going to answer, was prevented by a fit.)

Benjamin Gold, hath he hurt you?

I have seen him several times, and been hurt after it, but cannot affirm it was he.

Hath he brought the book to any of you?

Mary Wolcott and Abigail Williams and others affirmed he had brought the book to them.

Giles Cory, they accuse you, or your appearance, of hurting them, and bringing the book to them. What do you say? Why do you hurt them? Tell us the truth.

I never did hurt them.

It is your appearance hurts them, they charge you; tell us what have you done?

I have done nothing to damage them.

Have you never entered into contract with the Devil?

I never did.

What temptation have you had?

I never had temptation in my life.

What! Have you done it without temptation?

What was the reason (said Goodwife Bibber) that you were frighted in the cow-house? and then the questionist was suddenly seized with a violent fit.

Samuel Braybrook, Goodman Bibber, and his daughter testified that he had told them this morning that he was frighted in the cow-house.

Cory denied it.

This was not your appearance but your person, and you told them so this morning. Why do you deny it?

What did you see in the cow-house?

I never saw nothing but my cattle.

Divers witnessed that he told them he was frighted.

Well, what do you say to these witnesses? What was it frighted you?

I do not know that ever I spoke the word in my life.

Tell the truth, what was it frighted you?

I do not know any thing that frighted me.

All the afflicted were seized now with fits, and troubled with pinches. Then the court ordered his hands to be tied.

What! Is it not enough to act witchcraft at other times, but must you do it now in the face of authority?

I am a poor creature, and cannot help it.

Upon the motion of his head again they had their heads and necks afflicted.

Why do you tell such wicked lies against witnesses, that heard you speak after this very manner this morning?

I never saw any thing but a black hog.

You said that you were stopt once in prayer—what stopt you?

I cannot tell; my wife came toward me, and found fault with me for saying, living to God and dying to sin.

What was it frighted you in the barn?

I know nothing frighted me there.

Why here are three witnesses that heard you say so to-day.

I do not remember it.

Thomas Gould testified that he heard him say that he knew enough against his wife that would do her business.

What was that you knew against your wife?

Why that of living to God and dying to sin.

The Marshal and Bibber's daughter confirmed the same that he said he could say that that would do his wife's business.

I have said what I can say to that.

What was that about your ox?

I thought he was hipt.

What ointment was that your wife had when she was seized? You said it was ointment she made by Major Gidney's direction?

He denied it, and said she had it of Goody Bibber, or from her direction.

Goody Bibber said it is not like that ointment.

You said you knew, upon your own knowledge, that she had it of Major Gidney.

He denied it.

Did not you say, when you went to the ferry with your wife, you would not go over to Boston now for you should come yourself next week?

I would not go over because I had not money.

The Marshal testified he said as before.

One of his hands was let go and several were afflicted. He held his head on one side, and then the heads of several of the afflicted were held on one side. He drew in his cheeks and the cheeks of some of the afflicted were suckt in.

John Bibber and his wife gave in testimony concerning some temptations he had to make way with himself.

How doth this agree with what you said that you had no temptations?

I meant temptations to witchcraft.

If you can give way to self-murther, that will make way to temptation to witchcraft?

NOTE. — There was witness by several that he said he would make way with himself and charge his death on his son.

Goody Bibber testified that the said Cory called said Bibber's husband damned devilish rogue.

Other vile expressions testified in open court by several others.

SALEM VILLAGE, April 19, 1692.

Mr. Samuel Parris being desired to take in writing the examination of Giles Cory, delivered it in, and upon hearing the same and seeing what we did at the time of his examination, together with the charge of the afflicted persons against him, we committed him to their majesties' gaol.

JOHN HATHORN.

The termination of this case is recorded in the same volume.

"Giles Cory pleaded not guilty to his indictment, but would not put himself on trial by the jury (they having cleared none upon trial), and knowing there would be the same witnesses against him, but rather chose to undergo what death they would put him to. In pressing, his tongue being prest out of his mouth, the sheriff, with his cane, forced it in again when he was dying. He was the first in New England that was ever prest to death."

Surely, we may be thankful that we do not live in such times; that our lot is cast in pleasanter places, and that although we may feel that our administration of justice is not yet quite perfect, we may be content with the progress we have made toward a state of society where such barbarities cannot be perpetrated; and where, generally, we may be assured that strict justice can and will be done, as well between man and man as between the citizen and his government.

The Anti-Rent trials in Columbia and Delaware counties in 1845; the Astor Place Riot trials in New York in 1849, and the recent abandonment of prosecutions against the leaders of the Rebellion, are forcible illustrations that in this country strict justice can be done and mercy shown even amid the highest popular excitement.

Our progress seems to have been on Bacon's principle of Reform: "To make a stand on the ancient way, and look about us to discover what is the straight and right way," and to "follow the example of time itself, which, indeed, innovateth greatly, but quietly, and by degrees scarcely to be perceived."

THE ROMAN LAW OF LUNACY.

Without entering into a medical description of the state of madness, which was just the same among the Romans as ourselves, I shall simply content myself with asserting that at present there exists no exact definition of *madness*. From a state of perfect health there are cases in various stages of madness down to perfect mental and physical prostration, and the gradation of the disease is as imperceptible as the gradation of color or of tone. It is impossible from one stage of insanity to draw a general definition which will answer all the rest. The test of any individual case of insanity is not by placing it in comparison with some species, or even the genus of insanity, but by comparing or by testing it with sanity. There are, as facts tell us, but two states of mental condition — a sane and insane one. The mind, then, if not of the one, must be of the other. It is incorrect to say, that madness consists in reasoning correctly from "erroneous premises," as Locke defines it; or, "erroneously from correct premises," as some others will have

it. Locke's definition and the succeeding one may be applied to certain stages of insanity, as of monomaniacs; but how will they apply to those cases where the features are void of expression, the brain of thought, the countenance vacant, the eyes uncontrollably wandering, the instinct lost; where the poor, wretched creatures, unconscious of their existence, heedless to the calls of sinking nature, remain silent and rigidly motionless, their limbs becoming paralyzed, till death, as an angel of mercy, releases them from their misery? The definition of Dr. Spurzheim and others of his school is, that insanity is aberration of any mental power (an intellectual faculty or moral feeling or propensity), from the healthy state, with an inability, on the part of the individual, to discern its unhealthiness or to resist it.

This definition applies to other forms of insanity than those of Mr. Locke's school, and is quite as applicable as a general definition of insanity. But though we may not arrive at a complete and perfect definition of insanity, we may do much good by a judicious and careful classification of the grades of the disease, which, as yet, has never been completed, though attempted.

The Roman lawyers classified their kinds of madness into Dementia and Furor; of these two terms *dcmentia* has the wider signification, and embraces *furor*—thus *propter furorem vel quem alium casum dementiæ;*(*a*) though there are some passages which serve to make these terms equivalent to each other—thus, "*plerigue vel furorem vel dementiam fingunt;*(*b*) *in furore aut dementia dederit;*(*c*) *vel demens vel furiosus;* (*d*) *furiosus vel demens;* (*e*) *coram furioso vel demente.*(*f*) The alternative term *vel* does not in these passages assist to find out whether the two terms are both generic or both specific, or one generic and the other specific.

The following passage shows, by the peculiar values of "tam" and "quam," that there was a difference—thus, *tam* dementis, *quam* furiosi.(*g*) And yet, in the following passage of Proculus, one term is substituted for the other as an equivalent: *Bonorum possessiones dementis curatori data, legata a curatore qui furiosum defendit peti poterunt.*(*h*) Further examples of a certainly inexact use of these terms will be found in D. 27, 10; but the rule to be drawn from an examination of a multitude of examples, and not from one merely, is that *dementia* is the *generic* term and *furor* the *specific* one.

When the furiosus was incurable he was said to be *continua mentis alienatione,*(*i*) "perpetuo furiosus."(*j*) The general term was perpetuo. A furiosus, whose madness was not uninterrupted by sane moments, was said *Intermissionem habere, Intervalla insaniæ habere,*(*l*) or *Furor intervallum habere.*(*m*) The intervals themselves were called Inducicæ, Dilucida Intervalla, Intermissiones.

(*a*) D. 47, 10, 17, 11.
(*b*) D. 27, 10, 6.
(*c*) D. 26, 5, 8, 1.
(*d*) C. 37, 1, ult. s. 1.
(*e*) D. 5, 2, 2.
(*f*) D. 4, 8, 27, 5.
(*g*) C. 1, 4, 28.
(*h*) D. 31, b. 2, 48, 1; and see also D. 27, 10, 7.
(*i*) D. 1, 18, 14.
(*j*) D. 5, 1, 12, 2; 24, 3, 22, 7; C. 6, 26, 9.
(*l*) D. 28, 1, 20, 4; C. 5, 70, 6; G. Com. 1 2.
(*m*) D. 24, 3, 22, 7.

In his legal relations the furiosus was at all times considered in law as a juristical person, which is more than a venter was, for there were, as I have before shown, some cases in which a venter was not. The furiosus, by means of his diseased mind, was considered by positive law as an incapax in respect of gestio, and was so classed under the genus incapax with divers other species, as impubis, surdus, mutus, etc. Being such incapax, it follows, that though, as a juristical person, he has the *jus contrahendi*, yet, as an incapax, he has not the power (potestas) of exercising that jus, either in favor of himself or of another. If the jus be exercised at all, the law declares that it shall be exercised by a capax, in order that the requirements of the rule as to parties to contracts, namely, "that the parties making the contract should both be capaces," should be fully carried out. *Furiosus nullum negotium gerere potest* (*a*) is a principle of the Roman law which scarcely needs confirming, and the ground of such principle is *quia non intelligit quid agit.* Of the rights and duties which arise upon contracts of furiosi (made by their curators), there is a distinction from those of sane persons. If the law sees that in the making of the contract the furiosus was duly represented, in person and interest, by a sane person, it is satisfied, and allows the contract to operate; if it be not satisfied, then it will suspend it, assuming the contract to be duly made by a proper curator; then, as between the furiosus and the curator, it is to be considered with reference to the law respecting curators and agents; and, as between the furiosus and third parties, it falls under the general law or principle common to all contracts. As regards his position in testamentary matters, he had the testamenti factio, although he had not the potestas faciendi testamentum. He could acquire under a testament, though he could not make one. If furiosi make testaments during lucid intervals (quo furor eorum intermissus est), they are by the Roman law regarded as *testati.* That testament is valid which is made during a sane period, or before they become insane (furorem facerint), for neither a testament rightly made, nor any other business (negotium) rightly done, will be nullified by subsequent insanity. If the furiosus makes a testament in furorem, it is, in truth, no testament at all, and must be carefully distinguished from the inofficiosum testamentum, which presumes a capacity to make in the maker, and though not void, may be voidable on extrinsic grounds, as in exhæredation. (See D. 5, 2, 5, and Just. 2, 18.)

Marriage among the Romans, being a contract, falls under the general rule as to incapacity. In short, in all those matters of law in which the presence of *voluntas* must be made manifest, the furiosus cannot himself act, but must act by another; and where that voluntas must be made manifest by the principal only, as in marriage, testacy, etc., the curator cannot act. Hence, there can be no such act done by the furiosus. A furiosus being a person whose peculiar disease deprives him of the power of mental control—*i. e.*, the *control over the mind*—has, in all systems of law, special provision made for his protection and welfare. His affairs and his person are placed in the care of approved people, whose duty it is to act in all

(*a*) Inst. Just. L. 3, 20, 8.

things as well and as carefully toward the unfortunate furiosus as they would to themselves. These people the Romans called curatores. They were chosen from the *agnati* by the laws of the twelve tables, except in those cases where appointed by the præfectus urbi, or the prætor, in those cases which arose within the district of the city of Rome, and by the præsides of the provinces in cases within the provinces.

The mode of appointing the curatores was by inquisition — the leading features of which are still preserved in the English inquisition *de lunatico inquirendo* or commission of lunacy. It seems that the appointing of curatores among the Romans was by virtue of their common law. In the case of a "*clara persona*," a person of aristocratic rank, who, being a furiosus, was in debt, and whose bona were privileged from being levied, it was by S. C. ordained that the bona could be taken to satisfy the creditors, and that the prætor or præsides, as the case may be, could appoint a curator for that purpose.(*a*)

This was in abrogation of an older rule of law which protected the goods of noble persons from being distrained. The appointing of a curator by the prætor, or the præsides, took place in those cases where the curator was *not appointed by testament;* the appointment by the testator required in certain cases confirmation by the prætor. Thus: *Si furioso puberi quanquam majori annorum viginti quinque, curatorem pater testamento dederit, eum prætor dare debet, secutus patris voluntatem; manet enim ea datio curatoris apaud prætorem.* (*b*) In this case had the furiosus been under 25, there would have been no ground for the prætor's interference, by being within the period which the law fixes for the duration of curatorship, but then upon the furiosus attaining the age of 25, the confirmation by the prætor of the testamentary appointment was essential; otherwise it would terminate by law, usque ad vicesimum, quintum annum completum curatores accipiunt. (Just. 1, 23 Pr.) The duty of the curator is to have regard, not only to the preservation of the property, but to the bodily health and condition of the furiosus. (*c*) He was bound to administer the bona with as much care as if they were his own; he could not part with them. If, upon sufficient proof of wasting, or intent to waste, he would not give the required satisdatio, or if he, in other respects, improperly administered, or omitted properly to administer the estate, the pro-consul could remove him and substitute another in his place, who could sue him upon the negotiorum gestio. The heirs of the furiosus also had a right of action against him by way of negotiorum gestio; in such case, however, assuming that the removed curator had been previously sued by his curator sequens, he had a plea of res judicatæ against the hæres, which was here in the nature of a plea in bar. The furiosus might have separate curators — one in respect of the corpus furiosi, and the other in respect of the bona, in the same way as the venter had two curators.(*d*)

I have in this brief sketch endeavored to show the leading features in the Roman law of Dementia. To have shown what acts of the curator bind the furiosus, and what not, would have extended this article beyond due limits, and therefore it is reserved for a future occasion. The English and Scotch systems upon this subject are evidently of Roman origin. See Bracton, *f* 375, *b*, and 420 *b*, Stair's Institutes and Erskine's ditto, *h. t.*

(*a*) D. 27, 10, 5.
(*b*) D. 27, 16.
(*c*) D. 27, 10, 7.
(*d*) D. 37, 9. The same in the English system, Shelford Lun c. 5, s. 2 and 3.

LAW AND LAWYERS IN LITERATURE.*

IV.

BUTLER.

Sam Butler had not a high opinion of lawyers, which perhaps was due to his having married a widow whom he thought possessed of a great fortune, which, being placed on bad security, or through the unskillfulness or roguery of a lawyer, was lost. In his common place book, he says a lawyer never ends a suit, but prunes it, that it may grow the faster, and yield a greater increase of strife. The same idea occurs in Hudibras:

"So lawyers, lest the bear defendant,
And plaintiff dog, should make an end on 't,
Do stave and tail with writs of error,
Reverse of judgment, and demurrer,
To let them breathe awhile, and then
Cry whoop, and set them on again."

His line,

"Like scriv'ner newly crucify'd,"

refers to the cutting off the ears, inflicted on lawyers or scriveners guilty of dishonest practices. In another place he says:

"Others believe no voice t'an organ
So sweet as lawyer's in his bar-gown,
Until, with subtle cobweb cheats,
They're catch'd in knotted law, like nets;
In which, when once they are imbrangled,
The more they stir, the more they're tangled;
And while their purses can dispute,
There's no end of th' immortal suit."

Of the Pickwickian nature of our quarrels, and the character of our learning, he holds these just views:

"For law 's the wisdom of all ages,
And manag'd by the ablest sages;
Who, though their bus'ness at the bar
Be but a kind of civil war,
In which th' engage with fiercer dudgeons
Than e'er the Grecians did, and Trojans,
They never manage the contest
T' impair their public interest;
Or by their controversies lessen
The dignity of their profession."
* * * * * * *
"While lawyers have more sober sense
Than t' argue at their own expense,
But make their best advantages
Of others' quarrels, like the Swiss;
And out of foreign controversies,
By aiding both sides, fill their purses;
But have no int'rest in the cause
For which th' engage and wage the laws,
Nor further prospect than their pay,
Whether they lose or win the day.
And tho' th' abounded in all ages
With sundry learned clerks and sages;
Tho' all their bus'ness be dispute,
With which they canvass ev'ry suit,
They've no disputes about their art,
Nor in polemics controvert:
While all professions else are found
With nothing but disputes t' abound."
"But lawyers are too wise a nation
T' expose their trade to disputation,
Or make the busy rabble judges
Of all their secret piques and grudges;
In which, whoever wins the day,
The whole profession's sure to pay.
Besides, no mountebanks, nor cheats,
Dare undertake to do their feats,
When in all other sciences
They swarm like insects, and increase.
For what bigot durst ever draw,
By Inward Light, a deed in law?
Or could hold forth, by revelation,
An answer to a declaration?

For those that meddle with their tools,
Will cut their fingers, if they're fools;
And if you follow their advice,
In bills, and answers, and replies,
They'll write a love letter in chancery."

But again:

"He that with injury is griev'd
And goes to law to be reliev'd,
Is sillier than a sottish chouse,
Who, when a thief has robb'd his house,
Applies himself to cunning men
To help him to his goods agen;
When all he can expect to gain,
Is but to squander more in vain."

A righteous hit at "detectives." Under these lines, in Butler's MS., are the following strictures on lawyers:

"More nice and subtle than those wire-drawers,
Of equity and justice, common lawyers:
Who never end, but always prune a suit
To make it bear the greater store of fruit.
As laboring men their hands, criers their lungs,
Porters their backs, lawyers hire out their tongues.
A tongue to mire and gain accustom'd long,
Grows quite insensible to right or wrong."

The absurd practice of verifying the answer, but not the petition in chancery, is thus commented on:

"And knowing he that first complains,
Th' advantage of the business gains;
For courts of justice understand
The plaintiff to be eldest hand;
Who what he pleases may aver,
The other nothing till he swear."

The scene in which Hudibras states his case to his counsel is most admirable. But first the character of the counsel, who is also a justice, is drawn in the most unfavorable light. He was

"A lawyer fit for such a case,
An old dull sot, who told the clock,
For many years at Bridewell dock."

The puisne judge was formerly called the tell-clock, as supposed to be little employed, but listening how the time went, something like our "side justices." He finds the justice in his den,

"With books and money plac'd for show,
Like nest-eggs to make clients lay,
And for his false opinion pay."

The dialogue between the client and his counsel shows a knowledge of human nature and of law rarely paralleled in literature:

"Quoth he, there is one Sidrophel
Whom I have cudgell'd. Very well.
And now he brags he hath beaten me—
Better and better still, quoth he—
And vows to stick me to the wall,
Where'er he meets me—Best of all.
'Tis true the knave have taken 's oath
That I robb'd him—Well done, in troth.
When he 's confess'd he stole my cloak,
And pick'd my fob, and what he took;
Which was the cause that made me bang him,
And take my goods again—Marry hang him.
Now, whether I should beforehand
Swear he robb'd me?—I understand.
Or bring my action of conversion
And trover for my goods?—Ah, whoreson!
Or, if 'tis better to indite,
And bring him to his trial?—Right.
Prevent what he designs to do,
And swear for th' state against him?—True.
Or whether he that is defendant,
In this case, has the better end on't;
Who, putting in a new cross-bill,
May traverse th' action?—Better still.
Then there's a lady too—Aye, marry.
That's easily prov'd accessary;
A widow, who by solemn vows,
Contracted to me for my spouse,
Combin'd with him to break her word,
And has abetted all—Good Lord!
Suborn'd th' aforesaid Sidrophel
To tamper with the dev'l of hell,
Who put m' into a horrid fear,
Fear of my life—Make that appear.
Made an assault with fiends and men
Upon my body—Good agen.
And kept me in a deadly fright,
And false imprisonment, all night.
Meanwhile they robb'd me, and my horse,
And stole my saddle—Worse and worse.
And made me mout upon the bare ridge,
T' avoid a wretcheder miscarriage."

The lawyer approves his case and would like to have it his own case.

"But we that practise dare not own;
The law severely contrabands
Our taking bus'ness off men's hands;
'Tis common barratry, that bears
Point-blank an action 'gainst our ears,
And crops them till there is not leather,
To stick a pen in left of either;
For which some do the summer-sault,
And o'er the bar, like tumblers, vault:
But you may swear at any rate,
Things not in nature for the state;
For in all courts of justice here
A witness is not said to swear,
But make oath, that is, in plain terms,
To forge whatever he affirms.
I thank you, quoth the Knight, for that,
Because 'tis to my purpose pat—
For Justice, tho' she's painted blind,
Is to the weaker side inclin'd,
Like charity; else right and wrong
Cou'd never hold it out so long,
And, like blind fortune, with a sleight,
Convey men's interest and right,
From Stiles's pocket into Nokes's,
As easily as *hocus pocus;*
Plays fast and loose, makes men obnoxious;
And clear again, like *hiccius doctius.*"

His lawyer also counsels him to

"Retain all sorts of witnesses,
That ply i' th' Temple, under trees;
Or walk the round, with knights o' th' posts,
About the cross-legg'd knights, their hosts;
Or wait for customers between
The pillar-rows in Lincoln's-Inn;
Where vouchers, forgers, common-bail,
And affidavit-men ne'er fail
T' expose to sale all sorts of oaths,
According to their ears and clothes,
Their only necessary tools,
Besides the Gospel, and their souls;
And when ye 're furnished with all purveys,
I shall be ready at your service."

Of the nature of an oath, Hudibras says:

"Oaths were not purpos'd, more than law,
To keep the good and just in awe,
But to confine the bad and sinful,
Like mortal cattle in a pinfold."

In short, Hudibras bristles all over with accurate knowledge of law and scathing sarcasms on its ministers and administration. His correct use of law phrases is not singular when we learn that he was for some years clerk to a justice, but nothing short of genius can account for his remarkable insight into the human mind and human motives.

POPE.

Pope has immortalized one lawyer, Mr. Fortescue, to whom his first satire is addressed:

"I come to counsel learned in the law;
You'll give me like a friend, both sage and free,
Advice; and (as you use) without a fee."

Fortescue was the author of the humorous report in Scriblerus, "Straddling *versus* Stiles," in which this nice point is discussed with professional phraseology and due gravity: "Sir John Swale, of Swalehall, in Swaledale, by the river Swale, knight, made his last will and testament, in which, among other bequests, was this, viz.: 'Out of the kind love and respect that I bear unto my much-honored and good friend, Mr Matthew Straddling, gent., I do bequeath unto the said Matthew Straddling, gent., all my black and white horses.' The testator had six black horses, six white horses, and six pied horses. The debate, therefore, was whether or no the said Matthew Straddling should have the said pied horses by virtue of the said bequest." The case is ably debated, though not at

such length as legal cases usually are, when it is suddenly terminated by a motion in arrest of judgment, that the pied horses were mares; and thereupon an inspection was prayed!

Fortescue in 1738 was master of the rolls, but he would never have been remembered by posterity, had it not happened that he worked for a poet for nothing.

Another attorney has been immortalized by another poet, and for another reason. In "Retaliation," by

GOLDSMITH,

we find the following on "honest Tom Hickey," who gave the poet good dinners:

"Here Hickey reclines, a most blunt, pleasant creature,
And slander itself must allow him good nature;
He cherish'd his friends, and he relish'd a bumper;
Yet one fault he had, and that one was a thumper.
Perhaps you may ask if the man was a miser:
I answer, No, no, for he always was wiser.
Too courteous, perhaps, or obligingly flat?
His very worst foe can't accuse him of that.
Perhaps he confided in men as they go,
And so was too foolishly honest? Ah, no!
Then what was his failing? come, tell it, and burn ye;
He was — could he help it? a special attorney."

In "The Logicians Refuted," he controverts the idea that reason belongs to man alone, and says, among other things:

"Who ever knew an honest brute,
At law his neighbor prosecute,
Bring action for assault and battery."

In "The Citizen of the World," Goldsmith describes a visit to Westminster Hall, made by the Chinese narrator with a friend who has a law-suit there, and who has "been on the eve of an imaginary triumph these ten years." His lawyer tells him that he "has Salkeld and Ventris strong in his favor, and there are no less than fifteen cases in point." Unfortunately, Coke and Hale are against him. The Chinese cannot understand why a case should be decided upon precedents. His friend explains that it is in order to consume time, for "the more time that is taken up in considering any subject, the better it will be understood." The Chinese is astonished at the number of attendants at court. His friend says: "They live by watching each other. For instance, the catch-pole watches the man in debt, the attorney watches the catch-pole, the counselor watches the attorney, the solicitor the counselor, and all find sufficient employment." Just then the attorney informs his friend that his cause is put off till another term, and the Chinese and his friend go to see Bedlam.

JAMES SMITH,

one of the authors of "Rejected Addresses," wrote this epigram, at the expense of lawyers, on the street in which he lived in London:

"In Craven street, Strand, the attorneys find place,
And ten dark coal-barges are moor'd at its base.
Fly, Honesty, fly! seek some safer retreat;
There's *craft* in the river, and *craft* in the street."

But Sir George Rose came to their rescue in the following extemporaneous after-dinner epigram:

"Why should Honesty fly to some safer retreat,
From attorneys and barges? — 'od rot 'em!
For the lawyers are *just* at the top of the street,
And the barges are *just* at the bottom."

ROGERS.

The poet Rogers, in his poem "Italy," dresses up a law incident very neatly, and entitles it "The Bag of Gold." Three banditti deposited with their hostess, Lucrezia, a bag of gold, to be delivered on the joint order of the three. They departed, but one soon returned, asking leave to put his seal on the bag as the other two had done, and while the hostess' attention was momentarily withdrawn, made off with the treasure. Of course, in due time, the other two appear and demand the gold. Ruin stares the hostess in the face. No counselor could be found to advocate her cause, because she had no money to pay fees. At this juncture, when the trial day was approaching, Lorenzo, inspired by love of her daughter, Gianetta, volunteers his services, and on the trial takes the self-evident position that as the gold was to be delivered to the three, two cannot lawfully claim it. His defense was successful, and fame and marriage with the fair Gianetta followed. The original of this story is said to be found in a case of Attorney-General Noy, with whose client, an innkeeper, three drovers had made a similar deposit.

TAYLOR.

In the works of John Taylor, the Water poet, we find a beggar's prayer for a lawyer:

"May the terms be everlasting to thee, thou man of tongues; and may contentions grow and multiply; may actions beget actions, and cases engender cases as thick as hops; may every day of the year be a Shrove Tuesday; let proclamations forbid fighting to increase actions of battery; that thy cassock may be three-piled, and the welts of thy gown may not grow thread-bare!"

THOMAS FULLER,

in his character of "The Good Advocate," says:

"He not only hears but examines his client, and pincheth the cause where he fears it is foundered. For many clients in telling their case rather plead than relate it, so that the advocate hears not the true state of it till opened by the adverse party." "If the matter be doubtful, he will only warrant his own diligence. Yet some keep an assurance office in their chamber, and will warrant any cause brought unto them, as knowing that if they fail, they lose nothing but what long since was lost — their credit. He makes not a Trojan siege of a suit, but seeks to bring it to a set battle in a speedy trial. Yet sometimes suits are continued by their difficulty, the potency and stomach of the parties, without any default in the lawyer." "In trivial matters, he persuades his client to sound a retreat and make a composition. When his name is up, his industry is not down, thinking to plead not by his study, but his credit. Commonly, physicians, like beer, are best when they are old; and lawyers, like bread, when they are young and new. But our advocate grows not lazy." "He is more careful to deserve than greedy to take fees." "Yet shall he, besides those two great felicities of common lawyers, that they seldom die either without heirs or making a will, find God's blessing on his provisions and posterity."

These are the sentiments of a wise, just, and sensible man. From his character of "The Good Judge," we extract the following:

"He harkens to the witnesses, though tedious."

"Many country people must be impertinent before they can be pertinent, and cannot give evidence about a hen, but first they must begin with it in the egg.

All which our judge is contented to hearken to. He meets not a testimony half way, but stays till it come at him." "If any shall brow-beat a pregnant witness on purpose to make his proof miscarry, he checketh them, and helps the witness that labors in his delivery. On the other hand, he nips those lawyers, who, under a pretense of kindness to lend a witness some words, give him new matter—yea, clean contrary to what he intended." "His private affections are swallowed up in the common cause as rivers lose their names in the ocean."

JOHNSON.

Sam Johnson had some good ideas about law as about most other subjects. When the goose, Boswell, said to him, that "a gay friend had advised him against being a lawyer, because he would be excelled by plodding blockheads," the great man replied: "Why, sir, in the formulary and statutory part of law, a plodding blockhead may excel; but in the ingenious and rational part of it, a plodding blockhead can never excel." He called the study of the law copious and generous. His opinions on the morality of a lawyer's receiving fees, and acting for a cause which he knows to be bad, are too familiar to our profession to justify quoting them here, and were dictated by the good sense of a true moralist. Johnson was, himself, no mean lawyer, as is shown by his argument furnished to Boswell on Vicious Intromission. His supposition, however, that with the increase of precedents, the less occasion there would be for lawyers, is hardly borne out by experience; on the contrary, the more numerous the precedents, the greater seems the need of a class of expert reasoners to explain and distinguish them.

Johnson says elsewhere: "To hiss a pleader at the bar would, perhaps, be deemed illegal and punishable."

BURKE.

Burke attributed the untractable spirit of the American colonists in a large measure to their general study of law. In his speech on Conciliation with America, he says:

"This study renders men acute, inquisitive, dexterous, prompt in attack, ready in defense, full of resources. In other countries, the people, more simple, and of a less mercurial cast, judge of an ill principle in government only by an actual grievance; here they anticipate the evil, and judge of the pressure of the grievance by the badness of the principle. They augur misgovernment at a distance, and snuff the approach of tyranny in every tainted breeze."

SIDNEY.

While our profession are popularly accused of bad manners, it is gratifying to learn that Sir Philip Sidney, that soul of honor and entire gentleman, held us in the estimation indicated in the following extract from an Apologie for Poetrie:

"And for the Lawyer, though *Jus* bee the daughter of Justice, and Justice the chiefe of Vertues, yet because hee seeketh to make men good, rather *Formidine pœnæ*, than *Virtutis amore*, or to say righter, dooth not endeavor to make men good, but that their evill hurt not others; having no care so hee be a good Cittizen, how bad a man he be. Therefore, as our wickednesse maketh him necessarie, and necessitie maketh him honorable, so is he not in the deepest trueth to stande in rancke with these; who all indeavour to take naughtines away, and plant goodnesse even in the secretest cabinet of our souls. And these foure are all that any way deale in that consideration of men's manners, which beeing the Supreme knowledge, they that best breed it deserve the best commendation."

The other three of "these foure" are the Poet, the Historian and the Philosopher. Pretty good company for men of bad manners, truly! Sir Philip further on discusses the nice point whether poets are blameworthy for giving names to men they write of, and thus arguing a conceit of an actual truth: "And doth the Lawyer lye then," says he, "when under the names of *John a Stile* and *John a Noakes* hee puts his case?" But Poetry, he acknowledges, may be abused, and so may Law: "Dooth not knowledge of Law, whose end is to even and right all things, being abused, grow the crooked fosterer of horrible injuries."

THE NEW SUPREME COURT BILLS.

The following are the texts of the three bills introduced into the State Senate providing for the organization of the Supreme Court under the new judiciary article:

INTRODUCED BY SENATOR MURPHY, JANUARY 6.

AN ACT relating to the Supreme Court.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The general terms of the supreme court, as organized under existing laws, are abrogated from and after the first day of May next, and thereafter all causes and matters then pending in such general terms, or which, according to law, might be brought before them, shall be cognizable before the general terms organized under this act.

§ 2. For the purpose of organizing general terms of the supreme court pursuant to the seventh section of the amended sixth article of the constitution, the state shall be divided into three judicial departments. The counties of New York, Kings, Queens, Suffolk, Richmond, and Westchester, shall constitute the first department. The counties of Rockland, Putnam, Orange, Dutchess, Ulster, Greene, Columbia, Sullivan, Albany, Rensselaer, Schenectady, Delaware, Schoharie, Otsego, Montgomery, Herkimer, Fulton, Hamilton, Saratoga, Washington, Warren, Essex, Clinton, Franklin, St. Lawrence, Lewis, and Oneida, shall constitute the second department. The counties of Jefferson, Oswego, Madison, Chenango, Broome, Cortland, Onondaga, Cayuga, Tompkins, Tioga, Chemung, Schuyler, Seneca, Wayne, Ontario, Steuben, Yates, Livingston, Monroe, Allegany, Orleans, Cattaraugus, Genesee, Wyoming, Niagara, Erie, and Chautauqua, shall constitute the third department.

§ 3. Prior to the first day of May next, there shall be established in each of said departments a branch of the supreme court, which may be called the general term, or the supreme court of the department, to be composed of a presiding justice and two associate justices, and the first designation of such presiding justice and associate justices shall be made by the governor, from the whole bench of justices of the supreme court. Such designation shall be in writing, and shall be filed in the office of the secretary of state. The presiding justice shall continue to act as such during his official term as justice of the supreme court. The associate justices shall continue to act as such

for five years from the thirty-first day of December next, after their designation, or until the earlier expiration or close of their official terms.

§ 4. After such first designation of presiding and associate justices the judicial force herein provided for the holding of such general terms shall be maintained and supplied from time to time as may be necessary: and for that purpose other presiding and associate justices shall, from time to time, be designated, and such other and further designations shall be made by the court of appeals, if in session, by order to be entered in its minutes; or, if not in session, by the chief judge thereof. If made by the chief judge, the designation shall be in writing, and shall be filed with the clerk of the court of appeals. In all cases, any person designated as presiding justice shall act as such during his official term; and any person designated as associate justice shall act as such for five years from the thirty-first day of December next after the time of their designation, or until the earlier close of their official terms.

§ 5. The general terms shall have all the powers and jurisdiction which, under existing laws, now belong to general terms of the supreme court; and all laws relating to general terms, as now organized within the judicial districts, and to the hearing of appeals from judgments pronounced and orders made within such districts, if not inconsistent with the constitution or this act, shall apply so far as the same are applicable to judgments pronounced and orders made within the judicial departments and to the general terms instituted by this act.

§ 6. Causes and matters pending in any general term instituted by this act may be entitled in the supreme court in the proper department. Two of the justices designated shall be a quorum, and the concurrence of two shall be necessary to pronounce a decision. If two shall not concur a re-argument may be ordered. In case of such disagreement, when any one of the three justices shall not be qualified to sit, the cause may be directed to be heard in another department. To prevent a failure in the regular sittings of any general term, for want of a quorum, in consequence of the inability of the justices designated to be present, other justices may be designated as provided in the fourth section of this act, to sit for the time being. The associate justices, designated to any department, shall be competent to sit in the general term of any other department in place of any justice in such other department.

§ 7. A general term shall be held by the justices who shall be designated for duty therein, in each of the judicial departments, commencing on the fourth Tuesday of May next. In the first department, such term shall be held at the court house in the city of New York; in the second department, at the capitol in the city of Albany, and the third department, at the court house in the city of Rochester. Causes and matters arising within the several departments and cognizable at general terms, may be noticed for hearing at the terms in this section mentioned, and the clerk of the proper county shall make up a calendar for the term to be held in his county.

§ 8. At the terms specified in the last preceding section, and thereafter from time to time as the public interest may require, the justices holding the same shall appoint other general terms for their respective departments, to be held at convenient times and places; and to the end that such terms may be held in the several judicial districts of the state as required by the constitution, there shall be terms in the first and second districts within the first department; in the third and fourth districts within the second department, and in the fifth, sixth, seventh and eighth districts within the third department.

§ 9. To prevent the failure of circuit courts, special terms, and courts of oyer and terminer as the same have been heretofore appointed for the years 1870 and 1871, in consequence of the designation to be made of justices for service in the general terms as appointed by this act, it shall be the duty of the governor, on the request of two justices in any judicial district, to assign justices to hold such circuit courts, special terms and courts of oyer and terminer within such district, provided, however, that the justices in any district may themselves make provision for the holding of such courts. At least one month before the expiration of the year 1871, the justices of the supreme court, resident in each judicial department mentioned in this act, shall appoint the times and places of holding special terms, circuit courts, and courts of oyer and terminer, within their department, for two years, commencing on the first day of January, 1882, and the like appointment shall be made for every two succeeding years thereafter.

§ 10. Pursuant to the twelfth section of the said sixth amended article of the constitution, it shall be the duty of the governor, whenever the public interest shall require, to designate one or more judges of the superior court, or court of common pleas of the city and county of New York, to hold circuits and special terms of the supreme court in that city. Such designation shall be in writing, and shall specify the time and place of holding any such circuit or special term. When a case or bill of exceptions shall be made in any cause tried at such circuit or special term, the same shall be settled before the judge holding the same, and the review shall be had at a general term of the supreme court in the same manner, and with the same effect as if such circuit or special term had been held by a justice of the supreme court.

§ 11. The justices of the supreme court, in addition to their stated salaries, shall receive a per diem allowance of not exceeding five dollars per day for their actual and reasonable expenses when absent from their homes and engaged in holding any general or special term, circuit court, or court of oyer and terminer.

§ 12. This act shall take effect immediately.

INTRODUCED BY SENATOR HARDENBERGH, JAN'Y 12.

AN ACT organizing general terms, etc., of the Supreme Court under the amended judiciary article.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The justices of the supreme court of the state shall be classed in three sections. The first section shall consist of the justices residing in the first and second judicial districts; the second, of those in the third, fourth, and sixth districts; and the third, of those in the fifth, seventh, and eighth districts.

§ 2. On the third Tuesday of May next, the justices composing the first section shall meet at the city hall, in the city of New York; those of the second section at the capitol, in the city of Albany; and those of the third section at the court house, in the city of Rochester, and shall (1) choose by ballot one of their number as a "presiding justice;" (2) designate three others of their number to hold general terms with the presiding justice, and to be known, while so acting, as "general term justices," and (3) appoint circuit courts, courts of oyer and terminer, and special terms in their respective districts, for the years 1870 and 1871, and assign justices to hold them.

§ 3. The justices in each section to be so designated as general term justices shall be the three other than the presiding justice then having the shortest time to serve. Until the thirty-first of December, eighteen hundred and seventy-seven, every general term justice (being a justice of the supreme court elected or appointed for a term of eight years or less) shall be entitled to serve as such till the expiration of such term. At the expiration of such term, or if his office shall sooner become vacant by his death, resignation, or any other cause, he shall be succeeded by the justice in the same district then having the shortest time to serve. The terms of the general term justices in office, in each section, on the first day of January, eighteen hundred and seventy-eight, shall end, one on the thirty-first of December, eighteen hundred and seventy-eight, another on the thirty-first of December, eighteen

hundred and seventy-nine, and the third on the thirty-first of December, eighteen hundred and eighty; the date of the expiration of each to be determined by lot, at the general term held on or next after said first day of January, eighteen hundred and seventy-eight. After the thirty-first of December, eighteen hundred and seventy-seven, whenever the term of a general term justice shall end, according to the foregoing provisions, or shall sooner become vacant for any cause, he shall be succeeded, as such, by the justice in the same district elected for the term of fourteen years, then having the shortest time to serve, and such successor shall be a general term justice for the term of three years, and no longer. At all times, at least one of the general term justices, in each section, shall be from each judicial district, and not more than two of them, including the presiding justice, from any one district; and all the provisions of law for the designation or selection of justices to hold general terms shall be subject to this requirement. If it shall happen at any time, that two or more justices of the supreme court shall be equally entitled, under the foregoing provisions, to be designated or to succeed to the position of general term justice, they shall determine by lot which of them shall serve in that capacity.

§ 4. All the presiding justices and general term justices in the state shall meet at the capitol in the city of Albany on the second Tuesday of June next, and shall (1) appoint general terms throughout the state for the years eighteen hundred and seventy and eighteen hundred and seventy-one, and assign justices to hold them; (2) appoint a reporter of the decisions of the supreme court, and (3) adopt rules. Similar meeetings shall be held for the like purposes, on or before the first day of November, in the year eighteen hundred and seventy-one, and in every second year thereafter. At least four general terms shall be appointed, in each section, in each year, and as many more as shall be found necessary from time to time.

§ 5. On or before the fifteenth day of November, in the year eighteen hundred and seventy-one, and in every second year thereafter, the justices of the supreme court in each section, not designated to hold general terms, shall appoint circuit courts, courts of oyer and terminer and special terms, in their respective districts, and assign justices to hold them.

§ 6. A vacancy in the office of presiding justice, in any section, occasioned by expiration of term or any other cause, shall be filled by election at a meeting of all the justices of the supreme court in that section, to be called by the secretary of state as soon as practicable after the happening of such vacancy. In case no presiding justice shall be present at the time and place appointed for holding a general term, the general term justices present may appoint one of their number to act as presiding justice until a presiding justice attends.

INTRODUCED BY SENATOR WOOD, JANUARY 14.

AN ACT to organize General Terms of the Supreme Court under the amended judiciary article.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The state is hereby divided into three judicial departments. The first department shall consist of the first and second judicial districts; the second department of the third, fourth and sixth judicial disiricts, and the third department of the fifth, seventh and eighth judicial districts.

§ 2. On the third Tuesday of May next the justices residing in the first department shall meet at the city hall, in the city of New York; those residing in the second department at the capitol, in the city of Albany, and those of the third department, at the court house, in the city of Rochester, and shall:

1. Choose by ballot one of their number as a presiding justice.

2. Designate two others of their number to hold general terms with the presiding justice, and to be known as general term justices; and,

3. Appoint circuit court, courts of oyer and terminer and special sessions, in their respective districts, for the years eighteen hundred and seventy and eighteen hundred and seventy-one, and assign justices to hold them.

§ 3. Until the thirty-first day of December, eighteen hundred and seventy-seven, every general term justice (being a justice of the supreme court, elected or appointed for a term of eight years or less) shall be entitled to serve as such till the expiration of such term; at which time or whenever his office shall sooner become vacant, by his death, resignation or any other cause, the justices of the department in which such vacancy shall occur shall assemble at the place in the said department above indicated, at such time as the presiding justice of said department shall fix, and designate one of their number to fill such vacancy.

§ 4. The term of the general term justices in office in such department on the first day of January, eighteen hundred and seventy-eight, shall end, one on the thirty-first day of December, eighteen hundred and eighty, and the other on the thirty-first day of December, eighteen hundred and eighty-three. The date of the expiration of each to be determined by lot, at the general term held on or next after said first day of January, eighteen hundred and seventy-eight.

§ 5. After the thirty-first day of December, eighteen hundred and seventy-seven, whenever the term of a general term justice shall end according to the foregoing provisions, or shall sooner become vacant for any cause, the vacancy shall be filled in the manner herein before provided, and such successor shall be a general term justice for the term of six years, and no longer.

§ 6. At all times the presiding justice and the general term justices in each department, except the first, shall be designated from different districts, and in the first department the general term justices shall be designated one from each district, and all the provisions of law for the designation of justices to hold general terms shall be subject to the provisions in this section contained.

§ 7. All the presiding justices and general term justices in the state shall meet at the capitol, in the city of Albany, on the second Tuesday of June next, and shall (1) designate from the justices of the supreme court not presiding as general term justices, three justices to hold terms of the supreme court at the capitol, in the city of Albany, to hear appeals from the special terms in all non-enumerated motions, and all appeals from motions involving questions relating to the practice of the courts, fix the number of terms to be held in each year, and appoint the times of holding the same. The justices so designated shall hold said terms, one for two years, one for four years, and one for six years. The first term shall be held on the first Monday of December next, at ——, when the time each justice shall hold said court shall be determined by lot; (2) appoint general terms throughout the state for the year eighteen hundred and seventy and eighteen hundred and seventy-one, and assign justices to hold them; (3) appoint a reporter of the decisions of the supreme court; and (4) adopt rules as hereinafter provided.

§ 8. Similar meetings shall be held for a like purpose on or before the first day of November, in the year eighteen hundred and seventy-one, and every second year thereafter.

§ 9. All appeals from non-enumerated motions decided at special terms of the supreme court shall be heard by the said justices holding said court as provided in section seven.

§ 10. At least four general terms shall be appointed in each department in each year, and as many more as shall be found necessary from time to time.

§ 11. On or before the fifteenth day of November, in the year eighteen hundred and seventy-one, and in every second year thereafter, the justices of the supreme court in each department not designated to hold general terms shall appoint circuit courts, courts of oyer and terminer

and special terms in their respective districts, and assign justices to hold them.

§ 12. A vacancy in the office of presiding justice in any department, occasioned by the expiration of the term or any other cause, shall be filled by election at a meeting of all the justices of the supreme court in that department, to be called by the secretary of state as soon as practicable after the happening of such vacancy.

§ 13. In case no presiding justice shall be present at the time and place appointed for holding a general term, the general term justices present may select any justice of the supreme court to fill the vacancy, and appoint one of their number to act as presiding justice until the presiding justice attends. And in case one or both general term justices shall not be present at the time and place appointed for holding a general term, the presiding judge present may select any justice or justices of the supreme court to hold with him such general term, until such general term justice or justices shall attend.

§ 14. Civil actions hereafter commenced shall be known and designated as legal and equitable. Legal actions shall be those of which the supreme court had jurisdiction of the thirty-first day of December, eighteen hundred and forty-six; and equitable are those which on the day last aforesaid the court of chancery had jurisdiction.

§ 15. The rules and practice of the supreme court in reference to the trial of actions, and its incidents and all subsequent proceedings, as they existed on the thirtieth day of June, eighteen hundred and forty-seven, shall apply to and govern the proceedings in actions hereafter brought in the supreme court herein designated as legal actions. The rules and practice of the supreme court in reference to the trial of actions, in its incidents and all subsequent proceedings, including appeals from orders and interlocutory and final judgments and decrees, as they existed on the thirtieth day of June, eighteen hundred and forty-seven, shall apply to and govern all actions as herein designated as equitable actions; and all equitable actions hereafter commenced shall be entitled "Supreme court in equity."

§ 16. The presiding and general term justices shall, at their first meeting at the capitol in the city of Albany, make and adopt two sets of rules, one set shall prescribe the rules and practice of the supreme court in legal actions, and the other set, the rules and practice in equitable actions. And the power and authority possessed by the supreme court and the court of chancery, on the thirtieth day of December, eighteen hundred and forty-six, in reference to the practice, proceedings and rules of said courts respectively, is hereby conferred upon said presiding and general term justices, and they are hereby authorized and required to make all such rules, and adopt such practices as may be necessary for the prompt and efficient administration of justice in the prosecution of actions now pending or hereafter brought in the supreme court.

CURRENT TOPICS.

President Woolsey, of Yale, recently delivered an address before the Methodist State Convention at New Haven, on the subject of divorce. He insisted very strongly on the duty of the State governments to conform their laws on the subject to the laws of Christ, and adds that the State "cannot require what Christ forbids, nor forbid what Christ requires." He lays down the following as the "true policy in divorce laws:"

1. "To prohibit divorce from the bond of matrimony in very few cases — in only one, if such a law can pass, or in two at most — adultery and malicious desertion. 2. Again, the law ought to grant separation from the bed and board sparingly. 3. The time before divorce becomes valid ought to be such as to allow a considerable delay after the sentence. 4. The guilty party in adultery ought not to be allowed to marry again in the life-time of the innocent partner, and if malicious desertion is allowed to dissolve marriage, much more ought this to be so in that case."

When society shall have reached that state of perfection in which there shall be no more ill-assorted and unhappy marriages; no more brutality and desertion, the rigid rule of the New Testament will be sufficiently liberal, but in these days most of the States have given greater latitude to divorce, probably from a like reason to that which led Moses to "command to give a writing of divorcement," "because of the hardness of your hearts." Marriage is treated in law as a *civil contract*, and is governed by regulations deemed best calculated to facilitate the interests of society; and whether these interests are most facilitated by liberal or stringent divorce laws is a question on which both political and moral philosophers have differed.

It is to be hoped that the Court of Appeals, to be organized under the new judiciary article, will adopt a different mode of disposing of causes from that at present in vogue. Under the present system the judges hear arguments for three or four weeks and then make a division of the causes among the judges for investigation. Each judge examines during the vacation the causes assigned to him, and writes the opinion. In nine cases out of ten he has forgotten the arguments advanced, except so far as they are contained in the papers handed up. At the next term a consultation is held on the causes argued the term before. Only two or three of the judges have studied any one case and the others have usually forgotten it and the argument. They base their opinions on their general knowledge and the results of the investigations of those to whom the cause was assigned. Now, it occurs to us that it would be a much better plan to hear arguments during the forenoon — say from ten till two — and then devote the balance of the day to consultation and the writing of opinions — such opinions to be written only after the law of the case has been settled, and to contain briefly the conclusions of the court, with, perhaps, the authorities on which they are based. In this manner nine-tenths of the causes can be disposed of at once, and in a manner more likely to lead to correct conclusions, since the facts and arguments will be fresh in mind. The plan will also relieve the judges of a vast amount of labor that they would otherwise be compelled to perform in investigating authorities and writing long opinions, and will reduce materially the size or number of our Court of Appeals reports, without detracting in the least from their value. There is nothing gained by lengthy opinions, fortified at every step by the whys and wherefores. A simple and plain statement of the law as laid down by the court is all that is needed. This or similar plans have been adopted by the courts of several of the other States, by the United States Supreme Court, and we believe by some of the English courts.

It was a very unfortunate thing for Traupmann, the notorious Paris murderer, and a very fortunate thing for humanity, that he was not tried in the State of

New York. There were the most abundant grounds on which to base the "insane impulse" theory, and which is here irresistible. His advocate had evidently some notion of such a defense, but worked it up poorly. He would have gained some valuable hints had he read a detailed history of the trial of one Cole at Albany, or of one Sickles at Washington. The advocate, Lachaud, put the matter thus:

"Gentlemen, here is a young man of 20 years, and eight dead bodies of his victims! Oh, I beseech you not to believe that. The prisoner is subject to one of the most frightful moral maladies which render men irresponsible. His crime?—it is written in the book, the 'Wandering Jew.' Throughout the whole world there are men of science who are concerned with this affair, and who have their eyes on this youth of 20. One of them said to me yesterday, 'Look at him; look at his attitude; look at his arms. Well, if this man be a ferocious beast, it is best to muzzle him, and not to kill him.'"

An eminent French physician, Dr. Amedee Bertrand, pronounced Traupmann insane. Here was the possibility of a defense every whit as strong as that which cleared Cole or Sickles, but the French courts and juries seem to stick to the good old-fashioned theory that a man may have mental disease and yet know the difference between right and wrong; that however strong the homicidal impulse, if he have sufficient reason to comprehend the nature of the act he commits, he should be punished. It is to be regretted that our courts and juries have not displayed a like adhesion to this theory. The moment we depart from it, we tread uncertain and dangerous ways. Lord Macaulay used to say that the population of Great Britain consisted of "about thirty millions, mostly fools." If the theory of the physicians be correct, he might have added, "and mostly insane." The medical definition of insanity is so liberal and comprehensive as to include a very large proportion of mankind. This is harmless in itself; but becomes pernicious when it is followed by the proposition that "no insane person ought to be punished," and especially so when that proposition is adopted by the courts. It was the doctrine of Lord Hale that some kinds of insanity furnish no excuse for crime. This seems to be a very sound and sensible doctrine. Whenever a person has sufficient reason to distinguish between right and wrong, and does the wrong, he should be punished whether he has mental disease or not. If we can get back to this doctrine we shall hear very little more of "emotional insanity," "insane impulses," "melancholia," and kindred defenses that have of late proved so formidable.

We print in another column the text of the bills introduced into the Senate for the reorganization of the Supreme Court, under the new judiciary article. It is neither probable nor desirable that either bill will be passed as offered. Senator Murphy's bill provides that the first designation of general term justices shall be made by the Governor, and that subsequent designations shall be made by the Court of Appeals, or by the chief judge thereof, when such court is not in session. We fail to discover any benefit to be derived from calling in the services of the Court of Appeals to designate the general term justices. The matter would better be left entirely in the hands of either the Governor or of the justices of the several departments. The latter course provided by the bills of Messrs. Hardenbergh and Wood, we apprehend, will prove the more satisfactory. Senator Murphy's bill fails to make any provisions for the appointment of a reporter—a matter of considerable importance both to the bench and bar, and one that ought not to be over-looked. Senator Wood's bill provides for a sort of secondary general term, to consist of three justices, who are to hold terms at Albany to hear appeals from special terms in all non-enumerated motions, and all appeals from motions involving questions relating to practice. This proposition, if practicable, will relieve the regular general terms of a large amount of petty business. But perhaps the most remarkable provision is that in Senator Wood's bill (§§ 14, 15 and 16), which proposes in effect to abolish the Code, and to return to the former practice. It has always been very questionable whether we have gained much by the sweeping changes made by the Code, but we are not prepared to take such an extensive step backward as that proposed by the Senator.

These several bills, which undoubtedly contain at least the main features of the plan that will be adopted by the legislature, are of especial importance to the profession of the State, and the pages of the LAW JOURNAL will be open to any one who has any thing to say regarding their respective merits. We shall print in our next issue the text of the bill providing for the reorganization of the Court of Appeals, also that in relation to County Courts.

A bill has been introduced into the Senate, and will be passed, providing that when any justice of sessions shall fail to attend at any court of Oyer and Terminer or of Sessions, or if a vacancy shall occur in such office, the presiding judge may designate any justice of the peace in the county to serve as such justice of sessions. The act of 1847 (chap. 280, § 40) contained a provision of this kind, but it was omitted by the amendment of 1847 (chap. 470, § 35). The result has been that in several instances courts of Oyer and Terminer and of Sessions could not be organized.

In a recent number of the LAW JOURNAL we urged the necessity of the revision of the laws of this State. We are glad to notice that a bill for that purpose has been introduced into the Senate. It provides for the appointment of three commissioners by the Governor and Senate "to revise, simplify, arrange and consolidate the statutes, general and permanant in their nature," and to report to the legislature from time to time, "such contradictions, omissions and imperfections as they may discover," that defective laws may be amended or abolished. The commissioners may hold for three years, at a salary of $5,000 each, and $3,000 a year for the clerk-hire and contingencies of the commission.

A motion was recently made at the General Term of the first district to debar one Oscar A. Harris, a New York divorce lawyer, for culpable malfeasance as an attorney and counselor at law and frauds practiced in obtaining divorces. The matter was re-

ferred to a referee to take evidence as to the truth of the allegation. This divorce business as practiced by a certain class of lawyers (so called), chiefly in the city of New York, is a burning shame to the profession, and every true lawyer will agree with us that the court should treat all offenders in the matter with the utmost rigor.

The editor of the *Independent* is growing jubilant over the brightening prospects for lawyers of the fair sex. In a recent article he says:

"We salute with fervent acclamation the on-coming of the day when human beings of both sexes will be able to enter the legal profession with equal opportunities."

The key-note of this burst of rhetoric was the rumor that Anna Dickinson is about to enter the Law Department of the University of Michigan. Tilton, however, is of the opinion that the "gentle Anna" would prefer to be a "Philadelphia lawyer," and intimates that she would make a better one than any now in that city of brotherly love. If Miss Dickinson seriously cherishes any such designs, and Theodore is correct in his opinions, we have reason to sympathize with the leaders of the Philadelphia bar. No longer will they be "masters of the twelve;" their laurels will be stripped from their brows; their glory will have departed from Zion; for lo, a Portia comes, a second Daniel, learned in the law, and armed with such powers of eloquence and female charms, as to wring verdicts

> "From brassy bosoms and rough hearts of flint,
> From stubborn Turks and Tartars never train'd,
> To offices of tender courtesy."

LEGAL NEWS.

Of the sixty-six United States Senators, forty-six are lawyers.

Alpine, California, advertises for a lawyer — "a young, energetic fellow."

James McCormick, a distinguished lawyer of Pennsylvania, died at Harrisburg on the 18th inst., aged sixty-nine.

The Judges of the United States Supreme Court were recently entertained by President Grant at the White House.

The revenue officials at New York have issued warrants for the arrest of a number of New York lawyers for not paying the special tax.

Governor Fairchild recommends that the Legislature of Wisconsin submit to the people a constitutional amendment abolishing the grand jury system.

A London tramp, arrested for stealing a plum-cake from a pastry cook's shop, pleaded in extenuation that he "was not going to starve in a Christian land."

One of the Pennsylvania courts has decided that owners of dogs that bite are responsible for all injuries done, whether on the street or on the premises of the owner.

A murderer, on being sentenced to be hanged in Terre Haute, Indiana, did not catch the date, and inquired: "When did you say, your honor, that occurrence is to take place?"

A number of young practitioners at the bar in Brooklyn are about to organize a society for the discussion and acquisition of the principles and practice of the law by means of mock courts, debates, lectures, etc.

The London papers contain accounts of the rejoicing in England on the first of January, when the new bankrupt law, which abolishes imprisonment for debt, except in cases of county court judgments, came into operation.

In Ulster county, this State, a young lady who wished to marry a youth with $10,000, promised a lady friend $3,000 for her assistance. She succeeded, but the successful bride refused to pay the $3,000 when demanded, and a suit is the result.

It is stated that Frederick T. Wallace, a well-known and hitherto highly-respected lawyer in Cleveland, Ohio, has fled from that city after being detected in a long and adroit series of forgeries. The amount thus far ascertained is over $24,000.

The new Surrogate of New York county, Robert C. Hutchings, has removed all persons in his office holding positions by reason of political influence, and supplied their places with lawyers and persons versed in the law. Another important reform is the holding of Court every day in the week, except Sunday.

A Southern paper informs us that a lawyer and a red-hot stove, the one having its feet braced against the other, upset in the Chancery Court at Nashville, the other day, while Judge Gaut was reading a deposition. The fire flew all over the room, and the Chancellor vociferously declared the court adjourned.

Six Wisconsin jurors recently voted by ballot. Juror No. 1 voted, "No cose of action;" No. 2 voted, "Salt and battery, Second De Gree;" No. 3 deemed the prisoner "Gilty of Salt;" No. 4 decided there was "no action of caus;" No 5 voted it "assault and batory;" while No. 6 decided the prisoner "Guilty of an a salt only."

A man named John Seiler recently obtained, in Rochester, a verdict for $3,000 against Peter C. Ward for enticing away his (Seiler's) wife. An Illinois divorce decree was offered by the defense, but the court would not admit it, on the ground that the courts of Illinois had no jurisdiction when both parties were residents of New York State.

The Winsted (Conn.) *Herald* copies, from the early records of the town of Winchester, the findings of a justice court in May 29, 1781, in the case of one Phebe Turner, charged "with a breach of the Sabbath by laughing and playing in an indecent and unbecoming manner at ye meeting-house in time of public worship." The said Phebe was fined three shillings State money, and costs of three shillings more.

A HAPPY QUOTATION.

In a recent action in the Supreme Court, brought by a purchaser against the vendors, to recover damages for the non-fulfillment of an executory contract of sale, the defendants claimed an exemption from liabilty, on the ground that the subject of sale, a quantity of cotton, had been accidentally destroyed by fire, which, their counsel insisted, was an "act of God," rendering performance impossible. To this the plaintiff's counsel replied: "There seems to be an inclination, sometimes, among jurists, to attribute to the Almighty what cannot be distinctly charged upon any one else. It would be better for them to follow the advice which *Horace* gives to dramatic authors, not to introduce a God upon the stage, except in a crisis worthy of such an awful intervention. *Nec deus interrit, nisi dignus vindice nodus Inciderit.*" (*Dexter* v. *Norton et al.*, to be reported, 55 Barbour.)

A SCENE IN COURT.

The following story of the *debut* in court of a strong-minded American lady is from the New Orleans *Times*:

"It is now more than twenty-five years since a suit was brought in the first district court of this city, then presided over by the late Judge A. M. Buchanan, which involved the legality of the claim of title of Myra Clarke Gaines to certain real estate in this city. It was what the lawyers call a jactitation suit, that is, a suit for a slander of title, in which damages were claimed of Mrs. G. for pretending that she had any title to the property of plaintiff. When the case came up for trial, Mrs. G. appeared in court with her counsel, and her gallant and veteran husband, the hero of Fort Erie, and one of the highest types we have ever known of the gentleman and chivalric soldier — Gen. Edmund Pendleton Gaines. The general was a very strict observer of the regulations and of all the proprieties of the service and of society, and on this occasion he appeared in his uniform, with his sword by his side. Mrs. Gaines was defended in the suit by able and eloquent counsel, but in the progress of the trial these falling into a wrangle with the judge, declared that they could not compromise their professional dignity by a further continuance in the case, and so they withdrew from the court-room; whereupon the general arose and announced to his Honor that he was the husband of the defendant in the suit, and in that character, and as an admitted member of the bar of the United States, he might claim the right to represent his wife's interests. When he married that lady he had, besides his obligation as her husband and a gentleman, assumed the additional obligation to his old friend, Daniel Clarke, to stand by his daughter in all her trials. He was there to fulfill that duty. Unfortunately, when he studied law in Virginia it was under a very different system of jurisprudence. And he felt very much out at sea in the courts of a civil-law State. He would, therefore, ask that the lady defendant, who was better acquainted with the remarkable facts of her history than any one else, should be allowed to address the jury in her case. The judge stated that the lady had the right to argue her own case. Then the general, with that grand old dignity for which he was so distinguished, led forward Mrs. Gaines, who proceed to address the jury at great length reading numerous documents bearing upon her case. Whilst reading these documents the judge, who was a high-spirited man, interfered, and notified her that she could not be allowed to read documents which were not in evidence in the case. The lady still persisting, the judge again interfered, and a disagreeable wrangle arose, in the midst of which Mrs. Gaines charged the judge with having an interest against her.

Judge Buchanan retorted with temper, and notified Gen. Gaines that he was expected to control his wife in court, where no persons were privileged. Whereupon the stately old general arose to his full altitude of six feet three, and assuming the position of a commander of grenadiers, and gracefully touching the hilt of his sword, responded:

"May it please your honor, for everything that lady shall say or do I hold myself personally responsible in every manner and form known to the laws of my country or the laws of honor."

This reply, and the accompanying action and the appearance of the general in his military garb, aroused to a still higher pitch the Irish ire of the judge, who quickly answered:

"General Gaines, this court will not be overawed by the military authorities."

"Rest assured, your honor, when an attempt of that sort is made, the sword which I wear in conformity to the regulations of the service, and out of respect to this honorable court, will be quickly unsheathed to defend the rights aud dignity of your honor, and of all the civil tribunals of my country."

After these explanations, peace and order were restored, but the judge considered it his duty to note the charge of Mrs. Gaines, that he was sitting in a case in which he was interested. He should, therefore, reduce it to an exception of recusation, and require the evidence to be produced to sustain it.

It turned out that some years before, in some proceedings in which Mrs. Gaines' rights were involved, Judge Buchanan had made a motion for a brother lawyer who was retained against Mrs. Gaines. This, it was decided, did not justify his recusation, and the case proceeded, and was, we believe, in the Supreme Court, at least, determined in favor of Mrs. Gaines.

This was the first appearance of Mrs. Gaines as her own advocate in court. Since then she has advocated her case in and out of court, to the judges, in public and in private, and to every body else, and in every place, and under all circumstances, and in every form, and with every agency and appliance, exhausting and surviving scores of lawyers, and maintaining all the while her confidence, her equanimity, her earnest zeal and unflagging energies, and exhibiting to the world the most remarkable example of courageous devotion and resolute persistency which can be found in the history of these severest of all trials of human patience and endurance, tedious, complicated and exciting lawsuits."

BOOK NOTICES.

Reports of Cases Argued and Determined in the Supreme Judicial Court of Massachusetts. Albert G. Browne, Jr., Reporter. Volume III; being Massachusetts Reports Volume XCIX. Boston: H. O. Houghton & Company. 1870.

Mr. Browne has a very satisfactory idea of the duties of a reporter, and has succeeded in making his series among the most valuable of the Massachusetts Reports. The cases are selected with judgment, the head notes are, in the main, well prepared, and the statements of facts are sufficiently full to enable us to understand the exact question before the court. To give proper statements of the facts is one of the most difficult of a reporter's duties, and the one usually the worst performed. Some reporters make the statements so brief as to render it quite impossible to tell what was the exact point decided, and how far the decision may be regarded as an authority; while others go to the other extreme, and lumber their volumes with a mass of matter of no earthly use. Mr. Browne has followed the middle way, and has given clear and full statements, shorn of all matters not necessary to a comprehension of the points presented for adjudication. He has also given in the index — what every report should, but which few of them do, contain — a list of "cases overruled, doubted, or denied;" and a table of "statutes, cited, expounded," etc.

There is one feature about these Massachusetts decisions that cannot fail to strike one accustomed to turn over the pages of the New York State Reports, that is, the *apparent* unanimity of the judges in the decision of each case. No dissenting opinions are reported, nor is any mention made of any judge differing from the views of the majority. When the majority decide, the decision is as much the decision of the court as if all the judges had concurred, and we fail to discover any benefit to be derived from recording the voice of the minority, especially in a court of last resort.

It only tends to lessen the dignity of a court, and to detract from the authority of its opinions. In one other respect, this book presents a favorable contrast to the Reports of the Court of Appeals of this State, and that is in the admirable manner in which it is printed and bound. In our next number we shall give an abstract of the cases of general importance contained in this volume.

TERMS OF THE SUPREME COURT FOR THE COMING WEEK.

January 31 — *Circuit and Oyer and Terminer*, at Delaware, by Justice Boardman; Madison, by Justice Balcom.

Special Term. — Monroe county, by Justice Johnson.

A WARNING.

A solicitor at Braintree has been sentenced to twelve months' imprisonment for appropriating to his own use the moneys of his client. This is, we believe, the first time that the offense, which is only too common, has been punished by indictment, plundered clients having been ignorant of the remedy or reluctant to enforce it. Now that it is known there can be no doubt that it will be more frequently resorted to by those whose confidence has been betrayed. Nor in the true interests of the Profession can we object to the law itself or its enforcement. In very truth there is no real difference between robbery by appropriating the money which clients have confided to the care of a solicitor, or which he has received for them in the course of business, and picking a pocket, or robbing a till. If any thing, the solicitor is guilty of the greater crime, for he adds breach of trust to theft, and uses the confidence of his employer for the purpose of robbing him. No excuse whatever can be offered for this crime, for no circumstances whatever will justify a solicitor in using for his own purposes the money which he holds in trust for others, whether that money has been given to him by his client for investment, or whether it has been received by him for his client. The moment he applies any portion of that money to his own use, he is guilty of dishonesty, and has committed a crime, even if done with design to refund it.

We fear that the offense of thus misappropriating the property they hold in trust is more frequent than the public are aware. It results from the practice, against which we have so often and earnestly warned our readers, of mingling their clients' money with their own—a course to be sedulously shunned by every prudent solicitor. Debts recovered, purchase-moneys received, rents collected, and such like, are too frequently paid to the private account of the solicitor at the bank; he cannot, or will not, distinguish what of the balance is his own, and what the property of others which he holds in trust; he draws upon the whole balance for his private uses, invades the property of his client, deluding his conscience with the suggestion that he does not know what is his own, averts some present pressure by the tempting crime, in the vain hope that something may turn up to save him. It is thus that hundreds of solicitors have been brought to ruin in times past, and if the Woodbridge example should be followed, it is thus that many will hereafter be brought to the felon's dock and the convict's prison.

The warning we have given before we would emphatically repeat now. Make it an inflexible rule never to mingle your clients' money with your own. Keep a separate account at the bank, and pay over whatever you receive for a client with the least possible delay. By observing this rule, you will avoid the double risk of temptation and of error. You will both gain clients and keep them; for there is nothing that so recommends a solicitor to men of business as prompt paying over of debts collected and moneys received, and it will promote your peace of mind as much as it will advance your prosperity.—*The Law Times.*

SINGULAR SCENE IN A COURT HOUSE.

The Ottawa *Daily News* says: "The name of Judge Lafontaine has become familiar to Canadian lips. Here in the province of Ontario we are justly proud of the high standing of the judges of our superior court. Our neighbors, however, of the province of Quebec are not so highly favored. Grave charges have been made against some of the judges of the superior and other high courts, and it is much to be feared that many of these charges are too well founded. Chief among the accused is his honor Judge Lafontaine, of the district of Ottawa. His position in the community over which he judicially presides may be inferred from the scenes that usually characterize the sittings of his courts. These scenes usually go unreported, but as they are a scandal to British justice—of which we usually boast so much—it may not be out of place to shed a little daylight upon them. At the opening of the recent sessions of the Superior Court in Aylmer, it was discovered that there were only thirty-three jurors present. The court was about to proceed with its ordinary business, when Mr. Peter Aylen pointed out that the law requires that at least forty jurors should be in attendance at the sessions of the Superior Court. Judge Lafontaine was in a quandary. Afraid to proceed without a legal number, he temporized and explained, and argued and pleaded, but all to no purpose. Mr. Aylen was inexorable. And so the first day of the court was spent. On the morning of the second day the same difficulty appeared again. There were not enough petit jurors present to satisfy the demands of the law. Judge Lafontaine thought that Mr. Aylen's ambition would have been satisfied with his having kept the court a whole day without transacting business; but he was mistaken. Mr. Aylen sternly denounced the way in which justice was administered in the district of Ottawa, and appealed to the plain written text of the law against holding a court with less than forty jurors. It was no use that Judge Lafontaine appealed in the interests of justice. His appeals fell upon deaf ears. The second day was spent as fruitlessly as the first. On the morning of the third day Judge Lafontaine took his seat upon the bench in triumphant humor. The forty petit jurors were present, and he felt that he could smile defiance at the foe. Mr. Aylen, robbed of a grievance, was mute. Just then the grand jury, which had been pushing through its business while the court was wrangling with Mr. Aylen, brought in its presentment. The unfortunate presentment renewed the strife. In their presentment the grand jurors expressed their regret that the judge's influence should be so much impaired by the charges that had been made against him both in and out of Parliament. Any other man in the judge's position would probably have regarded such an expression of sympathy as very equivocal indeed. But certain men gladly grip at straws, and the judge seemed to be overjoyed at the expression of sympathy. His joy, however, was of but short duration. Mr. Aylen sprang to his feet and protested against the presentment. He denounced it in unmeasured terms as misrepresenting the people of the district of Ottawa. The judge mildly protested, but his protests were unheeded. Warming with his indignation Mr. Aylen went further, and accused the officers of the court of malpractice in paying silver to the jurors, and pocketing the discount. This brought others into the row, and for a while there was the mischief to pay. Mr. Aylen condemned the whole administration of justice in the district of Ottawa as a sink of iniquity fitly represented by his honor who sat upon the bench. Every now and then, with piping voice, the court would say: 'Mr. Aylen, Mr. Aylen, you are interrupting the business of the court.' But the warning note was unheeded as the voice of a child in a thunderstorm. And that storm lasted until noon of that third day. After that there was peace, and Mr. Justice Lafontaine, on the afternoon of the third day, began the business of the Superior Court of the district of Ottawa. The moral of all this is not far to seek. A judge who, with all the terrors of law at his disposal, cannot make himself respected in his own court has no business to be a judge at all."

COURT OF APPEALS ABSTRACT.

William T. Erickson, Admr., etc., Resp., v. *David Smith and another, App's.*

Plaintiff's intestate was killed while a passenger on defendants' boat by an explosion of the boiler. An action for damages was brought by the administrator, and on the trial a certificate of the inspectors who inspected the boat, in pursuance to the act of Congress, passed August 30, 1852, was offered in evidence by the defendants. *Held*, that such certificate was evidence only so far as to show that the inspection had been made in the manner prescribed by law; and that further than that it contained nothing—giving it the

character of evidence in controversies between the owners of steamboats and third persons, involving the conditions of the boilers and machinery. Where a public officer is required by law to make a return, and his acts included in the return afterward become involved in controversy, his return may be used in evidence. But where no return is required by law to be made, the certificate of the officer is not evidence, either for himself or in behalf of other persons not using it, as an admission against him.

John Dodge, Exr., etc., of John McBurney, Appellant, v. *Lemuel Williams, Resp.*

The defendant was the equitable owner in possession of certain lands, having a valid agreement for the conveyance to him of the legal title on payment of the price. That price he had in part paid, and had cultivated the farm. The residue of the purchase-money being about to become due, the defendant applied to the plaintiffs' testator for the advancement of the sum, and it was thereupon by parol agreed that the defendant should procure the conveyance of the lands to be made to the testator in consideration for the advance, and that the testator should make a written contract to reconvey such lands to the defendant, upon the payment of the advance within five years, with interest payable annually. The advance was made, and the property conveyed to the testator, who thereupon declined to give the contract for reconveyance. This action was brought to eject the defendant from possession. *Held*, 1st, that the action could not be sustained; 2d, that the respondent could enforce in a court of equity a fulfillment of the contract made with plaintiff's testator to reconvey to him on payment of the advances; 3d, that such agreement did not come within the statute of frauds (2 R. S. 135, §§ 8, 10) since there had been a part performance; 4th, that a party will not be permitted to insist upon the statute of frauds to protect him in the enjoyment of advantages procured from another in faith of an oral agreement, on which the latter has acted, and in faith whereof he has placed himself in a situation in which he must suffer wrong and injustice.

Daniel Comstock, Resp., v. *John Dodge, Exr., etc., Appellant.*

Action for damages for forcibly ejecting plaintiff from a house, etc. *Held*, that the justice at the trial erred in refusing to charge the jury that the defendant was justified in expelling the plaintiff from the house, if they should find the fact that the defendant was at that time in possession of such house, and that he used no more force than the occasion required, after he had first requested him to leave the house, and he had refused.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.*

ACTION.

1. *Forms of.*—Although the forms of action were abolished by the Code, the principles by which the different forms of action were previously governed still remain, and now, as much as formerly, control in determining the rights of parties. *Eldridge* v. *Adams*, 54 Barb.

2. In pleading, a party is now to state the facts on which he relies to sustain a recovery; and if issue be taken thereon, he will be entitled to just such a judgment as the facts established will, by the rules of law, warrant, without regard to the form or name of his action. *Ib.*

3. *For wrongfully taking and carrying away property; judgment in.*—By the rules of practice and pleading before the Code, an action of trover could not be sustained without proof of a detention or conversion of the property; but as the forms of pleading do not now control, the court, in an action for wrongfully taking and carrying away and converting property, must examine the evidence, and if the proof, or facts found by the jury, entitle the plaintiff to a judgment, such judgment should be given, even though not asked for by the complaint. *Ib.*

AGREEMENT.

Validity.—If a vendee, subsequently to the execution of a written agreement which is declared void by a statute of another State for being made on Sunday, demands, on a week day, a conveyance of the land, and receives the same, promising to pay the purchase money, a new and valid contract arises between the parties, which entitles the vendor to maintain an action to enforce payment. *Hamilton* v. *Gridley*, 54 Barb.

FALSE IMPRISONMENT.

1. *Probable cause.*—The question of probable cause, in actions for false imprisonment, has been settled as an important one, by the common law, from time immemorial. The absence of probable cause was always alleged in the declaration, and was a necessary allegation. Per POTTER, J. *Hawley* v. *Butler et al.*, 54 Barb.

2. An important distinction is recognized in this class of cases, both in the English courts and in our own, viz.: the distinction between an arrest made by, or at the instance of, a private person, and one made by magistrates or other police or public officers, where the defense pleaded is probable cause for the arrest. *Ib.*

3. In an action for false imprisonment, the question whether the defendant had probable cause for the arrest, upon undisputed facts, is a question for the court; not for the jury. If the facts are in conflict, the jury must find the facts, and when found, it is a question of law whether they amount to probable cause. *Ib.*

4. When probable cause for an arrest is shown, whether it appear from extrinsic circumstances, or from the conduct, falsehoods or contradictions of the party arrested, the officer, acting without malice or bad motive, will be protected, if acting in the line of his duty. *Ib.*

INSANITY, (see WILL).

OFFICERS.

There can be no difference in the powers of the same character of officers, whether performing their duties under the general or the State governments. The common law prevails in both. *Hawley* v. *Butler et al.*, 54 Barb.

PRINCIPAL AND AGENT.

1. *Power of agent acting for both parties.*—A person standing in the position of agent of both parties, cannot execute a mortgage as the attorney of one, for the benefit of the other. *Greenwood* v. *Spring et al.*, 54 Barb.

2. *Validity of agent's contract.*—A contract made by an individual as the agent of both parties is not void, but only voidable, at the election of the principal, if he come into court within a reasonable time. *Ib.*

3. It is not necessary for a party seeking to avoid such a contract to show that any improper advantage has been gained over him. It is at his option to repudiate, or affirm, the contract, irrespective of any proof of actual fraud. *Ib.*

4. But unless application be made, within a reasonable time, to set it aside, a valid title will pass, if it be upheld by a sufficient consideration and the proper forms have been observed. *Ib.*

5. If application to set aside such a contract be not made within a reasonable time, the delay will be considered a waiver. *Ib.*

* From Hon. O. L. Barbour, and to appear in the 54th volume of his Reports.

PROVOST MARSHALS.

1. *Power to arrest deserters.*—Provost Marshals appointed under the act of Congress of March 3, 1863, and their deputies, are such officers as by law possess the power to arrest an individual where there is probable cause for believing that he is a deserter. *Hawley* v. *Butler et al.*, 54 Barb.

2. *Nature of the office, etc.*—A provost marshal is a public officer; his duties concern the public, and are connected with the administration and execution of justice; and his office bears the same relation, in some respects, to the military courts, that sheriffs, marshals, constables and police officers do to the civil courts. His acts, performed by authority of law, are done by "due process of law," within the meaning of the 5th article of the amendments to the Constitution of the United States. *Ib.*

3. In trying the legality of acts done by provost marshals and their deputies, in the exercise of their duty, great latitude should be allowed; a public duty being imposed upon them, for public purposes, and they being punishable for neglect of duty, if they fail to act, in a case where there is sufficient or probable cause for acting. *Ib.*

RAILROAD COMPANIES.

1. *Rights of different companies, as between themselves; priority of location.*—Where two separate railroad companies have the right, under their respective charters, and by the permission of a city corporation, to lay their tracks in and through a particular street, until one of them has actually commenced taking a qualified possession of the center or middle of the street, by locating and constructing its track thereon, either has the right to lay down its rails there, to the exclusion of the other from that particular location. *Waterbury et al.* v. *The Dry Dock, East Broadway and Battery Railroad Company*, 54 Barb.

2. But the company which first actually takes a qualified possession of the center or middle of the street by locating and constructing its track therein for a part of the distance, acquires the right to complete the construction of, and to operate, its road through such street, to the exclusion of the right of the other company to interfere, in any way, with the construction and operation of the first mentioned company's road *as thus located*. *Ib.*

SHERIFF.

1. *When he must plead a judgment.*—Where, in an action for taking and selling on execution property claimed to be exempt, the real defense is new matter, viz.: a justification for taking the property under a judgment and execution, if the defendant is an officer and relies entirely upon the execution as a defense, and nothing beyond it, it is sufficient for him merely to set forth the fact; but if he desires to go farther, or it becomes necessary to inquire into the consideration of the judgment, he must plead such judgment, and set it forth in his answer. And having averred the existence of a judgment, he will be at liberty to prove it, and then to show its consideration, without having averred it, if material to answer any fact proved by the plaintiff. *Dennis* v. *Snell*, 54 Barb.

2. If, in such an action, the defendant does not set up the judgment in his answer as a defense, nor allege it to have been recovered for the purchase price of exempt property, he cannot be allowed to show its consideration, as a defense to the plaintiff's claim of exemption from levy and sale, on execution, of the property in suit. *Ib.*

3. When an officer sees fit to go beyond the power of the process, or, for any other reason, when sued, it becomes necessary for him to prove a judgment, he no more than any other party, can do so without having alleged its existence, in his answer. *Ib.*

SURROGATES.

1. *Incidental powers.*—The incidental powers possessed by Surrogates' Courts previous to the Revised Statutes, and taken away by those statutes (Part 3, chap. 2, title 1, § 1), were restored by the act of the Legislature of 1837 (Laws of 1837, chap. 460, § 71), repealing that section of the Revised Statutes. *Campbell* v. *Thatcher et al., Exrs.*, 54 Barb.

2. *Power to open decrees.*—Although a surrogate, after parties in interest have been represented at a hearing before him, and final sentence or decree has been given, has no power of opening or reversing such sentence or decree on the ground that he erred as to the law, or decided erroneously upon the facts, he may open such decree for the purpose of correcting any mistake therein, the result of accident. *Ib.*

3. Thus he may open a final decree made by him upon the settlement of executors' accounts, for the purpose of correcting an omission or oversight in making up such accounts. *Ib.*

TROVER AND CONVERSION.

1. *Unlawful taking.*—The plaintiff, having in his possession a wagon which he had hired for a year from J., let it to the defendant. It was used by H. and was brought back and received by the plaintiff. The wagon being injured, the plaintiff sent it to a shop for repair. H. afterward told him to get the wagon fixed, and he would pay for it. Subsequently H. and the defendant took the wagon to another shop, had it repaired, and returned it to the plaintiff, before suit brought, and it remained in his possession. *Held*, that the bailment of the wagon continued until it was repaired and returned; and there being an implied license from the plaintiff to H. and the defendant to have the wagon repaired, the removal of it from one shop to another, for that purpose, was not an unlawful *taking* of the property. *Eldridge* v. *Adams*, 54 Barb.

2. *Conversion.*—*Held, also*, that, as the defendant did not interfere with the plaintiff's dominion over the wagon, but recognized and acknowledged his title throughout, and the wagon was not taken or detained with the intent to convert it to the defendant's use, or the use of any one else, he assuming no ownership over it, and it was not injured while in his possession,—there was no *conversion*; the defendant being guilty of a mere asportation. *Ib.*

3. *Damages.*—*Held, further*, that, even if it were conceded that the defendant was guilty of a technical trespass, the plaintiff was not entitled to recover the full value of the wagon, he having but a special property in it under a bailment for a year. That there being not only no conversion, but a return of the property before suit brought, the plaintiff, after refusing then to accept it, was entitled to recover only the value of his special property; which the court, in the absence of the value of such special property, could not assume to be over six cents. *Ib.*

VARIANCE.

Where the plaintiff counted upon an agreement for the sale and purchase of land, as being in writing, but was allowed on the trial, without obligation, to prove a subsequent conveyance of the premises, and a parol promise to pay the price: *held*, that the variance might be disregarded, under the provisions of the Code. *Hamilton* v. *Gridley*, 54 Barb.

WILL.

1. *Repugnancy.*—Two written instruments, executed by the same person, at the same time, may, notwithstanding their repugnancy in certain particulars, or in certain respects, constitute *a* will, or *the* will of such person, and legally and properly be admitted to probate as such. *Matter of the probate of the will of Anna Maria Forman*, 54 Barb.

2. The point or question of repugnancy or inconsistency in the provisions of the two instruments may be a subject or question for consideration after the probate of the will, when the two instruments come to be carried into effect, or claimed or acted under, as a will, but does not arise, and cannot properly be considered, in the probate proceedings. *Ib.*

3. *Execution.* — Where one of the attesting witnesses to a will testified that the testatrix told her, in the room where and when the same was executed, before signature, that the paper or papers constituting the same was or were her will; and the other witness swore that although the testatrix did not say, while she was in the room where and when the papers were executed, that they were her will, yet that when the testatrix came to the kitchen to call her as a witness, she told her that she wanted her to witness her will: *Held*, that this evidence, together with proof that the testatrix signed the instruments in the presence of the two witnesses, and that they signed their names as witnesses in her presence and in the presence of each other, was sufficient to show that they were executed and attested in the manner required by the statute. *Ib.*

4. *Testamentary capacity.* — What is sufficient proof of the testamentary capacity of a testator at the time the will was executed and attested. *Ib.*

5. The words "*mind and memory*," as used in our statute relating to wills of personal property, and as used at common law, are and were convertible terms. *Ib.*

6. The question in respect to testamentary capacity, in the abstract is, had the testator, at the time, etc., a mind, or mind and memory, sufficiently sound to make a will; that is, to do the thing or act authorized by the statutes; but practically, in most cases, the question is, had the testator, at the time, etc., a mind, or a mind and memory sufficiently sound to make *the* will in question. *Ib.*

7. The only legal test of insanity is delusion. Insane delusion consists in a belief of facts which no rational person would believe. A person may be partially insane; that is, he may have an insane belief or delusion as to one or more subjects, and not as to others.

8. Moral insanity is a disorder of the feelings and propensities, and may or may not impair the intellect. Legal insanity is a disorder of the intellect. *Ib.*

9. Moral insanity, not proceeding from or accompanied by insane delusion, the legal test of insanity is insufficient to set aside a will. *Ib.*

10. Where it appeared from the evidence that at the time a will was executed the testatrix despised, distrusted and hated her husband, and probably feared him, and it was a fair inference from the evidence that these feelings toward her husband caused her to execute the will in question, and there was no doubt that she intended thereby to prevent him from getting any more of her estate than was given to him by such will: *Held*, that, in testing the testamentary capacity of the testatrix, the question was not whether these feelings toward her husband, at the time, etc., were unreasonable, excessive or unjustifiable merely, or even whether they amounted to or showed *moral* insanity as to her husband, but was whether these feelings were insane — whether the contempt, distrust, hatred and fear which she had of and for him at the time was *insane* contempt, *insane* distrust, *insane* hatred, fear, or in other words, the contempt, the distrust, the hatred, the fear of an insane wife toward her husband. *Ib.*

11. And the preliminary proofs showing that the testatrix, at the time when, etc., was competent or had testamentary capacity to execute the will; and that her feelings toward her husband caused her to execute the instrument as and for her will. *Held, further*, that it was for the contestants satisfactorily to show that these feelings toward her husband came from, or originated in, or at least were accompanied by, delusion as to her husband, his character, conduct, motives or condition.

12. And the proofs not showing that the testratrix's contempt for her husband, her distrust, fear and hatred of him, when she executed the will, came from, or originated in, or were accompanied by, delusion *as to her husband*, his character, conduct, motives or condition; it was *held*, that the testatrix, at the time she executed the will, must be deemed to have had testamentary capacity, and was competent to execute the instrument as her will.

13. *Revocation.* — Where a testatrix, at the time she tore up and destroyed a will previously executed by her, was, though not permanently insane, in a condition and laboring under an excitement which, under the circumstances, incapacitated her performing or having a reasonable or intelligent intention of revocation: *Held*, that such act was not to be regarded as a revocation of the will. *Ib.*

WRITTEN INSTRUMENTS.

Rules of construction. — The general rule is that two or more written instruments, executed at the same time, relating to the same subject matter, by the same party, or between the same parties, shall be construed together, and viewed as one instrument. *Matter of the probate of the will of Anna Maria Forman*, 51 Barb.

DIGEST OF RECENT ENGLISH DECISIONS.

(*Continued from last week.*)

[Q. B. refers to the Queen's Bench, C. P. to the Common Pleas, Ex. to the Exchequer, and L. J. R. to the Law Journal Reports.]

LIMITATION OF ACTION.

1. *Foreign Statute of Limitations: lex fori: attorney and client. costs, when first accruing.* — Where a foreign Statute of Limitations requires proceedings to be taken within a shorter period than that prescribed by the English statute, but like the English statute does not affect causes of action, but only the remedy in respect of them, a foreign judgment declaring that a claim is barred by the local Statute of Limitations is no bar to an action here for that same claim within the period prescribed by the English law. *Harris* v. *Quine*, Q. B. 38; L. J. R. 331.

2. Two attorneys in partnership having been retained to defend an action, it was decided in favor of defendant; upon which plaintiffs appealed. While the appeal was pending, the partnership was dissolved, and the proceedings were continued by one of the partners separately: *Held*, that the partners were not entitled to sue for their costs till the appeal was decided, so that the Statute of Limitations did not until then begin to run as against their claim. *Ib.*

NEGLIGENCE.

1. *Railway company: want of proper means for alighting from trains.* — The plaintiffs were passengers in an excursion train of the defendants. On arriving at the station for which they were bound, the train being longer than the platform, some carriages, in one of which the plaintiffs were riding, stopped at a point beyond the platform. It was then daylight. The carriage in which the plaintiffs were was constructed in the ordinary way, with an iron step about three feet from the ground, and a footboard immediately under and on each side of the step, extending along the carriage. The plaintiffs were told neither to get out nor to remain in the carriage. The male plaintiff looked out of the window, but no servant of the company was at hand. Several other passengers got out of the carriages on each side, and after waiting a few moments he alighted. His wife then taking both his hands jumped as carefully as she could from the iron step to the ground, and in so doing sustained the injury for which the action was brought. No offer was made to back the train so as to bring the carriage to the platform, but no request was ever made to the company's servants to do so. It was not shown that the length of the platform at the station was inadequate to the ordinary traffic of the place: — *Held* (per *Byles, J., Mellor, J., Montague Smith, J.* and *Hannen, J.*; dissentiente *Keating, J.*), affirming the decision of the Court of Exchequer, that the accident arose from the acts of the plaintiffs, and that there was no evidence of negligence on the defendants' part to go to the jury. *Foy* v. *The London, Brighton and South Coast Railway Co.* distinguished. *Siner* v. *The Great Western Rail. Co.* (Ex. Ch.) Ex. 38; L. J. R. 67.

2. *Plaintiff's negligence contributing to injury: railway passenger.*—In an action against a railway company for an injury occasioned by the negligence of the guard of a train, the evidence was that plaintiff in getting into the railway carriage put his hand on the hinge side of the door of the carriage, which was standing open, and before he had quite got in and taken his seat, the guard came and, without any warning, slammed the door upon plaintiff's hand, and so jammed it between the door and the door post. It appeared from plaintiff's evidence at the trial that there was no handle to get into the carriage by, or at least none which could be seen, it being dark at the time:—*Held*, affirming the decision of the Court below, that there was evidence of negligence on the part of the defendants, and that there was not such clear evidence of contributory negligence on the part of plaintiff that the judge at the trial ought to have withdrawn the case from the jury. *Fordham* v. *The London, Brighton and South Coast Rail. Co.* (Ex. Ch.), C. P. 38; L. J. R. 324.

3. *Railway company: injury to passenger while looking at time-bill.*—The plaintiff went to the station of the defendants, a railway company, intending to travel by their line to C. A train had started previously, and, upon inquiring of a porter when the next train for C. would start, the plaintiff was directed to go to a time-bill which was hanging outside of the door of the booking office, and under a covering or portico. While standing looking at the time-bill, he received an injury from a plank and a roll of zinc which fell through the covering, and upon looking up he saw the legs of a man protruding through the covering: *Held*, that, there being nothing to show that the defendants knew that the covering was insecure, or that the man who was upon it was employed by them, there was no evidence of negligence to go to the jury, and that the plaintiff must be nonsuited. *Welfare* v. *The London and Brighton Rail. Co.*, Q. B. 38; L. J. R. 241.

PAYMENT.

By cheque: laches of holder: reasonable time for presentment.—Plaintiff received on the 11th of May a cheque drawn by defendant's agent for the amount of a debt owing to him by defendant, but did not present it to the bankers for payment till the 9th of June, when it was dishonored, the agent having in the mean time absconded. On the evidence as to the state of the agent's banking account during the interval, a judge sitting without a jury found as a fact, that, if the cheque had been presented before the 4th of June, there was a reasonable chance that it would have been honored:—*Held*, that on this finding the defendant was entitled to treat the giving of the cheque as a payment, his position having been altered for the worse by the unreasonable delay of the holder, and his chance having also been lost of applying to his agent before the latter absconded. *Hopkins* v. *Ware*, Ex. 38; L. J. R. 147.

SALE OF GOODS.

Warranty of merchantable quality: defect not discoverable in sample.—Where the contract is for merchantable goods, and the sale is by seller's sample, which represents to the buyer a merchantable article, and discloses no defect, and the goods are accepted as according with the same,—there is still an implied warranty of their being merchantable, in respect of all such matters as cannot be judged of by the sample, just as there would be if bulk had been inspected, and defects could not thereby be ascertained. *Mody* v. *Gregson* (Ex. Ch.), Ex. 38; L. J. R. 12.

SUPPORT OF SOIL.

Right to support where land supported by water contained in spongy soil: rights of owners of adjacent lands derived from common grantor.—The owner of a piece of land of a wet and spongy character, in the neighborhood of a town, conveyed a portion of it to plaintiff, with a stipulation that buildings of a certain aggregate value should be erected upon it. He subsequently conveyed the remainder of the land to persons from whom it came to church trustees, who employed defendant to build a church on it. To obtain a firm foundation for the church, defendant was obliged to excavate to a considerable depth, the effect of which, from the spongy nature of the soil, was to drain off not only the water in the land on which he was excavating, but that in plaintiff's land, and to cause plaintiff's land and certain cottages, which he had built on it without draining it, to subside and crack. His land would have subsided even if it had not been weighted with cottages. Defendant was guilty of no negligence or unskillfulness:—*Held*, that defendant was not prevented from draining the land by any general principle of law, nor by any covenant in the plaintiff's favor, on the part of the common grantor of the lands, to be implied from the doctrine that a man cannot derogate from his own grant. *Popplewell* v. *Hodkinson* (Ex. Ch.), Ex. 38; L. J. R. 126.

TELEGRAPHS.

Property in telegraphic message: privity of contract: liability for mistake in message.—Plaintiff, having a cargo of ice on board a ship at Grimsby, telegraphed to R. & H., at Hull, asking them to make an offer for it, and requesting them to send an answer by telegraph. R. & H. sent to the office of defendants, a telegraph company, a message for transmission to plaintiff, by which they offered to take the cargo at 23*s.* per ton. In the reading off the message at defendants' office, in London, a mistake was made in the figures, and the telegram sent to plaintiff represented the offer as being 27*s.* instead of 23*s.* per ton. Plaintiff thereupon, in acceptance of the supposed offer, ordered the ship to proceed to Hull; she arrived there, but R. & H. refused to receive the cargo, except at 23*s.* per ton. Plaintiff brought an action against defendants to recover damages in respect of the injury which he had sustained by reason of the mistake: *Held*, that defendants were not liable, the obligation upon them to use due care and skill in the transmission of the message arising out of contract, and there being no contract between them and the plaintiff. *Playford* v. *The United Kingdom Telegraph Co.* (*Lim.*), Q. B. 38; L. J. R. 249.

WATER COURSES.

Obstruction of flow of water: liability of owner of land for wrongful act of strangers.—In an action for obstructing the flow of water from a stream to certain works of plaintiff, the evidence showed only that defendants were owners of the soil of the stream, and that the obstruction had been placed there in order to use the water for certain works before it came to plaintiff's works, but without the sanction of defendants and by persons who were strangers to defendants, and between whom and defendants there was no connection by title or otherwise. Defendants derived no advantage from the continuance of the obstruction, and offered to allow plaintiff to enter and remove it, but they declined to do so themselves: *Held*, that there was no evidence of a wrongful continuance of the obstruction by defendants, and that under these circumstances plaintiff was rightly nonsuited. *Saxby* v. *The Manchester, Sheffield and Lincolnshire Rail. Co.*, C. P. 38; L. J. R. 153; see *Fisheries*.

WILL.

Construction of, as to equitable estate in fee subject to defeasance.—Testator devised a house to trustees on trust to apply the rents for the advancement and benefit of his granddaughter M. until she should attain the age of twenty-one, but in case she should die under that age, then he devised the said house to his daughters E. and C., their heirs and assigns, as tenants in common. He afterward appointed two other of his daughters executrixes, and his son executor of his will, to whom he bequeathed all the residue of his real and personal estate, not specifically bequeathed, as tenants in common: *Held*, that testator's granddaughter M. took, under the above devise, an equitable estate in fee in the said house, subject to defeasance in case she should die under twenty-one years of age. *Cropton* v. *Davis*, C. P. 38; L. J. R. 159.

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HOW SOME MEN HAVE GOT ON AT THE BAR.

I.

It was a famous saying of Lord Eldon's that "some barristers succeeded by great talents, some by high connections, some by miracle, but the great majority by commencing without a shilling." Late in life he wrote, "I have now a letter in which Lord Thurlow promised me a commissionership of bankruptcy, when it would have been most valuable to me, in point of income; he never gave it me, and he always said it was a favor to me to withhold it—what he meant was, that he had learnt (a clear truth) that I was by nature very indolent, and it was only want that could make me industrious."

To a ward of his court he gave the following advice:

"You will shortly become entitled to a small property, which will prove to you either a blessing or a curse, according as you use it. It was perhaps fortunate for me that I was not situated in my early life as you are now. I had not, like you, a small fortune to look to, I had nothing to depend upon but my own exertions, and, so far from considering this a misfortune, I now esteem it a blessing, for if I had possessed the same means which you will enjoy, I should, in all probability, not be where I now am. I would, therefore, caution you not to let this little property turn your mind from more important subjects, but rather let it stimulate you to cultivate your abilities, and to advance yourself in society."

Thurlow evidently held notions of like character, for he said: "Spend your own fortune, marry, and spend your wife's, and then you will have some chance of succeeding in the law."

Eldon took early precaution against a lack of the "stimulant of necessity," for at twenty-one he fell in love with the pretty Bessie Surtees, and a runaway marriage resulted. The romantic couple were penniless, and the parents highly offended. In after years Eldon used to describe their pitiful plight on the third morning after the union, "Our funds were exhausted, we had not a home to go to, we knew not whether our friends would even speak to us again." Although a rather dangerous experiment, it was a very fortunate step for Eldon. He set about the study of the law in downright earnest. It is related of him that he was in the habit of rising at five in the morning, and studying at night with a wet towel round his head, to prevent drowsiness. His own overapplication injured his health, and when remonstrated with he said: "I must either do as I am now doing or starve." After his call to the bar prosperity was slow in coming to him. He himself used to relate an amusing anecdote of his first year's success. He said that it was agreed that his income for the first eleven months should be his and that for the twelfth month should be his wife's, and added, "What a stingy dog I must have been to have made such a bargain! I would not have done so afterward. But, however, so it was; that was our agreement; and how do you think it turned out? In the twelfth month, I received half a guinea; eighteen pence went for fees and Bessie got nine shillings; in the other eleven months I got not one shilling." One year he did not go the circuit because he could not afford it. But the day of prosperity dawned at last. He got a brief in the case of Acroyd *v.* Smithson, which laid the foundation of his fame. The following is the history of that case as given by Eldon himself:

"You must know that the testator in that cause had directed his real estate to be sold, and after paying his debts and funeral and testamentary expenses, the residue of the money to be divided into fifteen parts, which he gave to fifteen persons whom he named in his will. One of these persons died in the testator's life-time. A bill was filed by the next of kin, claiming, among other things, the lapsed share. A brief was given me to consent for the heir at law, upon the hearing of the cause. I had nothing then to do but to pore over this brief. I went through all the cases in the books, and satisfied myself that the lapsed share was to be considered as real estate, and belonged to my client (the heir at law). The cause came on at the Rolls, before Sir Thomas Sewell. I told the solicitor who sent me the brief, that I should consent for the heir at law so far as regarded the due execution of the will, but that I must support the title of the heir to the one-fifteenth which had lapsed. Accordingly I did argue it, and went through all the authorities. When Sir Thomas Sewell went out of court, he asked the register who that young man was? The register told him that it was Mr. Scott. "He has argued very well," said Sir Thomas Sewell, "but I cannot agree with him." This the register told me. He decided against my client.

"You see the lucky thing was, there being two other parties, and the disappointed one not being content, there was an appeal to Lord Thurlow. In the meanwhile, they had written to Mr. Johnstone, recorder of York, guardian to the young heir at law, and a clever man, but his answer was: "Do not send good money after bad; let Mr. Scott have a guinea to give consent, and if he will argue, why let him do so, but give him no more." So I went into court, and when Lord Thurlow asked who was to appear for the heir at law, I arose and said modestly, that I was; and as I cannot but think (with much deference to the master of the Rolls, for I might be wrong) that my client had the right to the property, if his lordship would give me leave to, I would argue it. It was rather arduous for me to rise against all the eminent counsel. Well, Thurlow took three days to consider, and then delivered his judgment in accordance with my speech; and that speech is in print, and has decided all similar questions ever since."

As he left the hall a respectable solicitor touched him on the shoulder and said, "Young man, your bread and butter is cut for life;" and so it was.

Lord Erskine's *debut* was more brilliant than usually falls to the lot of young lawyers, but it would not be very unsafe to hazard the assertion that he was forced to succeed from sheer want. He was not called to the bar till he was in his twenty-ninth year, wholly destitute of any means of subsistence, and with a family to support. Reynolds, the comic writer, in speaking of him at this time, says: "The young student resided in small lodgings, near my father's villa at Hampstead, and openly avowed that he lived on cow-beef, because he could not afford any of a superior quality; he dressed shabbily, and expressed the greatest gratitude to Mr. Harris for occasional free

admissions to Covent Garden." Erskine's opportunity came in the defense of Captain Bailey, Lieutenant-Governor of Greenwich Hospital, charged with libel on Lord Sandwich, first lord of the Admiralty. The author of the *Clubs of London* gives the following as Erskine's own story of the case:

"I had scarcely a shilling in my pocket when I got my first retainer. It was sent me by a Captain Bailey of the Navy, who held an office at the board of Greenwich Hospital, and I was to show cause in the Michaelmas term against a rule that had been obtained in the preceding term, calling on him to show cause why a criminal information for a libel, reflecting on Lord Sandwich's conduct as governor of that charity, should not be filed against him. I had met, during the long vacation, this Captain Bailey, at a friend's table, and after dinner I expressed myself with some warmth, on the corruption of Lord Sandwich, as First Lord of the Admiralty, and then adverted to the scandalous practices imputed to him with regard to Greenwich Hospital. Bailey nudged the person who sat next to him, and asked who I was. Being told that I had just been called to the bar, and had been formerly in the navy, Bailey exclaimed with an oath: "Then I'll have him for my counsel!" I trudged down to Westminster Hall, when I had got the brief, and being the junior of five, who should be heard before me, never dreamt that the court would hear me at all. The argument came on, Dunning, Bearcroft, Wallace, Bower, Hargrave, were all heard at considerable length, and I was to follow. Hargrave was long-winded, and tired the court. It was a bad omen; but, as my good fortune would have it, he was afflicted with strangury, and was obliged to retire once or twice in the course of his argument. This protracted the cause so long, that when he had finished, Lord Mansfield said that the remaining counsel should be heard the next morning. This was exactly what I wished. I had the whole night to arrange in my chambers what I had to say the next morning, and I took the court with their faculties awake and freshened, succeeded quite to my own satisfaction (sometimes the surest proof that you have satisfied others), and as I marched along the hall, after the rising of the judges, the attorneys flocked around me with their retainers. I have since flourished, but I have always blessed God for the providential strangury of poor Hargrave."

Erskine was not expected to speak, being junior counsel and but recently called to the bar. In the morning, the Solicitor General was to speak in support of the rule, and the court room was crowded. Directly after the opening of the court, Erskine surprised every one by rising and saying: "My lord, I am likewise counsel for the author of this supposed libel, * * * and when a British subject is brought before a court of justice only for having ventured to attack abuses which owe their continuance to the danger of attacking them, * * * I cannot relinquish the privilege of doing justice to such merit; I will not give up even my share of the honor of repelling and exposing so odious a prosecution." During his speech, he began an attack on the first lord of the Admiralty. When the court reminded him that Lord Sandwich was not before the court, Erskine at once replied: "I know he is not formally before the court; but for that very reason I will bring him before the court. He has placed these men (the prosecutors) in the front of the battle, in hopes to escape under their shelter; but I will not join in the battle with them; *their* vices, though screwed up to the highest pitch of human depravity, are not of dignity enough to vindicate the combat with *me*. I will drag *him* to light who is the dark mover behind the scenes of iniquity." * * * He gained a decision in favor of his client. On being afterward asked how he dared to face Lord Mansfield on a point where he was clearly out of order, he replied: "I thought of my children as plucking me by the robe, and saying: 'Now, father, is the time to get us bread.'" From this beginning his business went on rapidly, increasing until it brought him an annual income of £12,000.

(To be continued.)

LAW OF ARREST WITHOUT WARRANT.

II.

In a former article we discussed the authority of private persons to arrest offenders without warrant. We now propose to investigate the authority of officers.*

First: In the act of committing the offense.

It is clear that whenever a private person may make an arrest an officer may also. He has at least an equal power to apprehend with any individual, and the chief difference between his power and duty and that of a private person seems to be, that the former has greater authority to demand the assistance of others. 1 Chit. Cr. L. 20. He is a conservator of the peace at common law, and by the original and inherent power which he possesses he may for treason, felony, affray or breach of the peace committed in his view apprehend the offender without a warrant. 1 Chit. Cr. L. 20.

He is not only empowered as all private persons are to quiet an affray which occurs in his presence, but is also bound, at his peril, to use his best endeavors for this purpose, and not only to do his utmost himself, but also to demand the assistance of others which the law obliges them to render. 1 Russ. on Cr. 294. And so far is the officer intrusted with a power over all actual affrays, that although he himself is a sufferer by them, and therefore liable to be objected to, as likely to be partial in his own cause, yet he may suppress them; and therefore if an assault be made upon him, he may not only defend himself but also imprison the offender in the same manner as if he were in no way a party. 1 Hawk. P. C. C. 63, § 15. It is said that if an officer see persons upon the very point of entering upon an affray, as where one shall threaten to kill, wound or beat another, he may take the offender before a magistrate, but it is also said that he ought not to lay hands on those who barely contend with hot words, without any threats of personal harm, and that all he can do is to command them, under pain of imprisonment, to avoid fighting. Ib. § 14.

An officer may arrest those who having been engaged in an affray conduct themselves in a manner that convinces him they intend to renew it, for indeed while those are assembled together who have committed acts of violence and the danger of their renewal continues, the affray itself may be said to continue. *Timothy* v. *Simpson*, 1 Crompton, Meeson & Roscoe, 757.

It is not for the peace officer to inquire as to who did the first wrong, where two persons are engaged in

*The term "officer" as used in this article means a peace office with all the common law powers of constables over offenders.

mutual conflict, and thus delay his interference to preserve the public peace.

It has been well said, that if no one could be restrained of his liberty, in cases of mutual conflict, except the party who did the first wrong, and the officer acted at his peril in this respect, there would be very little chance of the public peace being preserved (*Id.* 757); besides, in such cases, it is not to be presumed that an officer can obtain a correct idea of the transaction from a statement by the parties themselves.

The officer should arrest both and take them before a magistrate who could inquire into all the circumstances, on oath, and bind over one party to prosecute or the other to keep the peace, as upon a review of all the circumstances he might think proper. It often turns out that both parties have offended against the law. On the subject of arrests for breach of the peace the reader is referred to *Phillips* v. *Trull* (11 Johns. 486); *Pow* v. *Beckner* (3 Ind. 475); *Vandeveer* v. *Mattocks* (3 Ib. 479); *City Council* v. *Payne* (2 Nott & McC. 475, 478); *Commonwealth* v. *Deacon* (8 Serg. & Rawle, 47); *The State* v. *Brown* (5 Harrington [Del.] 505).

We will now consider the authority of an officer to take into his custody a person arrested by a private individual.

In our former article, on the authority of private persons to arrest without warrant, we gave this question a few considerations. We now propose to discuss the question farther. Whether an officer is warranted in arresting a person after a breach of the peace has been committed, is a point which has occassioned some doubt. There are, indeed, some authorities to the effect that the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice to find security for his appearance. But the better opinion was always said to be the other way. (See Ros. Cr. Ev. 242, and cases there cited.)

It seems now to be settled that an officer has no power to arrest a man for an affray done out of his own view, without a warrant from a justice of the peace. *Cook* v. *Nethercote* (6 C. & P. 741); *Fox* v. *Gaunt* (3 B. & Ad. 798).

We cannot reconcile, altogether, on any principle of sound reasoning the above doctrine with the decisions in the cases of *Timothy* v. *Simpson* (1 C. M. & R. 757), and *Price* v. *Seeley and others* (10 Clark & Finnelly [House of Lords], 28), which are to the effect that a private person may arrest and place in custody of an officer, a party engaged in an affray, or who, having been engaged in an affray, is preparing to renew it. An officer cannot arrest for an affray out of his own view, or on the charge or information of another, without warrant, as we have above seen; but does he not act upon the information of another, when he receives into his custody a prisoner brought by a private person, who apprehended him while he was engaged in an affray, and who states the same to the officer at the time he is transferred to his custody?

Now, in the case we have just supposed, the private person could not, immediately after seeing the prisoner engaged in an affray, communicate the fact to an officer, and have that officer proceed to the place of the affray and make the arrest, after it is all over; and yet, according to the doctrine laid down in the decisions of those two cases, he could arrest the offender himself and take him to the officer, and place him in his custody with the same relation of facts.

We fail to see any good reason why the officer should receive a prisoner in custody after the affray is over, when he could not himself arrest him under such circumstances.

On a careful examination of the two cases referred to above (*Price* v. *Seeley* and *Timothy* v. *Simpson*), we find that in the case of *Price* v. *Seeley*, the officer was present during the latter part of the affray, and therefore had ample authority to arrest the plaintiff himself. In the case of *Timothy* v. *Simpson*, the officer was sent for and arrived at the shop where the plaintiff was standing, refusing to leave until he first obtained his hat, which he had lost in the scuffle or affray, and insisting on his right to remain there after being requested to leave the shop quietly by the shopman. A mob was gathering around the door, when the defendant gave him in charge to the policeman. It is quite evident that the officer saw enough himself to justify him in the belief that the plaintiff intended to renew the affray, even if we do not conclude that the affray was still continuing when the officer arrived, there was to him a well-grounded apprehension of a renewal of the affray; and, of course, there seems to be no objection that a private person may arrest and deliver a party engaged in an affray, or about to renew an affray, into the custody of an officer, who also witnesses a whole or a part of the transaction.

So that we think the doctrine that a private citizen may arrest a party engaged in an affray, and place him in the custody of an officer, should be received with such qualification.

The citizen, having made the arrest, in the first instance, instead of placing the prisoner in the custody of an officer who has witnessed no part of the transaction, should take the responsibility of the arrest entirely upon himself and convey him before a justice of the peace; especially when the officer would be liable with the citizen in case it should turn out that the original arrest was wrongfully made.

An officer may take into his custody a person who stands in his way for the purpose of preventing him from making an arrest and preserving the public peace; and where one encourages a person arrested, or being arrested, to resist the officer, he may be taken into his custody immediately. (*Levy* v. *Edwards*, 1 Car. & P. 40; *White* v. *Edmunds*, Peake, 89.) So an officer may take into his custody a person in a public house, who is making such a disturbance as to create alarm and disquiet in the neighborhood, if he does so in view of the officer. (*Howell* v. *Jackson*, 6 C. & P. 723.)

An officer, like a justice of the peace, is a conservator of the public peace, and undoubtedly, like him, has authority to disperse unlawful assemblies and quell riots.

An unlawful assembly may be dispersed by a magistrate, whenever he finds a state of things existing calling for an interference in order to preserve the public peace. He is not required to postpone his action until the unlawful assembly ripens into an actual riot. For it is better to anticipate more dangerous

results by energetic intervention at the inception of a threatened breach of the peace, than by delay to permit the tumult to acquire such strength as to demand for its suppression those urgent measures which should be reserved for great extremities. Am. Cr. L. 4th ed. § 2499.

We have seen that officers may arrest without warrant for affrays or breach of the peace committed in their presence, but the question naturally arises as to what other misdemeanors this principle applies. It was laid down in New Hampshire, "that constables and police officers have power to arrest, in many cases, upon their own view of an offense committed as at common law for breaches of the peace, and by statute for the breach of police regulations, but they have no such power in the case of placing a nuisance, not specified in the police law, in a highway." Mr. Bishop, in Vol. 1, § 640, Cr. Pra., adds, "that, on the other hand, it can hardly be doubted that there may be circumstances in which the persistent conduct of placing and continuing to place nuisances in a public and thronged street would justify the police officers of the law in interfering by arresting the wrong-doer without waiting to obtain a warrant from a magistrate." So it would seem that the individual who exhibits obscene prints in a public manner commits a misdemeanor for which he should be arrested immediately by the officer who witnesses it.

There are several statutory misdemeanors for which, when committed in the presence of an officer, he may arrest without warrant — that power being conferred upon him by the statute.

The several members of the Metropolitan Police force, Capital Police force, and Niagara Police force of the State of New York, have power and authority immediately, and without process, to arrest and take into custody any person who shall commit in his presence, or within his view, any breach of the peace or offense directly prohibited by act of the Legislature, or by any ordinance of the city, town, or village within which the offense is committed, threatened, or attempted; but such officer must, immediately upon such arrest, convey, in person, such offender before the nearest magistrate, that he may be dealt with according to law. Laws of 1864, chap. 403, § 30; Laws of 1865, chap. 554, § 25; Laws of 1866, chap, 454, § 23.

There are some case which define the authority of officers under peculiar circumstances, two of which we will briefly notice.

"If a police constable, on being sent for at a late hour of the night to clear a beer house, does so; and one of the persons, on the rest leaving the house and being told to go away, refuses, and uses threatening language, the police constable is justified in laying hands on him to remove him." Williams, J., said: "If a policeman had heard any noise in the house he would have acted within the line of his duty if he had gone in and insisted that the house should be cleared; and much more so if he was required by the landlady. * * * And if any thing was saying or doing, likely to lead to a breach of the peace, the policeman was not only bound to interfere, but it would have been a breach of his duty if he had not done so. One great use of these police constables is to prevent mischief in the bud." *Rex* v. *Hems*, 7 Car. & P. 312, 313.

In the case of *Mulligan* v. *The People*, 5 Park. Cr. Rep. 105, "The prisoner (Mulligan) was in a common gambling house of which Morrissey, one Dancy and others were proprietors, and while conversing peacefully with Dancy was ordered out of the house by Morrissey. Not leaving in pursuance of the request, Morrissey procured the attendance of Oliver, who was one of the police officers of the city of New York, and requested him to remove the prisoner from the premises; the prisoner refused to go or did not leave at the request of the officer, and the latter advanced toward him with a view to eject him from the house. The evidence tended to show that the prisoner advanced and took from his pocket a loaded pistol and pointed it at the officer using threatening language, indicating an intent to discharge it if the officer put his hand on him, or advanced toward him. The pistol was not cocked."

The prisoner was indicted for attempting to discharge a pistol with intent to kill, was convicted in the New York Oyer and Terminer, and error was brought to the Supreme Court.

By the court, Allen, J. :"As there was no breach of the peace or other offense committed in the presence of the officer, he, as such, had no authority to interfere with or molest the prisoner, and the display of his shield did not add to his powers. All the authority he had was as the servant of Morrissey, the proprietor of the house. As such he could have done, at his request, precisely what Morrissey himself could have done, that is upon the refusal of the prisoner to leave the house, upon being requested so to do, he could have removed him, using just that measure of force necessary to accomplish that purpose, and no more.

"The prisoner could not have been indicted for resisting Oliver as an officer. (*Reg.* v. *Mabel*, 9 Car. & Payne, 474.) The officer went beyond his duty as such in attempting to remove the prisoner, and was not therefore within the protection of the law as an officer. (*Wheeler* v. *Whitney*, id. 262.) But as the servant of Morrissey, and acting for him, he had a right to remove the prisoner."

In our next article we shall investigate the authority of officers to arrest, without warrant, after the offense is committed.

LAW AND LAWYERS IN LITERATURE.*

V.

RABELAIS.

If I were called on to specify the author who, while he is conceded to rank among the most distinguished of all times, is also the least read, and when read, least understood, I should unhesitatingly say Rabelais. And yet the witty Frenchman is quite explicit and unequivocal on the subject under present consideration. The procedure of his Justice Bridlegoose is too amusing not to be quoted in full:

"For having well and exactly seen, surveyed, overlooked, reviewed, recognized, read and read over again, turned and tossed over, seriously perused and

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

examined the bills of complaint, accusations, impeachments, indictments, warnings, citations, summonings, compositions, appearances, mandates, commissions, delegations, instructions, informations, inquests, preparatories, productions, evidences, proofs, allegations, depositions, cross-speeches, contradictions, supplications, requests, petitions, inquiries, instruments of the depositions of witnesses, rejoinders, replies, confirmations of former assertions, duplies, triples, answers to rejoinders, writings, deeds, reproaches, disabling of exceptions taken, grievances, salvation bills, re-examination of witnesses, confronting of them together, declarations, denunciations, libels, certificates, royal missives, letters of appeal, letters of attorney, instruments of compulsion, delinatories, anticipatories, evocations, messages, dimissions, issues, exceptions, dilatory pleas, demurs, compositions, injunctions, reliefs, reports, returns, confessions, acknowledgments, exploits, executions, and other such like confects and spiceries, both at the one and the other side, as a good judge ought to do, conform to what hath been noted thereupon."

Here let us pause for breath and to ask if there were no codifiers in those days?

"That being done," continues Francis, "I posit on the end of a table in my closet all the pokes and bags of the defendant, and then allow unto him the hazard of the dice, according to the usual manner of your other worships. I thereafter lay down upon the other end of the same table the bags and satchels of the plaintiff, as your other worships are accustomed to do, just over against one another. Then I do likeways semblably throw the dice for him, and forthwith liver him his chance. I give out sentence in his favor unto whom hath befallen the best chance by dice, judiciary, tribunian, pretorial, what comes first."

This learned and impartial judge being inquired of, why then he did "not deliver up these fair throws and chances the very same day and hour, without any further procrastination or delay," and "to what use can those writings serve you, those papers and other procedures contained in the bags and pokes of the law-suitors?" makes answer: "They are behoofed unto me, and serve my turn in three things very exquisite, requisite and authentic: first, for formality sake;" secondly, "in lieu of some other honest and healthful exercise;" and thirdly, "I defer, protract, delay, prolong, intermit, surcease, pause, linger, suspend, prorogate, drive out, wire-draw and shift off the time of giving a definitive sentence, to the end that the suit or process, being well fanned and winnowed, tossed and canvassed to and fro, narrowly, precisely and nearly garbled, sifted, searched and examined, and on all hands exactly argued, disputed and debated, may by succession of time come at last to its full ripeness and maturity. By means whereof, when the fatal hazard of the dice ensueth thereupon, the parties cast or condemned by the said aleatory chance will, with much greater patience, and more mildly and gently, endure and bear up the disastrous load of their misfortune than if they had been sentenced at their first arrival unto the court."

Of one who settled a great many lawsuits, he said: "He was no judge at all, but a right honest man."

He also has a chapter in which he likens the formation of lawsuits to the growth of a bear's cub, which, at first shapeless and ugly, is licked into form by its dam. At first they consist of only one or two writings, "but when there are heaps of these legiformal papers packed, piled, laid up together, impoked, insatcheled, and put up in bags, then it is with good reason we term that a suit."

"Process," he says, "is purchase; viz.: of good store of money to the lawyers, and of many pokes—*id est, Prou Sacks* — to the pleaders."

He was very severe on the judges, whom he called "furred law-cats," and of whom he says they "are most terrible and dreadful monsters that devour little children."

In his chapter on the "Apedepts," he satirizes certain courts of judicature. Among the monsters in this island was one which fed on Appeals, and another whose name was Review. The island was colonized from Attorneyland, and its inhabitants fed on parchment, ink-horns, and pens.

In commenting on another law-suit, he says: "Hereupon the magisters made a vow never to decrott themselves in rubbing off the dirt of either their shoes or clothes; Master Janotus with his adherents vowed never to blow or snuff their noses, until judgment were given by a definitive sentence. By these vows do they continue unto this time both dirty and snotty; for the court hath not garbled, sifted, and fully looked into all the pieces as yet. The judgment or decree shall be given out and pronounced at the next Greek Calends — that is, never. As you know that they do more than nature, and contrary to their own articles. The articles of Paris maintain that to God alone belongs infinity, and nature produceth nothing that is immortal, for she putteth an end and period to all things by her engendered, according to the saying, *Omnia orta cadunt*. But these thick mist-swallowers make the suits in law depending before them both infinite and immortal. In doing whereof they have given occasion to, and verified the saying of Chilo the Lacedæmonian, consecrated to the Oracle at Delphos, that misery is the inseparable companion of lawsuits; and that suitors are miserable; for sooner shall they attain to the end of their lives, than to the final decision of their pretended rights."

Against what other part soever of Rabelais' works the charge of obscurity may be sustained, it certainly cannot be brought against these animadversions on lawyers. It also seems to me, that, if we may judge by the want of consistency in the decisions of some of the highest legal tribunals in this land, the custom of dice-throwing as a means of determining lawsuits is by no means obsolete. The only argument against this belief is, that if the aleatory chance prevailed, their judgment would occasionally be just.

This review of Rabelais also suggests the query, whether the practice of Justice Bridlegoose may not have given rise to the phrase, "cast in law," or "cast in damages;" a problem for Mr. Richard Grant White, Dean Trench, and the other word-hunters.

MONTAIGNE

has less to say on the subject of our reading than might be expected. He asks: "What can be more outrageous than to see a nation where, by lawful custom, the office of a judge is to be bought and sold, where

judgments are paid for with ready money, and where justice may legally be denied to him that has not wherewithal to pay; where this merchandise is in so great repute, as in our government, to furnish a fourth estate of wrangling lawyers, to add to the three ancient ones of the church, nobility, and people; which fourth estate, having the laws in their hands, and sovereign power over men's lives and fortunes, make a body separate from the nobility." He complains that "the very women and children, now-a-days, take upon them to school the oldest and most experienced men about the ecclesiastical laws; whereas the first of those of Plato forbids them to inquire so much as into the reason of civil laws, which were to stand instead of divine ordinances." He complains, too, of the fluctuation of laws, particularly in England, especially in regard to religion; and of his own country, he says: "I have known a thing that was capital to become lawful." He says that King Ferdinand, sending colonies to the Indies, "wisely provided that they should not carry along with them any law students, for fear lest suits should get a footing in that new world; as being a science in its own nature the mother of alteration and division; judging with Plato, 'that lawyers and physicians are the pests of a country.'" He very pertinently inquires: "Whence does it come to pass that our common language, so easy for all other uses, becomes obscure and unintelligible in wills and contracts? and that he who so clearly expresses himself herein, whatever he speaks or writes, cannot find in this any way of declaring himself that he does not fall into doubt and contradiction? If it be not that the princes of this art, applying themselves with a peculiar attention to invent and cull out sounding words, and contrive artistical periods, have so weighed every syllable, and so thoroughly sifted every sort of seam, that they are now confounded and entangled in the infinity of figures, and so many minute divisions, that they can no more fall into any rule or prescription, nor any certain intelligence." He insists that glosses and commentaries only serve to obscure the text. "This is most apparent in the law; we give the authority of law to infinite doctors, infinite decisions, and as many interpretations; yet do we find any end of the need of interpreting? Is there, for all that, any progress or advancement toward peace? Do we stand in need of any fewer advocates or judges than when this great mass of law was yet in its first infancy?" On this point he is at direct variance from Dr. Johnson, who, as we have seen, believed that as precedents multiplied the less would be the need of lawyers. It is interesting to be told that Montaigne never had a suit. "No judge, thank God, has ever yet spoken to me in the quality of a judge." He is particularly savage on the French laws, and I judge his remarks on this point to be quite applicable to the bulk of our State legislation: "They" (the laws) "are often made by fools; more often by men that out of hatred to equality fail in equity; but always by men who are vain and irresolute authors. There is nothing so much, nor so grossly, nor so ordinarily faulty, as the laws. The command is so perplexed and inconstant, that it, in some sort, excuses both disobedience and defect in the interpretation, the administration, and the observation of it." I hope the makers of our late proposed constitution will ponder this last sentence. His chapter on "Sumptuary Laws" we commend to the New England Prohibitionists. This wise man winds it up with this weighty sentence: "No laws are in their true credit, but such to which God has given so long a continuance that no one knows their beginning, or that there ever was any other."

BOILEAU,

too, has his fling at the Law in the famous epigram, translated by Pope:

"Once (says an author, where I need not say),
Two travelers found an oyster in their way;
Both fierce, both hungry, the dispute grew strong,
While, scale in hand, dame Justice pass'd along.
Before her each with clamor pleads the laws,
Explain'd the matter, and would win the cause.
Dame Justice, weighing long the doubtful right,
Takes, opens, swallows it before their sight.
The cause of strife remov'd so rarely well,
'There, take (says Justice), take ye each a shell.
We thrive at Westminster on fools like you;
'Twas a fat oyster — live in peace — Adieu.'"

ADDISON

has some pleasant reflections on law in No. 564 of *The Spectator*, introduced by this apposite quotation from Horace:

"Adsit
Regula, peccatis quæ pœnas irroget æquas,
Ne scutica dignum horribili sectere flagello."

Among other things he observes: "The very same action may sometimes be so oddly circumstanced that it is difficult to determine whether it ought to be rewarded or punished. Those who compiled the laws of England were so sensible of this that they have laid it down as one of their first maxims: 'It is better suffering a mischief than an inconvenience;' which is as much as to say in other words, that since no law can take in or provide for all cases, it is better private men should have some injustice done them than that a public grievance should not be redressed. This is usually pleaded in defense of all those hardships which fall on particular persons in particular occasions, which could not be foreseen when a law was made. To remedy this, however, as much as possible, the court of chancery was erected, which frequently mitigates and breaks the teeth of the common law, in cases of men's properties, while in criminal cases there is a power of pardoning still lodged in the crown."

This about the court of chancery in England sounds like a grim joke. For "breaks the teeth" read "picks the teeth," and one gets nearer the truth, for chancery does not demolish the common law's grinding power, but if any crumb or fragment of an estate or controversy still sticks to the teeth of the common law, chancery carefully cleans them out, and the suitor too.

This paper concludes with the anecdote from Plutarch of the Spartan youth, who, being in the bath when his city was attacked, rushed out naked and was greatly instrumental in routing the enemy. For his gallantry he was rewarded by the magistrates with a garland; but for going to battle unarmed, he was fined a thousand drachmas.

In No. 577 is found "The humble petition of John a Noakes and John a Styles. Showeth, that your petitioners have had causes depending in Westminster Hall above five hundred years, and that we despair of ever seeing them brought to an issue; that your

petitioners have not been involved in these law suits out of any litigious temper of their own, but by the instigation of contentious persons; that the young lawyers in our inns of court are continually setting us together by the ears, and think they do us no hurt because they plead for us without a fee; that many of the gentlemen of the robe have no other clients besides us two; that when they have nothing else to do they make us plaintiffs and defendants, though they were never retained by either of us; that they traduce, condemn or acquit us, without any regard to our reputations and good names in the world. Your petitioners, therefore, being thereunto encouraged by the favorable reception which you gave to our Kinsman Blank, do humbly pray that you will put an end to the controversies which have been so long depending between us your said petitioners, and that our enmity may not endure from generation to generation, it being our resolution to live hereafter as becometh men of peaceable dispositions."

The reference to "our Kinsman Blank," is explained by reverting to No. 563, a letter of complaint written by "Blank," the postscript of which is quite in point:

"P. S. — I herewith send you a paper drawn up by a country attorney, employed by two gentlemen, whose names he was not acquainted with, and who did not think fit to let him into the secret which they were transacting. I heard him call it a 'blank instrument,' and read it after the following manner. You may see by this single instance of what use I am to the busy world:

"I, T. Blank, Esquire, of Blank town, in the county of Blank, do own myself indebted in the sum of Blank to Goodman Blank, for the services he did me in procuring me the goods following, Blank; and I do hereby promise the said Blank to pay unto him the said sum of Blank, on the Blank day of the month of Blank next ensuing, under the penalty and forfeiture of Blank."

In No. 372 (by Steele) is a communication from one describing an evening passed at "a lawyers' club," the tendency of which he complains is "to increase fraud and deceit." He says: "Every one proposes the cause he has then in hand to the board, upon which each member gives his judgment according to the experience he has met with. If it happens that any one put a case of which they have had no precedent, it is noted down by their clerk Will Goosequill (who registers all their proceedings), that one of them may go the next day day with it to a counsel. This, indeed, is commendable, and ought to be the principal end of their meeting; but had you been there to have heard them relate their methods of managing a cause, their manner of drawing out their bills, and, in short, their arguments upon the several ways of abusing their clients, with the applause that is given to him who has done it most artfully, you would before now have given your remarks upon them."

In No. 21, Addison reflects "upon the three great professions of divinity, law, and physic; how they are, each of them, overburdened with practitioners, and filled with multitudes of ingenious gentlemen that starve one another."

He pays his compliments to us as follows: "The body of the law is no less encumbered with superfluous members, that are like Virgil's army, which he tells us was so crowded many of them had not room to use their weapons. This prodigious society of men may be divided into the litigious and peaceable. Under the first are comprehended all those who are carried down in coach-fulls to Westminster Hall every morning in term time. Martial's description of this species of lawyers is full of humor: '*Iras et verba locant.*' 'Men that hire out their words and anger;' that are more or less passionate according as they are paid for it, and allow their client a quantity of wrath proportionate to the fee which they receive from him. I must, however, observe to the reader, that above three parts of those whom I reckon among the litigious are such as are only quarrelsome in their hearts, and have no opportunity of showing their passion at the bar. Nevertheless, as they do not know what strifes may arise, they appear at the hall every day, that they may show themselves in readiness to enter the lists, whenever there shall be occasion for them. The peaceable lawyers are, in the first place, many of the benchers of the several inns of court, who seem to be the dignitaries of the law, and are endowed with those qualifications of mind that accomplish a man rather for a ruler than a pleader. These men live peaceably in their habitations, eating once a day, and dancing once a year, for the honor of their respective societies. Another numberless branch of peaceable lawyers are those young men, who, being placed at the inns of court in order to study the laws of their country, frequent the play-house more than Westminster Hall, and are seen in all public assemblies, except in a court of justice."

We might well take comfort to ourselves, if we met with no severer critic than the gentle Addison.

WYCHERLEY.

As might be expected from the dissolute manners of the times, Law and Lawyers make but a small figure in the dramatists of the Restoration. In *The Plaindealer*, however, we find some amusing hits at the lawyers, and one very amusing character, "Widow Blackacre, a petulant, litigious widow, always in law." Scene 1, of Act 3, is laid in Westminster Hall, where *Manly* and *Freeman* enter:

"*Manly:* I hate this place worse than a man who has inherited a chancery suit. I wish I were out on't again.

Freeman: Why, you need not be afraid of this place; for a man without money needs no more fear a crowd of lawyers than a crowd of pickpockets.

Manly: This the reverend of the law would have thought the palace or residence of Justice; but if it be, she lives here with the state of a Turkish Emperor rarely seen, and besieged, rather than defended, by her numerous blackguard here."

The widow enters in a crowd of half a dozen lawyers:

"*Widow:* Offer me a reference! you saucy companion, you! D' ye know who ye speak to? Art thou a solicitor in chancery, and offer me a reference? Mr. Sergeant Plodden, here's a fellow has the impudence to offer me a reference!

Sergeant Plodden: Who's that has the impudence to offer a reference within these walls?"

The widow says to Mr. Quaint: "Pray, go talk a great deal in chancery; let your words be easy and your sense hard; my cause requires it; branch it bravely, and deck my cause with flowers, that the snake may lie hidden. Go, go, and be sure you remember the decree of my Lord Chancellor, *Tricesimo quart* of the queen.

Quaint: I will, as I see cause, extenuate or exemplify matters of fact; baffle truth with impudence; answer exceptions with questions, though never so impertinent; for reasons give 'em words; for law and equity, tropes and figures; and so relax and enervate the sinews of their argument with the oil of my eloquence. But when my lungs can reason no longer, and not being able to say any thing more for our cause, say every thing of our adversary."

On espying another lawyer, the widow exclaims: "Is not that Mr. What-d 'ye-call-him, that goes there, he that offered to sell me a suit in chancery for five hundred pounds, for a hundred down, and only paying the clerk's fees?" Again, *Manly* complains that "a lawyer talked peremptorily and saucily to me, and as good as gave me the lie," to which *Freeman* replies: "They do it so often to one another at the bar, that they make no bones on't elsewhere."

Major Oldfox, given to scribbling and in love with the widow, says to her: "Here's a poem, in blank verse, which I think a handsome declaration of one's passion;" to which the widow answers: "O, if you talk of declarations, I'll show you one of the prettiest penned things, which I mended too, myself, you must know. *Old.* Nay, lady, if you have used yourself so much to the reading harsh law, that you hate smooth poetry, here is a character for you, of— *Wid.* A character! Nay, then I'll show you my bill of chancery here, that gives you such a character of my adversary, makes him as black— *Old.* Pshaw! Away, away, lady! But if you think the character too long, here is an epigram, not above twenty lines, upon a cruel lady, who decreed her servant should hang himself, to demonstrate his passion. *Wid.* Decreed! If you talk of decreeing, I have such a decree here, drawn by the finest clerk— *Old.* O, lady, lady, all interruption and no sense between us, as if we were lawyers at the bar! but I had forgot Apollo and Littleton never lodge in a head together." Which last sentiment is agreed with by Pope, who says:

> "How sweet an Ovid, Murray was our boast!
> How many Martials were in Pulteney lost!"

This dialogue winds up with an offer on the part of the *Major* to read a letter about "the coffee-man's case." The widow answers: "Nay, if your letter have a case in't, 'tis something; but first, I'll read you a letter of mine to a friend in the country, called a letter of attorney." Finally, when one proposes to marry her, she replies: "O stay, sir! Can you be so cruel as to bring me under Covert-Baron again, and put it out of my power to sue in my own name? Matrimony to a woman is worse than excommunication, in depriving her of the benefit of the law."—Sentiments worthy of *The Revolution* newspaper.

FARQUHAR,

In the Twin-Rivals, depicts a vulgar rascally attorney, *Subtleman*, but I find only one sentiment in his speeches worthy of quotation. He is endeavoring to induce another to swear to a false will, and when it is objected to as against conscience he asks: "But if we make it lawful, what should you fear? We now think nothing against conscience, till the cause be thrown out of court."

CONGREVE,

In Love for Love, makes *Valentine*, who assumes madness, inquire: "Why does that Lawyer wear black? Does he carry his conscience without-side? Lawyer, dost thou know me? *Buckram.* O Lord, what must I say? Yes, sir. *Val.* Thou liest, for I am truth. 'Tis hard I cannot get a livelihood amongst you. I have been sworn out of Westminster Hall the first day of every term—let me see—no matter how long. But I'll tell you one thing; it's a question that would puzzle an arithmetician, if you should ask him, whether the Bible saves more souls in Westminster Abbey, or damns more in Westminster Hall." After the lawyer goes, he says: "'Tis well, then we may drink a bout without going together by the ears." When the lawyer re-enters, he exclaims: "'Tis the lawyer with an itching palm; and he's come to be scratched—my nails are not long enough. Let me have a pair of red-hot tongs, quickly, quickly, and you shall see me act St. Dunstan, and lead the devil by the nose." The lawyer runs off in a fright, and the pseudo-lunatic cries to him that he need not run so fast. "Honesty will not overtake you." Congreve shows his acuteness by attributing such sentiments as the foregoing to a madman. *Jeremy*, a servant, endeavoring to give an adequate idea of his skill in putting off his master's creditors, says: "I have dispatched some half a dozen duns with as much dexterity as a hungry Judge does causes at dinner-time." *Scandal*, in speaking of his collection of portraits,—"as like as at Kneller's"—says: "I have some Hieroglyphics too; I have a Lawyer with a hundred Hands, two Heads, and but one Face."

QUEVEDO,

a Spanish satirist of the first half of the seventeenth century, was much given to "Visions," and in one of the Day of Judgment, has the following uncomfortable allusion to lawyers: "I had to pity the eagerness with which a great crowd of notaries and lawyers was rushing by, flying from their own ears,"—a long journey for some of our profession, it must be confessed—"in order to escape hearing their own sentence; but none succeeded in this, except those who in this present world had had their ears cropped off as thieves; but these, owing to the neglect of justice, were by no means in the majority."

As an offset to this, I do not discover that Dante gives us any place in his Inferno. The nearest approach to it is a reference in the argument preceding the twenty-sixth canto, as translated by Wright, to "evil counselors." But, aside from the natural doubt whether that phrase means lawyers, it does not seem to be supported by any thing in the poem—the reporter's syllabus is not borne out by the decision. It is hardly worth while, on the other hand, to examine whether the poet gives us a place in Paradise; his age was not christianized enough for such a stretch of charity.

SHELLEY.

Nothing ever written against the Chancery Court of England equals, in intensity and bitterness, the lines of Shelley "To the Lord Chancellor." The Chancellor, Lord Eldon, had decreed that the poet was not a fit person to have the custody and education of his elder children, on account, I believe, of his peculiar notions of religion; and the poet poured out the vials of his wrath on him and his court, commencing as follows:

"Thy country's curse is on thee, darkest Crest
Of that foul, knotted, many-headed worm,
Which rends our Mother's bosom — Priestly Pest!
Masked Resurrection of a buried form!"

The Star-chamber meaning. He curses the chief bigwig by nearly as many forms and with as great ingenuity as the Catholic anathema; and, among other things,

"By all the acts and snares of thy black den."

Elsewhere, in the same piece, he mildly characterizes the chancery and the chancellor as:

"the earth-consuming hell,
Of which thou art a demon."

It must be bad enough to be a chancellor, without being cursed by a poet.

SUICIDE AND INTEMPERANCE IN LIFE INSURANCE.*

"The Law in reference to Suicide and Intemperance in Life Insurance," is the title of a pamphlet read before the New York Medico-Legal Society, by William Shrady, LL. B. It is interesting as an abstract of some of the leading English and American cases bearing upon the question of how far insurance companies may be liable in case of death by suicide consequent upon insanity. Upon the question of intemperance the authorities quoted would bear as strongly upon questions arising upon the concealment of any information material to be known by the insurers as upon the withholding the truth as to intemperate habits.

We regret that the subject was not more fully discussed, and a thorough examination made of the principles which underlie the liability of insurance companies in the cases mentioned in the title. In particular the question of insanity, as affecting the legal rights, liabilities and privileges of the citizen, is always a matter of great interest to the lawyer.

The conclusions arrived at in this pamphlet embrace the following:

"*First.* The English decisions strictly construe 'die by his own hands or the hands of justice,' or the words 'commit suicide,' as extending to all voluntary acts, whether the party committing such acts was sane or insane.

"*Second.* The American cases, with few exceptions, construe the same words as meaning only criminal acts of self-destruction, and do not extend to acts not under the control of the will."

*The Law in reference to Suicide and Intemperance in Life Insurance, read before the New York Medico-Legal Society, by William Shrady, LL. B., Counsellor at Law. New York: C. C. Hine, 1869.

Borradaile v. *Hunter*, 5 Man. & Gr., 648, is one of the English cases quoted, and may probably be taken as the true exponent of the law of England on the subject. In that case the policy contained the usual clause that "in case the assured should die by his own hands, or by the hands of justice, or in consequence of a duel," the policy should be void. The assured threw himself into the Thames and was drowned. ERSKINE, J., instructed the jury that if the assured, by his own act, intentionally destroyed his own life, and that he was not only conscious of the probable consequences of the act, but did it for the express purpose of destroying himself voluntarily, having at the time sufficient mind to will to destroy his life, the case would be brought within the condition of the policy; but if he was not in a state of mind to know the consequences of the act, then it would not come within the condition. The jury found that the assured voluntarily threw himself into the water, knowing at the time that he should thereby destroy his life, and intending thereby to do so, but at the time of committing the act, he was not capable of judging between right and wrong. The policy was held to be avoided.

Clift v. *Schwabe*, another English case, was decided in the Exchequer Chamber four years later. (54 Eng. Com. L. R., 437.) In this case the policy contained the words "commit suicide" instead of "die by his own hands." CRESSWELL, J., at *nisi prius*, charged the jury that to bring the case within the exception, it must be made to appear that the deceased died by his own voluntary act; that at the time he committed that act he could distinguish between right and wrong, so as to be able to understand and appreciate the nature and quality of the act he was doing; and that therefore he was at that time a responsible being. The jury found for the plaintiff, but in the Exchequer Chamber a new trial was ordered — the court holding that the terms of the condition included all acts of voluntary self-destruction, and, therefore, if one voluntarily killed himself, it was immaterial whether he was or was not at the time a responsible moral agent.

The only two American cases to which attention is called are *Eastabrook* v. *Union Mutual Life Ins. Co.*, 54 Maine, 224, and *Brewster* v. *Farmers' Loan and Trust Co.*, 4 Hill, 73. In the case of Eastabrook the jury found that the insured killed himself as the result of a "blind and irresistible impulse over which the will had no control." The insurers were held liable. The decision in 4 Hill, 73, was upon demurrer, which admitted the truth of the replication, that when the assured drowned himself he was of unsound mind, and wholly unconscious of the act. It was held that the replication was good, and upon the facts by the demurrer admitted the insurers were liable.

The last case was afterward tried upon its merits, and reviewed by the Court of Appeals (8 N. Y. 299). There an attempt was made to show that there was no conflict or difference of decision between the decisions of the English courts above cited and the case under consideration. Upon the trial before referees, they found that the assured threw himself into the Hudson river from the steamboat Erie, while insane, for the purpose of drowning himself, not being mentally capable at the time of distinguishing between right and

wrong. The Court of Appeals sustained a verdict against the insurers. WILLARD, J., however, in giving the opinion of the court, distinguishes the case from those of *Borradaile* v. *Hunter* and *Clift* v. *Schwabe*, the referees not having found that the deceased acted *voluntarily*, or that he knew the consequence of his act.

So the same distinction may be drawn in the case of *Eastabrook* v. *Union M. Life Ins. Co.*, and it does not, therefore, appear that there is any real conflict between the English and American cases. It is not, however, improbable, that, if the case should arise, our courts would go the same length as in the opinion of Judge NELSON, in 4 Hill, 73; and hold that self slaughter by an insane man or a lunatic is not an act of suicide within the meaning of the law.

It is doubtful, however, whether we shall ever have a uniformity of decisions upon this subject, or any other embracing the question of insanity, until some court having authority shall accurately define insanity more truthfully than by declaring it to be inability to distinguish between right and wrong. Any physician familiar with insanity knows that his patient, to all appearances, will be competent to know the consequences of a wrong act, and will declare and seem to understand its sin, yet will be as mad as ever entered an asylum.

Any one that associates in the busy crowds of the world has met men who never seemed able to appreciate the difference between right and wrong, and yet are as sane as the judges upon the bench. If the rule now adopted be correct, in criminal courts punishments should be meted in proportion as the moral nature of the offenders has been educated or developed. No consideration should be had of the health and strength of the intellect which plots crime, and accomplishes it with certainty of immunity from consequences if unaccompanied by moral faculties of such strength as to distinguish between right and wrong. It is not to be expected, however, that the courts will change the rule so long sanctioned by their own high authority, and probably it is best they should not, for a change would be apt to lead to still greater uncertainty.

It detracts somewhat from the force of all, or most of the decisions above referred to, that stress is laid upon the maxim of *noscitur a sociis*, and the words "death by his own hands" are construed as denoting criminal acts, because placed in juxtaposition with the clauses referring to death at the hands of justice, or in a duel, or in violation of law. Other considerations are given sufficient to sustain the judgments and decisions, and it would hardly be expected that different decisions would depend upon a policy being worded so as to bring the clauses in different connections.

It is, of course, competent for an insurance company, in its contract with the insured, to stipulate against liability, for death resulting from self-destruction, whether in a fit of insanity or otherwise. But while policies read according to the form most in vogue, we may expect the courts to hold that self-destruction by an insane person is not the act of his own hand. If the English courts apply to this particular class of cases a different test for insanity, they should not be understood as denying that the act of an insane man is not the act of his own hand.

It may be that it is not much more incorrect to hold the question of responsibility for an act to depend upon its being voluntary, than upon a due appreciation of moral responsibility. The definitions of insanity may differ, but unless the insurers except insanity from their contracts, they should be held liable for the insurance when death is the result of self-destruction committed by one insane or a lunatic.

CURRENT TOPICS.

St. Louis has the honor of developing a new "cause for divorce." A prominent citizen of that city is alleged to have recently applied for a divorce on the ground that his wife makes him fast continually for religious purposes. It is difficult to see how any court with a proper regard for its stomach can resist such a plea. We commend the case to the attention of the "society to prevent cruelty to animals."

It is to be hoped that some action will be taken in the Legislature during the present session, relative to the adoption of the Penal Code. Our readers will remember that this Code was reported to the Legislature some five or six years ago, since which time no action on it has been taken. Sufficient time has elapsed to enable all its provisions to be carefully examined, and if there be any merit in it, it is about time it should be passed upon.

The public press is considerably exercised over the awards made by the Canal Appraisers to the Black River claimants for damages caused by the escape of the waters of the North Lake reservoir. The awards were made by two of the appraisers without the knowledge or consent of the third, and without waiting to hear the arguments of counsel. That the action of the two Appraisers was most extraordinary and unjustifiable, few persons will deny; that their award is irregular and void we have not the least doubt. In the third number of the LAW JOURNAL (p. 57), we had occasion to refer to the statutes and decisions requiring persons and officers to whom any power, authority or duty is confided to meet and consult, before exercising any such power or authority, or performing any such duty. From the statutes and decisions there cited, it will very clearly appear that the award in the Black River case could only have been made on a meeting and consultation of *all* the Appraisers, though *after* such meeting and consultation a majority might have decided. There is nothing in the act referring their claims to the Canal Appraisers (Laws 1869, ch. 598) that can take the case out of the provision of, § 27. 2 R. S. 555.

The correspondent, whose letter we publish in another column, "wants to know, you know," to use a Barnacle expression, why the "Supreme Court Reporter" does not make his labors manifest in the shape of a report. It is a very pertinent question, but one not calculated to avail much. The "State Reporter" has now been in office for the greater part of a year,

and the fact that he has thus far accomplished nothing, apparently, is sufficient without much comment. He may have reasons and excuses satisfactory to himself, but we doubt much about their satisfying the profession. He may believe that decisions, like wine and fiddles, grow better with age; or he may hold, with the New York *Times*, that our judges have become so "bad" that their decisions are not worth publishing; or it may be—and this we deem the most probable theory—that his notions of what opinions ought to be, are so high that he has been unable to gather a sufficient number of the degree of excellence required to fill a volume. However this may be, the profession need and ought to have reasonably prompt reports of the decisions of our courts, even if the cases are not all "leading cases." If Mr. Lansing shall continue to exhibit a like degree of promptness, the profession will be compelled to get their knowledge of current law from other sources than the State reports.

It is a popular notion that the punishment meted out to a culprit is in proportion to the enormity of the offense, but the philosophic *Punch* puts it more accurately by saying that it depends upon the biliary secretion of the judge who dooms. Woe to the prisoner brought up for sentence when the digestive organs of the judge are out of order. All the vials of judicial spleen are poured out upon his luckless head, and years are added to what would have been his sentence had the judge taken a blue-pill over night. A rather striking, though perhaps not unusual, illustration is given in Edmonds' "Select Cases," of the power of the stomach over the doom of a convict. The prisoner, Boughton,—known as "Big Thunder" in the Anti-Rent disturbances in Columbia county—had been convicted of robbery. The law allowed the sentence to be for any period of imprisonment, from ten years to that for life. The presiding judge had summoned several other judges and judicial officers to sit with him on the trial of the case. On meeting to fix the term of the sentence, two voted for imprisonment for life, the others favoring terms from ten to twenty years. Four votes were necessary to fix the sentence. At length, after a protracted discussion, without any prospect of agreement, the bell for dinner rang. Thereupon, one of the judges turned to another and said "Come, Judge, there's the dinner bell; you go for life and I will." So the sentence was thus fixed. We wonder that no enthusiastic philanthropist has yet proposed that judges engaged in meting out punishment shall be subjected to a strict sanitary regimen.

A few weeks ago two men were convicted of arson in the third degree at the Rensselaer sessions and sentenced for five years. The main evidence against them was that of foot-marks. As a rule, this sort of evidence is the most unreliable and untrustworthy that can be adduced. The witnesses who usually swear to the correspondence between foot-marks and the prisoners' boots are men whose observations in this respect are entirely worthless. They do not found their convictions on accurate scientific measurements, but either on a mere eye comparison, or by pressing the boot into the track. The latter plan has this advantage, that by pressing the boot down the track conforms to the boot, however dissimilar it may have been before. There are very few foot-marks that a hundred boots could not be found to "fit exactly," if no other tests were used than those usually applied. Scores of men's boots are of the same size, have the same number of nails, and are worn very much in the same shape. The only reliable evidence in cases of foot-marks is that which is based upon a careful scientific measurement while the print is yet fresh. When it has become partially obliterated no test can be applied which is worthy of the least credit. Several known instances are on record where persons have been convicted on the evidence of foot-marks, whose entire innocence has been afterwards established. Not very long ago a case of the kind occurred in England. A man was sentenced for eighteen months. The evidence was solely that of foot-marks. The imprisonment so affected the prisoner that he died. His innocense was subsequently completely established. It is quite possible that there have been many similar cases where the innocence of the prisoner has never appeared. These considerations alone should lead courts to receive such evidence with the utmost caution.

Senator Wood's bill to abolish the Code is likely to serve no other purpose than to illustrate the Barnacle-like tenacity with which a few lawyers yet cling to the practice of their youth. Here and there is found a lawyer who cherishes the highest reverence for the "ways of our fathers," and mourns that the chariot of Civilization and Progress will persist in rolling on. Codification is one of the results of this on-moving. It has become an accepted fact. Many of the States have adopted Codes, either identical with or similar to ours. England has recently adopted a Code for India, and is at present entertaining the notion of adopting a Code of Civil Procedure, based upon ours, for her own courts. The Code of New York has undergone the crucial test of twenty years' use, and though found wanting in many respects, has proved to be a vast improvement over the old practice. Were Senator Wood's bill to abolish it and to return to the former practice put to a vote of the lawyers to-day, the minority in the affirmative would be pitifully small. The Code has had two great drawbacks to overcome. The first was the crude and hasty manner in which it was prepared. The first Code was adopted in 1848, and was the work of a few months. Its imperfections were glaring. The next year the commissioners reported, and the Legislature adopted, an improved Code. There were yet many short-comings, and the commissioners knew it, and so prepared, and in 1850 reported, a third and apparently complete Code. This was never adopted, but, for some reason only known to him versed in the vagaries of legislation, has been suffered to remain in the pigeon-hole ever since. Most people would say that if it were worth while to adopt at all the work of the commissioners it should have been their completed rather than their unfinished work. The other obstacle, and one quite formidable to any innovation, was the opposition it met with both from the bench and bar. Many of the judiciary were particularly hostile, and never lost an opportunity to hurl a brick at it. Our reports since the Code contain many an opinion, in which the

learned judge has gone *extra viam* to abuse the Code. But through all this fiery furnace it has come unscathed and is gradually making its way into every State in the Union. The fact that the English Code commissioners have reported to Parliament almost a transcript of our Code, as the system proper to be adopted in England, is a very gratifying evidence of its success.

We have often wondered and regretted that the study of legal science was so neglected in our Academies and Colleges. Many of the leading institutions omit the law altogether in their courses of study; and in the few where it is introduced, so little attention is given to it that the student receives no benefit. The undergraduate course at college usually occupies (including the preparatory school) some seven years. At least three-sevenths of this time is consumed in the study of Latin and Greek, two-sevenths in mathematics and the exact sciences, leaving only two-sevenths to be divided among all other departments of human knowledge. And this brief portion is chiefly spent in the study of metaphysics and moral science. The consequence is, that the student enters life with his mind well stored with information that he can never use to advantage, while he is ignorant of everything that the world around him knows and expects him to know. He is unfitted for business of any kind, and can only fit himself by giving several more years to the acquisition of that knowledge which should have been acquired during his college course.

It is claimed, we know, that the object of education is not merely to store the mind with facts, but to discipline it so that it may act with more ease and perfection in the labors of life. If that be the case, in what manner can that object be better accomplished than by the study of the law? If some excellent elementary legal treatises were substituted as text books in place of the usual works on mental and moral science, does any professional man doubt the result? If the student, instead of spending his days and nights in following the crude and unsatisfactory reasonings of the Scotch and German Philosophers, would investigate the principles of the common or civil law, he would find a more pleasant and easier path, and add at the same time to his stock of practical and useful knowledge. Every college graduate who has studied the law will admit this.

We do not hope for any change in this direction from college faculties. They have their traditions and their prejudices, and are governed by them. But the societies of Alumni are beginning to exercise a controlling influence, and we trust that they may be willing and able to effect something. It will be a glad day for the college student when he need no longer exercise his mind in the unsatisfactory discussions of every name and nature that make up the books on metaphysics and moral science, but may seek for discipline among the writings of the masters of the law. He may become less qualified to dispute concerning the laws of the mind, but he will at least know something of the laws of his country. He may not be able to construct or defend any system of theoretical morality, but he will lay the foundation of a practical morality which will serve him better than any theory. Give our young men for text books, Kent, and Greenleaf, and Story, instead of Hamilton, and Reid, and Wayland, and if they do not become as able metaphysicians and theologians, they will make more useful citizens.

LEGAL NEWS.

Miss Allie H. Jameson has been appointed a Notary Public at Marshalltown, Iowa.

Ex-Governor Solomon, of Wisconsin, is now practicing law in New York city.

The death in London, England, of Jno. Tidd Pratt, the well known English legal author, is announced.

An Indiana lawyer lately quoted "Let the galled jade wince," and credited it to the Bible.

Ten divorces were granted at the recent session of the Supreme Court at Burlington, Vt.

Judges Bradley, of Rhode Island, and Hunt, of Boston, have been appointed lecturers in Harvard Law School.

Christopher C. Langdell, Esq., has been appointed Dane Professor of Law in Harvard University, to succeed Hon. Theophilus Parsons, resigned.

The Waterburry (Conn.) police court judge has decided that lotteries at church fairs are criminal offenses.

Hope Scott, who married Miss Lockhardt, the granddaughter of Sir Walter Scott, has a law practice in England of $100,000 a year.

Alfred Hermen, the oldest member of the New Orleans bar, died in that city last week aged eighty-six.

The Cincinnati lawyers could not find any law that would reach the bogus doctor who dosed a patient with six gallons of warm water for rheumatism, which caused his death.

Hon. E. M. Aylesworth, of East Arlington, Vt., late one of the assistant justices of the Bennington County Court, attempted to commit suicide recently while laboring under temporary insanity.

Judge Strong, who, it is said, will be the successor of Justice Greer in the U. S. Supreme Court, was born in Somers, Conn., in May, 1808. He began the practice of the law in Reading, Penn., and has since lived in that State.

In the county court at Richmond, Va., recently, Judge Attler proposed to adjourn, when the Commonwealth's attorney, Mr. Bowden, objected, and made some very disparaging remarks regarding the judge, for which offense Mr. Bowden was sent to jail.

A lawyer occasioned a great deal of merriment one day last week in the Supreme Judicial Court at Auburn, Maine, by suddenly stopping in the midst of a plea and deliberately wiping his forehead with a salt bag, which somebody had substituted in his pocket for his handkerchief.

Miss Phebe Cozzens, one of the young ladies studying law in the St. Louis Law School, is described as "a tall, well-formed girl of twenty, with raven hair, coal black eyes and a strikingly handsome face." We pity the advocate who shall be pitted against her before a jury of twelve men.

A man was arrested in London (Eng.) the other day for refusing to contribute to the support of his grandfather. He was shortly afterward released, as no law could be found to compel him to do so, although a grandfather is legally liable for the support of his grandchildren.

Judge Watrous, of the District of Texas, having become mentally incapacited for his official duties, the House judiciary committee have agreed to propose that in case he resigns he shall be paid his salary the remainder of his life. In case he refuses to resign, the President will be authorized to appoint an assistant judge to discharge the duties.

BOOK NOTICES.

A Treatise on the Law of Descent: By Anson Bingham, author of "Treatise on the Law of Real Property." Albany: John D. Parsons, Jr. 1870.

The author says in his preface: "Two general purposes are sought to be fulfilled in the preparation of this work: *First*, to put the student in possession of all knowledge necessary to a clear and familiar understanding of the origin, operation and principles of the laws of inheritance as they now exist, including all the incidental questions connected therewith: and *second*, to place before the practical lawyer the adjudications upon the different points and questions from the reported decisions of England, and of the several States of this country, so fully set forth, explained and reviewed, that he can learn therefrom what is necessary in order to understand the law and its practical application as so established without having a copy of the decisions themselves before him." The plan here set forth is certainly comprehensive and important. There are few branches of law of which an accurate knowledge is so essential as that of the law of Descents, or which have of late years received less attention at the hands of text writers. Writers on the law of real property have usually dismissed the subject with a few pages, while those few treatises devoted exclusively to the subject have become practically useless by reason of the important changes made since their publication. It is fortunate that the preparation of a new treatise has fallen to the hands of one of the ablest real property lawyers in the State of New York. There are so many collateral questions bearing directly on the subjects discussed—extending or limiting their general principles—that one not thoroughly familiar with the entire real property law would make but sorry work at the law of Descents.

After a careful examination of the book we are satisfied that Mr. Bingham has done his work accurately and well, and that he has very fully carried out the plan proposed in his preface. It is a treatise in the strict sense of that term, and not a mere digest of cases. The principles involved in the reported decisions have been, so far as we have been able to examine, carefully extracted, and, on the whole, accurately set forth. The profession may, we think, be pretty confident that whatever has been decided on most points of the law of descent will be here found. The author has devoted considerable space to the subject of "Advancements," which, though of great importance in the adjustment of estates, has heretofore received but slight consideration from writers. The decisions on this subject, of late years very numerous, have been fully examined, and the principles evolved from them have been systematically arranged.

We confess to some surprise at finding that the author has devoted only five pages to "the rule in Shelley's case." We are not prepared to coincide with him in the reason given for this meagre treatment of the question. He says: "The rule in Shelley's case is not entitled to as much consideration in this country as in England, because it is not as important in its bearings upon the rights of the different parties connected with estates in fee. It makes but little if any difference here whether parties take the fee by descent or by purchase. There are no feudal lords to suffer loss in the fruit of their tenure here as in England, by reason of the estate passing by purchase instead of by descent; and the creditors of the devisor are as well protected in one event as in the other." Now we do not apprehend that the rule referred to has of late received much consideration in England on account of its bearing on the tenures of "feudal lords." Its chief and almost only importance there, as here, is on the questions whether and in what cases a devise to the first taker for life with remainder to his heirs, will place the fee in abeyance during the life-time of the first taker. Although the rule in Shelley's case has been abolished in several of the States by statute, yet in many of them it exists as a part of the common law, and questions of great intricacy frequently arise under it. That the rule has ever been regarded of the highest importance and of difficult application, is evident from the multitude of cases under it. Many will remember that Baron Surrebutter, in his stroll round the limbo of departed lawyers and litigants, is made to say: "My attention was arrested by a miserable looking ghost, surrounded by books and paper, which, with a bewildered countenance, he was vainly endeavoring to read through. Upon inquiry I found that this was the shade of the celebrated Shelley, who, for some misdeed committed upon earth, had been sentenced to read and understand all the decisions and books relating to the celebrated rule laid down in his own case."

In every other respect Mr. Bingham's book is very full and satisfactory, and will be found a very valuable work to every student and lawyer who wishes to obtain a thorough knowledge of the law relating to the title of lands by descent.

A Selection of Leading Cases in Criminal Law: with notes. By Edmund H. Bennett and Franklin Fiske Heard. Second edition, entirely revised and partly re-written. Vol. 1, by Edmund H. Bennett; Vol. 2, by Franklin Fiske Heard. Boston: Little, Brown & Company. 1869.

Since the time when John William Smith adopted the suggestions made in Warren's "Law Studies" and prepared his "Leading Cases," that method of presenting important legal principles has become very fashionable, as it certainly is very valuable. There have ever been a certain class of cases so well considered, and on subjects of such grave and general importance as to become "Leading Cases," and to be everywhere received as authority on the principles involved. To make these the *nuclei* around which to group subsequent decisions bearing on the questions involved, is a very excellent plan; but much learning and judgment is required to carry it out properly. After a very careful examination of the two volumes before us, we are satisfied that Messrs. Bennett and Heard were fully equal to the undertaking. The cases—of which there are some ninety in number—have been selected with great judgment, and have most of them an undoubted claim to be considered "leading cases" in criminal law. The selections have been so made also as to present nearly every important principle involved in criminal law and practice. These are the two fundamental essentials to every work of the kind. But in addition to these, to render a compilation of select cases of any great value, it is necessary that the notes appended to each case shall be of such a character as to enable the reader to fully understand the consequence and authority of the case and to trace the current of subsequent adjudication. We cannot speak too highly of the manner in which our authors have performed this, the most difficult part of their task. These notes display an amount of research, subtlety of discrimination, and familiarity with the progress of the decisions, that is alike creditable to them and to the profession. For instance, the note to *Commonwealth* v. *Rogers*—a very celebrated case on the subjects of insanity, delusion, etc.—occupies thirty-one pages, and is one of the most satisfactory examinations and expositions of the question, how far insanity is an excuse for crime? that we have ever seen. Three questions are discussed in the light of the decisions:

1. What is such insanity as exempts from punishment.
2. Of the evidence competent on the issues of insanity, and especially of the opinions of witnesses on that subject.
3. The degree of proof sufficient to authorize a jury to find insanity.

The English and American decisions are very fully reviewed, the principles involved clearly grasped, logically arranged and elegantly expressed. The same may be said of a large number of the notes in both volumes. So far as we know it is the only collection of leading criminal cases ever published, and we have no hesitation in pronouncing it a very worthy follower of Smith's masterly performance.

New York Practice Reports: By Nathan Howard, Jr., Counselor at Law. Albany: William Gould & Son. 1870.

This is the second monthly number of volume thirty-eight of Howard's Reports, and contains seventeen cases, some of them of considerable importance. Mr. Howard publishes a notice that he will continue his reports, notwithstanding the appointment of a "State Reporter," and invites all judges and lawyers who have opinions of importance to forward them to him. Under a proper system of reporting authorized by the State, Mr. Howard would receive but slight encouragement from the profession, but under the present management the profession will be compelled to rely mainly on his and the other "unauthorized" reports for their knowledge of the law.

CORRESPONDENCE.

BUFFALO, Jan. 28th, 1870.

Editor ALBANY LAW JOURNAL:

Sir—Some eight or nine months ago it was announced that a certain Mr. Lansing of Albany had been appointed "Supreme Court Reporter," under the act of 1869, chap. 99. That act requires that the opinions "shall be promptly reported," and, although nearly three-quarters of a year have elapsed since his appointment, the profession have thus far seen nothing of the results of his labors. Can you inform me of the reason of this unnecessary and unprofitable delay in making public the decisions of our courts? There certainly have been important decisions enough rendered during the interval since his appointment to have filled two volumes, and Mr. Lansing must either entertain an unwarrantable disregard to the requirements of the law under which he holds his office, or must have been grossly negligent in the discharge of his duties.

Yours very truly,

J. A.

[We are unable to give the information asked. From what we can learn it appears that it will be some time yet before Mr. Lansing will have ready his first volume. It is very clear that he has not thus far exhibited that promptness which the requirements of the profession and of the law demand.—ED. L. J.]

TERMS OF THE SUPREME COURT FOR FEBRUARY.

1st Monday, Special Term (Motions), New York, Cardozo.
1st Monday, Oyer and Terminer and Circuit (Part 1), New York, Ingraham.
1st Monday, Circuit (Part 2), New York, Brady.
1st Monday, Special Term (Chambers), New York, Barnard.
1st Monday, Special Term (Motions), Kings, Gilbert.
1st Monday, Special Term, Newburgh, Barnard.
1st Monday, Circuit and Oyer and Terminer, Sullivan, Miller.
1st Monday, Circuit and Oyer and Terminer, Fonda, James.
1st Monday, Circuit and Oyer and Terminer, Onondaga, Morgan.
1st Monday, Circuit and Oyer and Terminer, Monroe, Johnson.
2d Monday, General Term, Kings.
2d Monday, Circuit and Oyer and Terminer, Rensselaer, Peckham.
2d Monday, Circuit and Oyer and Terminer, Utica, Mullin.
2d Monday, Circuit and Oyer and Terminer, Ontario, Dwight.
2d Monday, General Term, Buffalo.
3d Monday, Special Term (Issues), Kings, Gilbert.
3d Monday, Circuit and Oyer and Terminer, Greene, Miller.
3d Monday, Circuit and Oyer and Terminer, Chenango, Boardman.
3d Monday, Circuit and Oyer and Terminer, Angelica, Marvin.
3d Monday, Circuit and Oyer and Terminer, Canton, James.
3d Tuesday, Special Term, Oswego, Foster.
4th Tuesday, Circuit and Oyer and Terminer, Malone, James.
4th Tuesday, Circuit and Oyer and Terminer, Salem, Rosekrans.
Last Monday, Circuit and Oyer and Terminer, Tioga, Parker.
Last Monday, Circuit and Oyer and Terminer, Chemung, Murray.
Last Monday, Special Term, Monroe, J. C. Smith.
Last Tuesday, Special Term, Albany, Peckham.

COURT OF APPEALS ABSTRACT.

James Cullaman, Jr., and another, App's, v. *Jasper T. Van Vleeck et al., Resp's.*

On and prior to June 1st, 1857, A. J. Stevens & Co. were engaged in business as "bankers and real estate brokers" at Des Moines, Iowa, and the defendants were bankers in New York. The latter acted as agents of the former, in New York, to receive remittances, pay drafts, and to redeem the bills of the Agricultural Bank of Tennessee, and return the latter, by express, to A. J. Stevens & Co. at Des Moines, applying the funds of the latter in their hands, as such agents, to these purposes. About the 27th of April, 1857, defendants received a letter from A. J. Stevens & Co. directing them to "pay John Thompson, of Wall street, for such packages of bills of the Agricultural Bank of Tennessee as he may hand you. Charge same to our account, and forward packages to us per express." On the 10th of June following, defendants received another letter from A. J. Stevens & Co., in which they said: "You will notice by the inclosed card that we have admitted new partners on the 1st instant." The card announced the business of the firm in the same terms as theretofore. Subsequently defendants, in pursuance of the instructions in the letter of the 27th of April, received from John Thompson packages of bills of the Agricultural Bank of Tennessee, paid him for them, charged the amount to Stevens & Co. and forwarded the packages to that firm at Des Moines. When the packages arrived there, Stevens claimed that they were for him individually, under arrangements of the old firm, and received them, and fraudulently misappropriated their contents. This action was brought by the new partners admitted into the firm of A. J. Stevens & Co. on the first of June to recover the amount of the firm funds appropriated by the defendants to the purchase of the said packages. Plaintiffs claimed that the redemption of bills of the Agricultural Bank of Tennessee was no part of the business of the new firm, and that the defendants had never received authority from such firm to make such redemption, and that they had done so without the knowledge or consent of plaintiffs. *Held*, that the notice to defendants that the new members had come into the firm of A. J. Stevens & Co. was notice that they had come into a participation in the identical business theretofore in progress, and that the defendants were justified in carrying out the instructions previously given by the firm, and transacting the business in the same manner.

Stephen May v. *William C. Rhinelander, Executor, etc.*

The defendant's testator gave a lease of certain lands to one Howard, for twenty-one years. When this lease was given there were no buildings on the prop-

erty demised, and the lease stipulated that at the expiration of the term the lessor should, at his option, either grant a new lease to the lessee or his assigns, for a like term, or pay the value "of all such stone and brick buildings as shall have been erected on the said hereby demised premises." Howard entered under the lease and erected certain buildings of brick. Afterward and during his term, the plaintiff became assignee of the lease and owner of the buildings. Before the expiration of the lease, the defendant, in pursuance of the agreement in the first lease, executed to the defendant a second lease, which contained a condition, that the defendants should, at their election, either grant a new lease for the further term of twenty-one years or pay unto the plaintiff the value "of all such stone and brick buildings as may have been erected by the said party of the second part (the plaintiff), his executors, etc., in the said demised premises, and be then standing thereon." At the expiration of the second lease the defendants elected not to renew the lease, but offered to pay the plaintiff for all such stone or brick buildings as *he himself had erected.* The only buildings on the premises were those erected by Howard, before the assignment of the lease to plaintiff, and which had passed to plaintiff under the assignment.

Held, that by a fair construction of the language of the two leases, the covenants in the second lease included all buildings of stone and brick standing on the premises at the expiration of the second lease, whether built by the plaintiff or his assignor, and that the defendants were bound, either to renew the lease or pay the value of the buildings.

Michael Connolly v. *Cornelius Parlton.*

While engaged in the defendant's service, in the relation of master and servant, the plaintiff was injured by the fall of some staging. *Held*, 1st, that an injury sustained through the negligence of a fellow workman gives no right of action against the common employer; 2d, that this rule prevails though the fellow workman causing the injury is of a superior grade and the party injured subject to his order and direction; 3d, that the master is bound to exercise ordinary care and diligence in the selection of his other servants, and in the employments and materials and conveniences furnished to his servants; 4th, that the master is responsible to the servant for injuries arising from his personal negligence.

The Town of Gravesend v. *John T. Hoffman et al.*

Where neither the complaint nor affidavits on which an application is made for an injunction to restrain defendants' proceedings to acquire, under an act of the Legislature, title to certain property for purposes of quarantine, do not show that such proceedings will work great and irreparable injury to the plaintiff, the application should be denied; a general allegation to that effect is not sufficient, but the facts must be so set forth as to enable the court to see that such results would be likely to flow from the proceedings.

John Monty v. *Second Avenue Railroad Co.*

In an action for damages sustained by the plaintiff by being run over by defendants' horse-car, it appeared that the former, in going over the railroad track of defendants, fell, and, while attempting to get up, was struck by the horses and seriously injured. It appeared by the evidence on the part of the plaintiff, that the car was some thirty-five or forty feet away when he undertook to cross, and that the driver was conversing with passengers with his back to the horses. This was denied by defendants, however, and some evidence introduced to show that the plaintiff, who was a lad of ten years, ran against the horses. At this point defendant asked the judge to charge that the fact that the plaintiff, before attempting to cross, did not look up or down the street to see if a car was approaching, was negligence on his part, which precluded his recovery; also that the fact that the plaintiff fell on the track did not affect the question of defendants' negligence, unless accompanied with evidence of the driver's having actually seen him on the track in time to have stopped the car; also that the jury must find that the driver, if he had seen him, must have been able to have stopped the car by the exercise of *ordinary* care. *Held*, 1. That the fact that the plaintiff did not look up and down the street was not of itself proof of negligence; if the car was far enough away to allow time to cross under ordinary circumstances, it was not negligence for plaintiff not to look up or down. 2. That to fall by accident, by sickness, by the interference of another, by means of a broken rail, or by stumbling, is not a result that a prudent man is bound to anticipate or provide against in crossing a public street; and that in such an event the defendants must show themselves free from all negligence. 3. That the defendants were bound to exercise the *highest* degree of care, and that ordinary care was not sufficient.

Orrin Swan v. *Abram Brotyman.*

The premises in question were conveyed in 1832, to an organized school district by the then owner. The conveyance was to "the trustees of school district No. 1, of the town," etc., to be held by them and their successors in office, so long as the said premises should be occupied by them "for a site for a school house." The district thereupon took possession thereof, under the deed, and continued that possession for the purpose named, down to the time of the trial of this action. The same premises were afterward, and over twenty years after the conveyance to the school district, deeded to the plaintiff by the heirs of the grantee to the district. The deed to the district was not recorded until after that to the plaintiff. This action was brought by plaintiff against the defendant, one of the trustees of said district, for a trespass in removing a certain fence placed by plaintiff around the land in question. It was insisted on behalf of the plaintiff that the deed to the school district was void, on the ground that it was not made to the district or to the trustees by name; also, that the plaintiff's deed being first recorded, that to the district became void as to time. *Held*, 1st. That the deed to the trustees of the lot for a school house site vested the title in them. 2d. That, the school district having been in possession and claiming title for over twenty years, and this claim and possession being notorious, the plaintiff was not a *bona fide* purchaser, and his deed not within the protection of the recording act as against the deed to the trustees.

Leonard Buck, Receiver of John R. Briggs, v. *Gertrude Briggs et al.*

The defendant, Mrs. Gertrude Briggs, wife of John R. Briggs, had executed a mortgage of her separate real estate to one Cliave, to secure a debt of her husband. Some time after, the said John R. Briggs executed a chattel mortgage on the property in question to Cliave, who thereupon, and on the same day, by the direction of Briggs, gave a bill of sale thereof to Mrs. Briggs. This transaction is sought to be set aside as a fraud on the husband's creditors. *Held*, that the husband had the undoubted right to transfer the said property to his wife in the manner he did as a part indemnity to her against the mortgage she had executed in his behalf; also, that the chattel mortgage was not invalidated by reason of being antedated.

Roome v. *Nicholson.*

This was a motion to dismiss an appeal from a judgment. The action was brought in the Superior Court of New York to recover the value of a cargo of coal. Defense a general denial. Motion was made at the Special Term to strike out the answer as sham and frivolous, which motion was granted and an order entered striking out the answer and ordering judgment for plaintiff. An appeal from the order and judgment was taken to the General Term, which affirmed the judgment. An appeal from the order and from the judgment was then taken to the Court of Appeals, where a motion was made by the respondents to dismiss the appeal, on the ground, that, as the answer had been stricken out as sham, this was a judgment by default, and as there was no appeal from such a judgment the appeal should be dismissed. It was contended on the part of the appellants that inasmuch as judgment (in virtue of an order) was given by direction of a single judge after argument by counsel for both parties, it was not a judgment by default, actual or constructive, even though the answer had been stricken out as sham. It was further contended, that, inasmuch as the General Term had affirmed the judgment, this court could not go behind the record, and their affirmance of a judgment as such had cured all defects, if any existed. *Held*, that a judgment entered on an order of the court striking out an answer as sham was appealable.

George Bowman, Resp., v. *William M. Tallman, Appl.*

The defendant, who was the executor of a will, employed the plaintiff, an attorney, to institute proceedings for the sale of certain lands devised by the will. The plaintiff did so, and a contract of sale was made. The purchaser refused to complete the purchase, on the ground that a perfect title could not be given. Another contract was then made with another person, who declined to complete the purchase for the same reason. Application was then made for an order to compel the last purchaser to perform his contract, but the Supreme Court, first at Special, and then on appeal at General Term, held the proceedings insufficient to convey title, and refused the application. In the meantime, the first purchaser brought suit to recover back moneys advanced upon his contract. No defense was made, and the moneys were repaid him. The plaintiff, as attorney, then instituted a partition suit, and the lands were sold under the judgment obtained therein. This action was brought to recover the value of the plaintiff's services in effecting sale of the real estate.

At the trial, defendant moved for nonsuit, on the ground that he was not *personally* liable to plaintiff for his *services*, and that his services in partition suit were worthless. *Held*, 1st. That, as the services were instituted and carried on under his employment of the plaintiff and his agreement to pay for them, the defendant was liable for their value. 2d. That, even if the plaintiff had been grossly unskillful and inattentive in resorting to and carrying on the special proceedings first instituted, it constituted no valid objection to recovery for services in the partition suit. 3d. It is not sufficient to deprive an attorney and counsel of his compensation that the services rendered by him were productive of no real value to his client. But it is necessary that such a result should be caused by his unskillfulness, inattention or other misconduct. 4th. It is not unskillfulness in an attorney where he advises and institutes proceedings under an erroneous opinion concerning the construction of a statute when such construction has not been authoritatively decided, and conflicting opinions concerning it have been expressed in the court of last resort.

ABSTRACT OF RECENT BANKRUPTCY DECISIONS.

WHAT PROPERTY VESTS IN ASSIGNEE.

The petition in bankruptcy was filed on the 5th of October, 1868, by Vogel, and on the 7th he was declared a bankrupt. On the 6th he surrendered to the Register, to whom the case was referred, a stock of goods in store at No. 39 Murray street, New York. Assignees were afterward duly appointed. Certain creditors of the bankrupt, who had sold to him a part of his stock in trade, upon the ground that he had made a fraudulent purchase of the same, replevied the goods in a State court on the 6th of October, and also on the 10th. The assignees claimed that the title of the goods had vested in them, and petitioned the Judge for a delivery of them into their hands. The Judge made an order accordingly. *Held*, 1st. That the property of the bankrupt in his actual possession at the time of filing the petition in bankruptcy passes into the hands of the assignees the instant they are appointed. 2d. That the proper remedy for the creditors under the circumstances was to apply to the District Court for relief, or to wait the appointment of the assignees, and institute a proper action against them in the District or Circuit Court. (U. S. Circuit Court, NELSON, J., *In the Matter of Vogel.*)

COMMERCIAL PAPER.

The alleged act of bankruptcy was, that the Company, a corporation, on the 10th of March, 1869, being a merchant and trader, fraudulently stopped or suspended, and did not resume payment of its commercial paper within a period of fourteen days. Such paper consists of two instruments. One is a promissory note dated November 12, 1868, and signed by the President and Secretary of the Company, and reading as follows: "On demand, after date, we, the McDermott Patent Bolt Manufacturing Company, promise to pay to the order of John E. Walsh, three hundred

dollars, at the office of Company, value received." The other is a receipt or due bill, signed by the Treasurer of the Company, and in the words following: "Received, New York, November 7, 1868, from Mr. J. C. Brinck, two hundred dollars for the McDermott Patent Bolt Manufacturing Company, as a loan for their use, the same to be returned, due on demand." *Held*, that neither of these instruments could be regarded as "commercial paper" within the meaning of those words in the 39th section of the bankruptcy act.

The consideration was unconnected with merchandise, trade or commerce, or with any mercantile trading or commercial transaction. The object to which the money borrowed by the Company was applied by it cannot affect the character of the instruments given as evidences of the indebtedness, even though it was previously known to the lenders that the money would be applied to such object. Both the instruments are payable on demand. The 39th section requires a fraudulent stoppage or suspension of payment of commercial paper, given in the debtor's character as a merchant or trader. (U. S. District Court, BLATCHFORD, J., *In the Matter of the McDermott Patent Bolt Manufacturing Company.*)

PROOF OF DEBT — AMENDMENT.

On the 24th of March, 1869, proof of debt was made by Thomas Montgomery on two notes, made by the bankrupt and one Griffin, dated October 19, 1853, each for $700, on which he claimed to be entitled to dividends. It subsequently appeared that these notes were taken up and settled by the bankrupt in November, 1864, by giving a new note for $916, and a due bill for $162.71. The creditor thereupon moved to amend his proof of debt by proving the note for $916. Counsel for the assignee resisted the application on the ground that it came too late, and that a want of good faith was apparent. The Register now certifies the question to the court, stating that, in his opinion, the application should be denied.

Held, that the proper course by which to obtain the relief sought by the alleged creditor, is not by an amendment of the proof of debt. The amendment sought relates to a new and different claim from any one of those embraced in the existing proof of debt. The proper course is for the creditor to prove his newly-discovered debt independently. (U. S. District Court, BLATCHFORD, J., *In the Matter of Montgomery.*)

DISTRICT IN WHICH PETITION MUST BE FILED.

On an application by one partner to have the firm declared bankrupt, it appeared that the firm had carried on business both in New York and in Massachusetts, but that the business in New York was terminated four months prior to the filing of the petition. *Held*, that section eleven of the act requiring petitions to be addressed to the Judge of the Judicial District in which the debtor has resided or carried on business for the six months next immediately preceding the time of filing the petition, or *for the longest period during such six months*, must be construed to mean "for the longest period during or within such six months that he has resided or carried on business in any district," and *not* for the longest part of six months. (U. S. District Court, BLATCHFORD, J., *In the Matter of Elisha Foster.*)

WHEN VOLUNTARY ASSIGNMENT BARS DISCHARGE.

A voluntary assignment made by a debtor, although without preferences, will be a sufficient bar to a discharge when it appears that it was made to delay and hinder creditors, though not to defraud them. (U. S. District Court, BLATCHFORD, J., *In the Matter of Goldschmidt.*)

SETTLING ESTATE.

Under section 43, the trustees, under direction of the committee, may, if so ordered by the court, proceed to settle the estate just as if there had been no adjudication of bankruptcy and the bankrupt was managing his own affairs, taking care always to secure legal protection to each of the creditors. If, under such a general order, the interposition of the court is needed for the examination of witnesses under oath, etc., application therefor may be made to the Judge or Register, and if made by the Judge, he, on granting the same, will order the examination to be had before the Register or otherwise. In other words, wherever the trustees and committee are satisfied that demands are correct, and need no testimony to be taken, they can allow the same. When they are not satisfied, the demand should be proved before the Register on notice to the trustees. (U. S. District Court, E. D. of Mo., TREAT, J., *In the Matter of Darby.*)

ASSIGNEE.

An attorney for creditor of a bankrupt may be assignee of the bankrupt's estate. One member of a firm or copartnership, on behalf of the firm, may execute a power of attorney to some third person, authorizing him to cast the vote of the firm in the choice of assignees. (U. S. District Court, W. Va., JACKSON, J., *In the Matter of Barrett.*)

PRIVILEGED COMMUNICATIONS.

Where a lawyer, being under examination in proceedings in bankruptcy, was asked touching the making and consideration of a certain deed of property from the debtor to him, also of a subsequent deed of the same property from him to the debtor's wife, refused to answer on the ground that such transfers were made in the course of his professional business, and were, therefore, within the privilege of confidential communications between him and his client, — the Register, John Fitch, after a very able review of the authorities, held that such transactions were not within the rule of privileged communications, and this conclusion was fully confirmed by BLATCHFORD, J. (*In re Bellis and Milligan*).

GENERAL TERM ABSTRACT.

THIRD DISTRICT — DECEMBER TERM.

[Owing to the engagement of Judge Hogeboom at Circuit we have been unable to procure an abstract of his opinions in time for publication this week. It will be given hereafter. Next week we propose to give an abstract of all the decisions rendered at the January Term in the Fourth District, and the week following, those rendered at the January Term in the Sixth District.]

AGENT. See *Parol Agreement.*

ANSWER. See *False Imprisonment.*

ASSAULT AND BATTERY.

Rape: reasonable resistance. — In an action of assault and battery it appeared that the defendant had had illicit connection with the plaintiff — an unmarried woman — and the evidence on the trial was conflicting as to

whether or not the plaintiff had resisted such connection. The counsel for the defendant requestes the court to charge that to entitle plaintiff to recover the jury must find that the "utmost resistance was manifested by her to such intercourse;" which request was refused, and exception taken. He further requested the court to charge that if plaintiff, though with great reluctance, finally ceased her resistance, and reluctantly consented to the sexual intercourse, she could not recover the damages resulting therefrom; request refused and exception taken. But the court added to the charge that "the jury must be satisfied, in order to find for plaintiff, that the plaintiff made every reasonable resistance, showing that she did not consent to the assault." *Held*, that the refusal to charge as requested was erroneous; that to maintain the action the *utmost* resistance, on the part of the woman, must be shown, unless it appear that such resistance was prevented by threats of death or great injury; that there must be a forcible ravishing of a woman or no action for an assault and battery lies at her suit for the connection. *Mary E. Smith* v. *Adam Fingar*. Opinion by PECKHAM, J.

BREACH OF PROMISE TO MARRY.

When right of action accrues.—In an action for a breach of promise of marriage, it appeared upon the trial, that in May, 1866, the parties entered into an engagement of marriage, no time being fixed for its consummation. That in May, 1867, it was agreed that it should take place in the Fall of 1868. That in the Fall of 1867 the plaintiff became pregnant, as was alleged, by the defendant, and that no positive and direct agreement was made to marry at any other or different time than the one previously agreed upon. *Held*, that no right of action accrued until the Fall of 1868, and the action was prematurely brought prior to that time. *Catharine McMurray* v. *Redmond McManus*. Opinion by MILLER, J.

CHATTEL MORTGAGE.

Notice of sale.—The action was brought to recover the balance due on a chattel mortgage. The defendant purchased of the plaintiff a yoke of oxen, and as security therefor executed a mortgage upon the oxen for the purchase-money, payable one year from date, by the terms of which the plaintiff had a right, at any time he should deem himself unsafe, to take possession of the oxen, and sell the same at public or private sale previous to the day of payment, and apply the proceeds upon said debt, and in case of deficiency, the defendant agreed to pay the balance. Before the mortgage became due, the plaintiff, deeming himself unsafe, took possession of the property, and sold the same to the highest bidder, leaving a deficiency, to recover which this action was brought. The usual public notice was given of the sale, but no notice of sale was served personally upon or given to the defendant. *Held*, that no notice was necessary to the defendant, that the sale was valid, and the plaintiff entitled to recover the amount unpaid upon the mortgage. *Gamaliel Huggans* v. *Danforth J. Frayer*. Opinion by MILLER, J. To appear in 1 Lansing's Report.

COMPROMISE. See *Receipt in Full*.

CONTRACT.

What will avoid performance of.—The parties entered into an oral agreement that the plaintiff should make and deliver to defendant a quantity of tierces, to be delivered from time to time as fast as completed. The defendant saw at the time of the agreement the materials out of which they were to be made, and also saw one tierce made. It appeared that some of the tierces delivered were unfit for use, and were sold by defendant at reduced prices. The defendant did not refuse to receive these tierces or offer to return them, but declined to pay the contract price for them on settlement. *Held*, that it was the duty of the defendant to have examined the tierces within a reasonable time after their delivery, and if found defective, to return them, or at least to have notified plaintiff that they would not be received. That the conduct of a party who seeks to avoid the performance of a contract, on the ground that the article is defective, must not be equivocal. The law very properly requires him to act with reasonable promptness and decision. *Melvin W. Stewart* v. *Albert B. Gibbs*. Opinion by INGALLS, J.

CANAL OFFICERS.

Right of, to destroy private property to restore navigation.—The plaintiff was the owner of a canal boat which had been run into a dry dock adjoining the canal for repairs. While bringing the boat out into the canal, and when it was about half way through the dry dock gate, the gates gave way, creating a large breach in the bank and suspending navigation. No negligence was attributed to the plaintiff. The defendant, who was superintendent of canal repairs, without notifying plaintiff to remove his boat, caused the boat to be cut in two and removed, and thus resumed navigation in about twelve hours. On trial before a referee, the referee found that there were several other methods by which the boat could have been removed without injury to it, though at considerable expense to the State and several days' delay, and gave judgment for plaintiff. On appeal, *held:* 1st. That the defendant acted ministerially and was therefore bound to exercise reasonable care, prudence, and discretion, in performing the work. 2d. That the expense of restoring navigation was properly chargeable to the State—the plaintiff being free from blame—and under the facts of the case the defendant was not justified in destroying plaintiff's property, and thereby subjecting him to the loss, instead of by some other means removing the obstruction at the expense of the State. *Hicks* v. *Dorn*. Opinion by INGALLS, J.

CERTIORARI.

To review proceeding of canal appraisers.—On a certiorari to review the proceedings of the canal appraisers in assessing damages occasioned by the construction and improvement of a canal as provided by laws 1840 (page 228, §§ 16, 17), the return must present some question within the provision of that act, which the court can consider. That act provides that such certiorari may be brought to review "any legal or constitutional question," and the court is authorized to "set aside the appraisal for *want of jurisdiction in the appraisers, or for any error committed by them in such determination*, except as to the amount of damages awarded." This statute contemplates the review of legal and constitutional questions only, and that such questions shall be fairly raised before and decided by the appraisers before a review can be had. The plaintiffs in error having failed to raise any such question before the appraisers, the writ was quashed. *People* v. *Frederick T. Carrington*. Opinion by INGALLS, J.

CHATTEL MORTGAGE.

On boat—filing.—The plaintiff had a mortgage on a boat which was recorded in the custom house at Albany as required by act of Congress, but which had not been recorded in the town where the mortgagor resided, as required by the statute of this State. Subsequently a creditor recovered judgment against the mortgagor, under which the boat was levied on and sold to the defendant, who knew of the prior mortgage. *Held*. 1st. That the recording of the mortgage in the custom house at Albany did not supersede the necessity of filing in the clerk's office as required by statute (*citing Ætna Ins. Co.* v. *Aldrich*, 26 N. Y. 92). 2d. That the judgment was a lien prior to the mortgage. 3d. That the defendant as a purchaser under the judgment was entitled to all the relief that the creditor himself would have been entitled to. 4th. That the fact that either the defendant or creditor knew of the mortgage would not deprive them of any advantage given by law. 5th. That this case is distinguishable from *White Bank* v. *Smith*, 7 Wallace Rep. 646. *Jacob Best* v. *Alva S. Staples*. Opinion by INGALLS, J.

FALSE IMPRISONMENT.

Answer in action of—mitigating circumstances.—The complaint in this action was for false imprisonment, and charges the defendant substantially with unlawfully arresting plaintiff and causing her to be taken into custody by an officer, etc., and of being confined and imprisoned upon a false charge, without reasonable or probable cause. The answer alleged that the defendants were vestrymen of a church in Albany, and as such bound to preserve good order in the church; that the plaintiff had previously come into said church with a design to disturb the congregation, and did disturb it; that said conduct had been persisted in previously for some months; that on the same day service was suspended by reason of the misconduct of the plaintiff, and the rector requested her to leave. That in the afternoon of the same day, the rector called personally on one of the defendants and stated to him, that by reason of the conduct of the plaintiff, he could not officiate or hold service in said church, and requested him to prevent such conduct. That at the evening service, he read a notice in regard to plaintiff's conduct, stating, among other things, that if persisted in, the officers of the church would perform their duty in preserving peace and good order. That in defiance of said notice the plaintiff repeated her previous conduct, and the defendants acted as officers in removing the plaintiff. The answer also set forth the misconduct of the plaintiff for some months previous. *Held*, upon appeal from order striking out a large portion of the answer. 1. That mitigating circumstances immediately preceding the arrest, might be set up by way of answer as a partial defense. 2. That the portion of the answer which alleged that the defendants were vestrymen, etc., was proper as a defense justifying the action of the defendants, and 3d. That the portions of the answer which set forth conduct for some time prior to the period when the arrest was alleged to have been made was too remote, and should be stricken out, as well as some other parts, which were redundant and not material, in order to present the defense or mitigating circumstances alleged. *Emma J. Beckwith* v. *Edward S. Lawson et al.* Opinion by MILLER, J. To appear in 6 Abbott.

HUSBAND AND WIFE.

Right of wife to make contract.—The plaintiff was a married woman, living with her husband upon the farm and premises owned by and in his possession, which were encumbered by mortgages held by the defendant, which were due and unpaid. The husband suddenly left, and attachments were issued against his property as an absconding debtor. After this the plaintiff had removed some of her personal property, intending to quit the premises. The defendant came to the house and premises and agreed to give the plaintiff $150 if she would stay there and hold the property until he could put a family in. She promised to do so, and did stay accordingly until the defendant obtained possession of the property, which he has held ever since then. The husband returned afterward and denied the right of the wife to enter into such a contract. *Held*, that there was a good consideration for the promise; that the plaintiff had a lawful right to make such a contract, and was entitled to recover. *Louisa P. Hall* v. *John Young*. Opinion by MILLER, J. To appear in 1 Lansing's Rep.

See *Parol Agreement.*

INDICTMENT.

Sufficiency of.—An indictment against the plaintiff in error, charged that the prisoner unlawfully, knowingly, and designedly, did, with intent to cheat and defraud one Abel Gregory, etc., "for the purpose of inducing said Abel Gregory to part with a yoke of oxen," and after setting forth the false pretenses closely following the language of the statute, alleged that "by which said false pretences, he, the said Richard R. Clark, then did unlawfully obtain from the said Abel Gregory one yoke of oxen," etc., and then after negativing the false pretenses set forth, alleged that the prisoner "well knew the said false pretenses to be false," etc. *Held*, that the indictment sufficiently alleged that the prosecutor was induced to part with his property by means of the false pretenses made. *Richard R. Clark* v. *The People*. Opinion by MILLER, J.

INJUNCTION.

Exercise of a grant; right to build raceway.—On appeal by defendants from a decree under an order of a referee perpetually restraining the defendants from digging any canal or raceway across plaintiffs' premises, it appeared that plaintiffs' grantor had deeded, to parties under whom defendants held, the right to carry surplus water from certain falls over said lands by a raceway, canal or flume. It was conceded that the defendants had the right to dig said canal, unless they or those under whom they claimed had already exercised said right granted to them, or had so far exercised it as to show to strangers that they had done so at the time the plaintiffs purchased. The evidence before the referee showed that for many years the water had been conveyed in raceways which had been several times extended and changed, but the referee expressly finds that this was never intended by either party to the grant as an exercise thereof. The referee did not find that the appearance of the premises when purchased by the plaintiffs would indicate to them that the right had been exercised and exhausted. *Held*, that the plaintiffs must establish such to have been the fact before they are entitled to the decree entered under the order of the referee. *Albert Hall et al.* v. *Jeremiah W. Dimmick et al.* Opinion by PECKHAM, J.

(*Concluded next week.*)

DIGEST OF RECENT AMERICAN DECISIONS.*

ADVERSE POSSESSION.

1. *What constitutes.*—Possession, by a tenant, of a portion of a lot of land, under a lease, and the clearing up and cultivating a part thereof, such possession being under a claim of title by the lessor, which is evidenced by his executing the lease and demanding and receiving rent, is a good adverse possession, at least to the extent of the land cleared and cultivated. *Finlay* v. *Cook.*

2. Actual possession of a part of a lot of land, with claim of title to the whole, the entry and claim being under a written instrument, is sufficient to constitute an adverse holding of the whole lot. *Ib.*

3. Where a valid constructive possession of an entire lot is acquired by entry under claim of title founded upon a written instrument, and the actual occupation of a part, it cannot be defeated by a subsequent entry, on the same lot by another, who makes an improvement on a part and obtains title to the whole lot. *Ib.*

4. The effect of such subsequent entry would be to give the person so entering a possession of the part actually occupied and improved, but no further. A constructive possession of the unimproved part of the lot would remain in him who made the first entry under claim and color of title and improved in part. *Ib.*

5. *Under a Comptroller's deed.*—A comptroller's deed, given upon a sale of land for taxes, with actual possession of a part of the lot embraced in it, and claim of title to the whole, is a sufficient foundation for an adverse possession, even though the comptroller had not authority to sell. *Ib.*

6. If such deed be fair upon its face, and contains no evidence of want of authority by the comptroller to execute it, inasmuch as it purports to be executed under an authority, it gives color of title to the grantee, although the pretended authority recited upon its face does not in fact exist. *Ib.*

7. The possession and claim of title of the grantee in such a deed, and of those claiming under him, will be presumed to have been in accordance with the title apparently derived from the comptroller's deed; and as that deed did not show that it was illegal or void, the possession

* From Hon. O. L. Barbour, and to appear in the 54th volume of his Reports.

and claim under it will be presumed to have been in good faith, and therefore adverse to the title of the former owner, and if continued for the period of twenty years, will ripen into a perfect title. *Ib.*

CANALS.

1. *Duties and liabilities of superintendents.* — It is the duty of a superintendent of repairs on the Erie canal to remove obstructions which hinder or prevent navigation thereon. *Hicks* v. *Dorn.*

2. And a superintendent having, in good faith, determined in regard to the necessity and propriety of removing a boat belonging to an individual, as an obstruction in the canal, he can only be held responsible to the owner upon the ground that he was chargeable with negligence, or improper conduct, in executing the work. *Ib.*

3. If he can repair a breach in the bank of the canal, occasioned by a flood, by a resort to *ordinary* means, and thereby continue navigation without material interruption, or serious detriment to the public welfare, it is his duty to do so, instead of adopting the *extraordinary* measure of cutting a piece off a canal boat owned by an individual, in order to close the gates of a lock. *Ib.*

4. And where the proof showed that there were several other methods by which the obstruction caused by a canal boat grounding in the gates of a lock could have been removed, and the difficulty obviated, *it was held*, that the superintendent of repairs was not justified, on the ground of "an overruling necessity," in cutting the boat in two and removing a portion thereof, thereby subjecting the owner to a loss of his property. *Ib.*

5. *Held, also*, that in what he did, after he determined the necessity of removing the obstruction, the superintendent must be deemed to have acted ministerially, and was therefore bound to exercise reasonable care, prudence and discretion, in performing the work. *Ib.*

CITY OF NEW YORK.

Injunction against making contracts. — An injunction will not be issued to restrain the corporation of the city of New York from entering into a contract where there is no valid statute preventing the making of such contract, and the case presents no facts justifying the interference of the court on the ground of fraud. *Pullman* v. *The Mayor, etc., of New York.*

COMPTROLLER'S DEED.

1. *Title of grantee.* — Section 55 of the act of the legislature of 1855 (Laws of 1855, p. 799), as amended in 1860 (Laws of 1860, ch. 209), which provides that where the person or persons claiming title under a comptroller's deed, upon a sale of lands for taxes, or their grantees or assignees, shall be in possession of the land described, either themselves or by their grantees, etc., then such deed shall be presumptive evidence that the sale, and all proceedings prior thereto, etc., whatever may be the date of such deed, should be construed as including, not only the case of an actual possession of the whole lot covered by the deed, but the constructive possessions of the whole when there is actual possession of a part of the land covered by the deed with claim of title to the whole. *Finlay* v. *Cook.*

2. Giving the section that construction, the title of a party claiming under a comptroller's deed is perfect, without proof of any other fact than that he was in possession of a part of a lot, under the deed claiming title to the whole. *Ib.*

CONSTITUTIONAL LAW.

Tax-levy for 1806. — The act of the legislature of April 20, 1866 (Laws, chap. 876), being the tax-levy for that year, is a private or local bill within the meaning of the Constitution; and section nine, restricting the power of the coporation of New York to make contracts, relates to a subject not expressed in the title of the act, and is, therefore, unconstitutional. *Pullman* v. *The Mayor, etc., of New York.*

FRAUD OR DECEIT.

1. *Action for.* — To entitle a party to recover for fraud or deceit, there must have been an assertion of a falsehood, with a fraudulent design as to a fact, with a direct and positive injury arising from such assertion. *Taylor* v. *Scoville.*

2. An action for false representation as to the defendant's solvency and ability to pay, and as to his ownership of a farm, whereby the plaintiff was induced to labor for him, cannot be maintained in the absence of any proof of the defendant's insolvency or inability to pay for such labor, and where, on the contrary, his responsibility affirmatively appears. *Ib.*

3. Unless the defendant is insolvent or unable to pay, the assertion of a falsehood as to his ownership of the farm, of itself, occasions no injury to the plaintiff. *Ib.*

JOINT-STOCK ASSOCIATIONS.

Notes given by members. — Where a note, made by one member of a joint-stock association, and indorsed by another, for the purpose of raising money for the use of the association, is paid and taken up by a third, the latter cannot maintain an action against the maker to recover back the money advanced until an account has been taken between the parties. *Crater* v. *Bininger.*

JURISDICTION.

1. *Actions for personal injuries committed abroad.* — It is now settled that the courts of this State have, and will entertain, jurisdiction of actions for personal injuries committed abroad, when both or either of the parties are citizens of the United States. *Dewitt* v. *Buchanan.*

2. As a question of law, the Supreme Court has jurisdiction of torts committed in a foreign country, between non-resident foreigners, but as a matter of policy, will only exercise it in its discretion in exceptional cases. *Ib.*

3. But were the question arises upon demurrer to a pleading, no papers, except the pleadings, are properly before the court, and if any special reasons exist for retaining jurisdiction, they would not and could not properly appear. The court has power to determine the sufficiency of the pleading only. *Ib.*

4. Upon a motion to dismiss the complaint, however, the special reasons, if any, for retaining jurisdiction can be set forth in the opposing affidavits, and the court has a discretion to adjudge whether it will retain jurisdiction of the action or not. *Ib.*

5. *Actions between foreigners.* — Actions for injuries to the person are transitory, and follow the person; and, therefore, so far as the nature of the action is concerned, one foreigner may sue another foreigner in our courts, for a tort committed in another country, the same as on a contract made in another country. *Ib.*

MUNICIPAL CORPORATIONS.

Power to contract. — A municipal corporation, like any other, may enter into any contract within the object for which the corporation was created, except where it is restrained by some legal enactment, and except so far as its contracts may be subject to the future exercise of its legislative authority. *Pullman* v. *The Mayor, etc., of New York.*

PRACTICE.

1. *Service of orders.* — If service of an order for the defendant to appear before a referee and submit to an examination as to his property, is made without exhibiting to him the original order of the judge, the service is only irregular; not a service which the defendant is at liberty to disregard, but one which he can object to and have set aside, by appearing and taking the objection. His failure to take the objection is a waiver of it. *Billings* v. *Carver.*

2. *Contempt: advice of counsel.* — While there is no rule or practice which absolutely protects a party from punishment for a violation of an order, committed upon the advice of counsel, yet substantial justice, and the wise exercise of the discretion vested in the court, require it to relieve a party where the effect of his counsel's mistake may be to keep such party in jail indefinitely, by reason of his inability to pay a large sum of money. *Ib.*

3. *Attachment: notice to holders of property.* — The notice accompanying an attachment to be served by the sheriff on a third person, who is in possession of property claimed to belong to the debtor, may describe the property in general terms, without specifying its precise nature and amount. *Drake* v. *Goodridge.*

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JUDICIAL LEGISLATION.

I.

By judicial legislation we mean that power which courts claim and have exercised in all free governments of formulating from a few maxims or general principles a vast, flexible, complex, yet elaborate system of laws, capable of embracing all the varied wants of human life; whilst they are in their terms as precise, and certain, and authoritative as those emanating from the legislature. In this article we shall consider, in a somewhat cursory manner, first, the existence of this power; second, its source and legitimacy; third, its mode of operation; and fourth, its advantages.

The term "judicial legislation" is not unknown, at least to the profession, though we are not aware that the subject has ever been illustrated by the labors of any great legists. Chancellor Kent, in his Commentaries, makes occasional use of the term, and cites with approval the most radical changes in the law, effected by the exercise of this power by the courts. In vol. IV, at page 13, speaking of the statute *de donis*, by which the policy of the common law had been overthrown and perpetuities in real estates established, he says "it was not until Taltarum's case, 12 Edw. IV, that relief was obtained against this great national grievance, and it was given by a bold and unexampled stretch of the power of judicial legislation."

Lord Coke says that "the judgment in 12 Edw. IV was no new invention, but approved by the *resolution* of the sages of the law, who, perceiving what contentions and mischiefs had crept in, to the disquiet of the law, by these fettered inheritances, upon consideration of the act and of the former exposition of it by the sages of the law, always, after the said act, gave judgment that, in the case of a common recovery, etc., the estate should be barred." 10 Coke, 38.

Thus we see how the courts, by the introduction of a fiction, abrogated a solemn act of Parliament, and "restored the policy of the common law." Another, and perhaps still more notable illustration of the exercise of this power by the courts, is seen in the contest between the English Courts of Chancery and Parliament, which is said to have continued nearly a century. We refer to the introduction of uses by the Court of Chancery, by which the statute of mortmains was defeated, and transfers of real estate relieved of many feudal burdens; and when Parliament declared the legal estate should be annexed to the use, thereby, in a great measure, restoring the law, the court again defeated the Legislature by the invention of trusts, and that device thus introduced obtains to this day, illustrating, by its beneficent operations, the wisdom as well as the power of the courts.

Again: to the courts alone are due the extinction of serfdom in England, and, we might add, the retention of slavery in the United States. This was effected by the establishment, in England, of a certain rule in the trial of all cases involving the freedom of the serf, viz., that the presumption of the law was on the side of freedom, thus constantly throwing the burden of proof on the lord; and by the introduction of another rule, perhaps still more potent, that the status of the child followed that of its father.

On the contrary, in the Southern States of our Confederacy, in like cases, the presumption was on the side of slavery, casting the burden of proof on the slave, and the child was adjudged to follow the status of its mother.

These illustrations of exercise of this power by the courts will suffice to show its existence, though we might mention many more, not particular rules or law, but whole titles that show the plastic hand. Among these are fixtures wholly the creation of the courts, built up by slow accretions, like islands in the ocean. To this may be added fire, marine, and life insurance, promissory notes, and bills of exchange; and bailments, which also had the same origin in our laws. This title is said to have been introduced at one sitting by that master builder, Lord Holt, though he took only what had been prepared to his hand by the Roman sages and pretors, "wrenching, as it were, a pillar from an old and still treasured ruin, to support and adorn our own modern edifice." Thus we see this power is as potent to create as to abrogate.

These illustrations, though mostly drawn from the history of English jurisprudence, are not without parallels in our own, and a moment's reflection will satisfy us that in theory, at least, the power of the courts, under our system, is greater than in England. Here the courts are authorized both to expound the law and the constitution. They are in fact the only independent power in the government, since they construe both their own powers and those of the other departments of government.

As an illustration of what our State courts can do, we refer to their earlier interpretation of what is known as the married woman's act, where it seems they thought "mischiefs had crept in, to the disquiet of the law," and they undertook to construe them out, though the legislature subsequently restored the "mischiefs."

We know this power is frequently disclaimed by the courts, and the use of this expression is common: "We must take the law as we find it," "legislation belongs to another body," but in theory these remarks will be found, usually, to be made with reference to some particular statute that has already been construed by the highest courts, or to some venerable and well settled rule, the disturbance of which would cause great present inconvenience.

Again, it is said that law is a perfect science, whose general principles are fixed, and whenever a new relation is discovered that is not provided for by any known rule, the necessary rule may be supplied by a logical deduction from the general principles; but even this statement implies very large powers and concedes all we claim, and its use must depend greatly upon the temperament, legal attainments and

capacity for right reasoning on the part of individual judges. As might be anticipated, a considerable diversity of opinion exists among the courts as to the "limits (to use their own expression) allowed to judicial discretion in creating new precedents."

One class holding precedents in very light esteem, when in conflict with their view of the law; holding that precedents, at most, are but illustrations of principles, and, failing in this, they should be swept away.

On the other hand, another class hold they cannot follow precedents too closely; that they are as firmly bound by their authority as the "pagan deities were supposed to be bound by the decrees of fate."

As a representative of the latter class, stands Lord Kenyon, one of the very ablest of the English judges, who declared that he wished "servilely to follow in *antiquas vias;*" and that as he could not legislate, he could, by his industry, discover what his predecessors had done, and he would tread in their footsteps; whilst at the head of the former class stands Lord Mansfield, who, to use the classic language of Chancellor Kent, "felt himself but little embarrassed with the disposition of the elder cases, when they came in his way to impede the operation of his enlightened and cultivated judgment."

The true path is doubtless between the two; we would not feel quite safe with too bold an innovator, one who treated lightly the wisdom of the ancient sages, nor yet would our civilization retain its progress or elasticity if the courts "servilely" followed the old precedents, however illustrious may have been their authority.

But some of the courts, both in this country and in England, have not hesitated to boldly claim such powers. In Bonham's case, 8 Rep. 118, Lord Coke says "an act of parliament against common right and reason, or repugnant or impossible to be performed, will be controlled and adjudged void by the common law. Lord Holt lays down the same dotrine in *The City of London* v. *Wood*, 12 Mod. 687. The same doctrine was acted upon by the Supreme Court of Maryland, 1 Bay's R. 252, holding substantially that there was a higher power than parliament or legislatures, and that the courts were the depositories of it.

As an illustration of an attempt to define the exercise of this power, we quote from the opinion by Lord Mansfield in 4 Borrows, 2539. He says: "'Discretion,' when applied to a court of law, means sound discretion, guided by reason and not by humor. It must not be arbitrary, vague and fanciful, but legal and regular." This statement, we think, concedes that this power is not capable of definition, which is an essential element of sovereign or ultimate power. But this, perhaps, more properly belongs to another branch of our topic, the origin and legitimacy of this power, which we will examine in another article.

In arguing a case before Judge Straub at Cincinnati the other day, an "Athenian barrister" made use of the following beautiful figure of speech: "Your honor is sitting there on the binch as the represintative of the abstract figger of Justis, which is supposed to be bloind, howlding the scales evenly balanced betwane man and man and woman and woman."

DECISION OF THE UNITED STATES SUPREME COURT ON THE LEGAL TENDER ACT.

SUSAN P. HEPBURN and another *v.* HENRY A. GRISWOLD, in error to the Court of Appeals of the State of Kentucky.

[The legal tender act, passed February 1862, is inoperative as to all contracts for the payment of money made prior to that date, and such contracts can only be discharged by the payment of gold or silver coin.]

CHASE, C. J.—The question presented for our determination by the record in this case is, whether or not the payee or asignee of a note made before the 25th of February, 1862, is obliged by law to accept in payment United States notes equal in nominal amount to the sum due, according to its terms when tendered by the maker or other party bound to pay it. And this requires, in the first place, a construction of that clause of the first section of the act of Congress passed on that day, which declares the United States notes, the issue of which was authorized by the statute, to be a legal tender in payment of debts. The entire clause is in these words: "And such notes herein authorized shall be receivable in payment of all taxes, internal duties, excises, debts, and demands of every kind due to the United States, except duties on imports and demands against the United States of every kind whatever, except for interest upon the bonds and notes, which shall be paid in coin; and shall also be lawful money and a legal tender in payment of all debts, public or private, within the United States, except duties on imports and interest as aforesaid" (12th U. S. Statutes, 345). This clause has already received much consideration here, and this Court has held that, upon a sound consideration, neither taxes imposed by State legislation (Lane County *v.* Oregon, 7 Wallace, 71), nor demands upon contracts which stipulate in terms for the payment or delivery of coin or bullion (Bronson *v.* Rodes, 7 Wallace, 229; Butler *v.* Hartwitz, 7 Wallace, 258), are included, by legislative intention, under the description of debts, public and private.

WHAT IS TO BE DECIDED—COIN *v.* CURRENCY.

We are now to determine whether this description embraces debts contracted before as well as after the date of the act. It is an established rule for the construction of statutes that the terms employed by the Legislature are not to receive an interpretation which conflicts with acknowledged principles of justice and equity, if another sense, consonant with those principles, can be given to them. But this rule cannot prevail where the intent is clear, except in the scarcely supposable case where a statute sets at naught the plainest precepts of morality and social obligation. Courts must give effect to the clearly ascertained legislative intent, if not repugnant to the fundamental law ordained in the Constitution. Applying the rule just stated to the act under consideration there appears to be strong reason for construing the word "debts" as having reference only to debts contracted subsequent to the enactment of the law: for no one will question that the United States notes which the act makes a legal tender in payment are essentially unlike in nature, and being irredeemable in coin are necessarily unlike in value, to the lawful money intended by parties to contracts for the payment of money made before its passage. The lawful money then in use and made a legal tender in payment, consisted of gold and silver coin. The currency in use under the act and declared by its terms to be lawful money and a legal tender, consists of notes or promises to pay impressed upon paper prepared in convenient form for circulation, and protected against counterfeiting by suitable devices and penalties. The former possess intrinsic value determined by the weight and fineness of the metal; the latter have no intrinsic value, but a purchasing value determined by the quantity in circulation, by general consent to its currency in payments, and by opinion as to the probability of redemption in coin. Both derive, in different degrees, a certain

additional value from their adaptation to circulation by the form and impress given to them under national authority, and from the acts making them respectively a legal tender. Contracts for the payment of money made before the act of 1862 had reference to coined money, and could not be discharged, unless by consent, otherwise than by tender of the sum due in coin. Every such contract, therefore, was, in legal import, a contract for the payment of coin.

LAWS OF CURRENCY.

There is a well-known law of currency, that notes or promises to pay, unless made conveniently or promptly convertible into coin at the will of the holder, can never, except under unusual and abnormal conditions, be at par in circulation with coin. It is an equally well-known law that depreciation of notes must increase with the increase of the quantity put in circulation, and diminution of confidence in the ability or disposition to redeem. Their appreciation follows the reversal of these conditions. No act making them a legal tender can change materially the operations of these laws. Their force has been strikingly exemplified in the history of the United States notes. Beginning with a very slight depreciation when first issued in March, 1862, they sunk in July, 1864, to the rate of $2.85 for a dollar in gold, and then rose until recently $1.20 in paper became equal to a gold dollar. Admitting, then, that prior contracts are within the intention of the act, and assuming that the act is warranted by the Constitution, it follows that the holder of a promissory note made before the act for $1,000, payable as we have just seen, according to the law and according to the intent of the parties, in coin, was required when depreciation reached its lowest point to accept in payment 1,000 note dollars, although with the 1,000 coin dollars due under the contract he could have purchased on that day 2,850 such dollars. Every payment since the passage of the act of a note of earlier date has presented similar though less striking features. Now, it certainly needs no argument to prove that an act compelling acceptance in satisfaction of any other than stipulated payment alters arbitrarily the terms of the contract and impairs its obligation, and that the extent of impairment is in proportion to the inequality of the payment accepted under the constraint of the law to the payment due under the contract. Nor does it need argument to prove that the practical operation of such an act is contrary to justice and equity. It follows that no construction which attributes such practical operation to an act of Congress is to be favored, or, indeed, to be admitted, if any other can be reconciled with the manifest intent of the Legislature.

CONSTRUCTION OF THE LAW.

What, then, is that manifest intent? Are we at liberty, upon a fair and reasonable construction of the act, to say that Congress meant that the word "debts," used in the act, should not include debts contracted prior to its passage? In the case of Bronson *qui.* Rodes, we thought ourselves warranted in holding that this word used in the statute does not include obligations created by express contract for the payment of gold and silver, whether coined or in bullion. This conclusion rested, however, mainly on the terms of the act; which not only allow, but require, payments in coin by or to the Government, and may be fairly considered independently of considerations belonging to the law of contracts for the delivery of specified articles as sanctioning special private contracts for like payments, without which indeed the provisions relating to Government payments could hardly have practical effect. This consideration, however, does not apply to the matter now before us. There is nothing in the terms of the act which looks to any difference in its operations on different descriptions of debts, payable generally in money, that is to say, in dollars and parts of a dollar. These terms, on the contrary, in their obvious import include equally all debts, not specially expressed to be payable in gold or silver, whether arising under past contracts, and already due, or arising under such contracts and to become due at a future day, or arising and becoming due under subsequent contracts. A strict and liberal construction indeed would, as suggested by Mr. Justice Story, in respect to the same word used in the Constitution (1 Story on Constitution, 921), limit the word "debts" to debts existing; and if this construction cannot be accepted, because the limitations sanctioned by it cannot be reconciled with the obvious scope and purpose of the act, it is certainly conclusive against any interpretations which will exclude existing debts from its operation. The same conclusion results from the exception of interest on loans and duties on imports, from the effect of the legal tender clause. This exception affords an irresistible implication that no description of debts, whenever contracted, can be withdrawn from the effect of the act if not included within the terms of the reasonable intent of the exception. And it is worthy of observation, in this connection, that in all the debates to which the act gave occasion in Congress, no suggestion was ever made that the legal tender clause did not apply as fully to contracts made before, as to contracts made after, its passage. These considerations seem to us conclusive. We do not think ourselves at liberty, therefore, to say that Congress did not intend to make the notes authorized by it a legal tender in payment of debts contracted before the passage of the act.

THE QUESTION OF CONSTITUTIONALITY.

We are thus brought to the question whether Congress has power to make notes issued under its authority a legal tender in payment of debts which, when contracted, were payable in gold and silver coin. The delicacy and importance of this question has not been overrated in the argument. This Court always approaches the consideration of questions of this nature reluctantly, and its constant rule of decision has been, and is, that acts of Congress must be regarded as constitutional unless clearly shown to be otherwise. But the Constitution is the fundamental law of the United States; by it the people have created a government, defined its powers, prescribed their limits, distributed them among the different departments, and directed in general the manner of their exercise. No department of the government has any other powers than those delegated to it by the people. All the legislative power granted by the Constitution belongs to Congress, but it has no legislative power which is not thus granted; and the same observation is equally true in its application to the executive and judicial powers granted respectively to the President and the courts. All these powers differ in kind, but not in source or in limitations. They all arise from the Constitution, and are limited by its terms. It is the function of the judiciary to interpret and apply the law between parties as they arise for judgment. It can only declare what the law is, and enforce by proper process the law thus declared. But in ascertaining the respective rights of parties it frequently becomes necessary to consult the Constitution, for there can be no law inconsistent with the fundamental law. No enactment not in pursuance of the authority conferred by it can create obligations or confer rights, for such is the express declaration of the Constitution itself, in these words: "This Constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges of every State shall be bound thereby, any thing in the Constitution or laws of any State to the contrary notwithstanding." Not every act of Congress, then, is to be regarded as the supreme law of the land; nor is it by every act of Congress that the judges are bound. This character and this force belong to such acts as are made in pursuance of the Constitution. When, therefore, a case arises for judicial determination, and the decision depends on the alleged inconsistency of a legislative provision with the fundamental law, it is the plain duty of the court to compare the act with the Constitution, and if the former cannot, upon a fair construction, be reconciled with the latter, to give effect to the Constitution rather than the statute. This seems so plain that it is impossible to make it plainer by argument; if it be otherwise, the Constitution is not the supreme law. It is neither necessary nor useful in any case to inquire whether or not any act of Congress was passed in pursuance of it, and the oath which every member of this Court is required to take, that he "will administer justice without respect to persons, and do equal right to the poor and the rich,

and faithfully perform the duties incumbent upon him to the best of his ability and understanding agreeably to the Constitution and laws of the United States," becomes an idle and unmeaning form.

THE QUESTION OF PRIVATE RIGHTS.

The case before us is one of private rights. The plaintiff in the Court below sought to recover of the defendants a certain sum expressed on the face of a promissory note. The defendants insisted on the right, under the act of February 25, 1862, to acquit themselves of their obligation by tendering in payment a sum nominally equal in United States notes, but the note had been executed before the passage of the act, and the plaintiff insisted on his right under the Constitution, to be paid the amount due in gold and silver, and it has not been and cannot be denied that the plaintiff was entitled to judgment according to his claim, unless bound by a constitutional law to accept the notes as coin. Thus, two questions were directly presented. Were the defendants relieved by the act from the obligation assumed in the contract? Could the plaintiff be compelled by a judgment of the Court to receive in payment a currency of a different nature and value from that which was in the contemplation of the parties when the contract was made? The Court of Appeals resolves both questions in the negative, and the defendants seek the reversal of that judgment by writ of error.

THE MAIN QUESTION TO BE DECIDED.

It becomes our duty, therefore, to determine whether the act of February 25, 1862, so far as it makes United States notes a legal tender, in payment of debts contracted prior to its passage, is constitutional and valid or otherwise. Under a deep sense of our obligation to perform this duty to the best of our ability and understanding, we shall proceed to dispose of the case presented by the record. We have already said, and it is generally, if not universally, conceded, that the government of the United States is one of limited powers, and that no department possesses any authority not granted by the Constitution. It is not necessary, however, in order to prove the existence of a particular authority, to show a particular and express grant. The design of the Constitution was to establish a government competent to take direction and administration of the affairs of a great nation, and at the same time to mark by sufficiently definite lines the sphere of its operations. To this end it was needful only to make express grants of general powers, coupled with a further grant of such incidental and auxiliary powers as might be required for the exercise of the powers expressly granted. These powers are necessarily extensive. It has been found, indeed, in the practical administration of the government, that a very large part, if not the largest part, of its functions have been performed in the exercise of powers thus implied. But the extension of power by implication was regarded with some apprehension by the wise men who framed, and by the intelligent citizens who adopted, the Constitution. This apprehension is manifest in the terms by which the grant of incidental and auxiliary power is made. All powers of this nature are included under the description of "power to make all laws necessary and proper for carrying into execution the powers expressly granted to Congress or vested by the Constitution in the government, or in any of its departments or officers."

The same apprehension is equally apparent in the Tenth Article of the Amendments, which declares that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States or the people." We do not mean to say that either of these constitutional provisions is to be taken as restricting any exercise of power, fairly warranted by the legitimate derivation from one of the enumerated or express powers. The first was undoubtedly introduced to exclude all doubt in respect to the existence of implied powers, while the words "necessary and proper" were intended to have a "sense," to use the words of Mr. Justice Story, "at once admonitory and directory," and to require that the means used in the execution of an express power should be appropriate to the end. (1 Story on Cons., 142, par. 1,253.)

The second provision was intended to have a like admonitory and directory sense, and to restrain the limited Government established under the Constitution from the exercise of powers not clearly delegated or derived by just inference from powers so delegated. It has not been maintained in argument, nor indeed would any one, however slightly conversant with constitutional law, think of maintaining, there is in the Constitution any express grant of legislative power to make any description of credit currency a legal tender in payment of debts. We must inquire, then, whether this can be done in the exercise of an implied power. The rule for determining whether a legislative enactment can be supported as an exercise of an implied power was stated by Chief Justice Marshall, speaking for the whole Court in the case of McCulloch *agt.* The State of Maryland (4 Wheaton, 421); and the statement then made has ever since been accepted as a correct exposition of the Constitution. His words were these: "Let the end be legitimate, let it be within the scope of the Constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consistent with the letter and spirit of the Constitution, are constitutional," and in another part of the same opinion, the practical operation of this rule was thus illustrated. Should Congress, in the execution of its powers, adopt measures which are prohibited by the Constitution, or should Congress, under the pretext of executing its power, pass laws for the accomplishment of objects not intrusted to the Government, it would be the painful duty of this tribunal, should a case requiring such a decision come before it, to say that such an act was not the law of the land; but where the law is not prohibited, and is really calculated to effect one of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department and tread on legislative ground. (Ibid. 423.) It must be taken, then, as finally settled, so far as judicial decisions can settle any thing, that the words "all laws necessary and proper for carrying into execution" powers expressly granted or vested have, in the Constitution, a sense equivalent to that of the words, "laws not absolutely necessary, indeed, but appropriate and plainly adapted to constitutional and legitimate ends—laws not prohibited, but consistent with the letter and spirit of the Constitution—laws really calculated to effect the objects intrusted to the Government." The question before us, then, resolves itself into this: Is the clause which makes the United States notes a legal tender for debts contracted prior to its enactment a law of the description stated in the rule? It is not doubted that the power to establish a standard of value, by which all other values may be measured, or, in other words, to determine what shall be lawful money and a legal tender, is, in its nature and of necessity, a governmental power. It is in all countries exercised by the Government. In the United States, so far as it relates to the precious metals, it is vested in Congress, by the grant of the power to coin money. But can a power to impart these qualities to notes or promises to pay money, when offered in discharge of pre-existing debts, be derived from the coinage power or from any other power expressly given? It is certainly not the same power as the power to coin money, nor is it in any reasonable satisfactory sense an appropriate or plainly adapted means to the exercise of that power, nor is there more reason for saying that it is implied in, or incidental to, the power to regulate the value of coined money of the United States or of foreign coins. This power of regulation is a power to determine the weight, purity, form, and impression of the several coins and their relation to each other, and the relations of foreign coins to the monetary unit of the United States. Nor is the power to make notes a legal tender the same as the power to issue notes to be used as currency. The old Congress, under the articles of confederation, was clothed by express grant with the power to emit bills of credit, which are in fact notes for circulation as currency, and yet that Congress was not clothed with power to make their bills a legal tender in payment. And this Court has recently held that Congress, under the Constitution, possesses the same power to emit bills or notes as incidental to other powers, though not denominated among those expressly granted, but it was expressly declared at the same time that this decision concluded nothing on the question of legal tenders. Indeed we are not aware that it has ever been claimed that the

power to issue bills or notes has any identity with the power to make them a legal tender; on the contrary the whole history of the country refutes that notion.

STATE CONTROL OVER BILLS FOR CIRCULATION.

The States have always been held to possess the power to authorize and regulate the issue of bills for circulation by banks or individuals, subject, as has been lately determined, to the control of Congress, for the purpose of establishing and securing a national currency; and yet the States are expressly prohibited by the Constitution from making any thing but gold and silver coin a legal tender. This seems decisive on the point that the power to issue notes, and the power to make them a legal tender, are not the same power, and that they have no necessary connection with each other. But it has been maintained in argument that the power to make United States notes a legal tender in payment of all debts is a means appropriately and plainly adapted to the execution of the power to carry on war, of the power to regulate commerce, and of the power to borrow money. If it is, and is not prohibited nor inconsistent with the letter or spirit of the Constitution, then the act which makes them such legal tenders must be held to be constitutional.

THE WAR.

Let us first inquire whether it is an appropriate and plainly adapted means for carrying on war. The affirmative argument may be thus stated: Congress has power to declare and provide for carrying on war. Congress has also power to emit bills of credit, or circulating notes, receivable for Government dues, and payable, so far at least as parties are willing to receive them, in discharge of Government obligations. It will facilitate the use of such notes in disbursements to make them a legal tender in payment of existing debts; therefore, Congress may make such notes a legal tender. It is difficult to say to what express power the authority to make notes a legal tender in the payment of debts pre-existing in contracts may not be upheld as incidental, upon the principles of this argument. Is there any power which does not involve the use of money? and is there any doubt that Congress may issue and use bills of credit as money in the execution of any power? The power to establish post-offices and post-roads, for example, involves the collection and disbursements of a large revenue. Is not the power to make notes a legal tender as clearly incidental to this power as to the war power? The answer to this question does not appear to us doubtful. The argument, therefore, seems to prove too much. It carries the doctrine of implied powers very far beyond any extent hitherto given to it. It asserts that whatever in any degree promotes an end within the scope of a general power, whether in the correct sense of the word "appropriate" or not, may be done in the exercise of an implied power. Can this proposition be maintained? It is said that this is not a question for the Court deciding a cause, but for Congress exercising the power. But the decisive answer to this is that the admission of a legislative power to determine finally what powers have the described relation as means to the execution of other powers plainly granted, and then to exercise absolutely and without liability to question, in cases involving private rights, the powers thus determined to have that relation, would completely change the nature of American Government. It would convert the government, which the people ordained as a government of limited powers, into a government of unlimited powers; it would obliterate every criterion which this Court, speaking through the venerated Chief Justice, in the case already cited, established for the determination of the question, whether legislative acts are constitutional or unconstitutional. Undoubtedly among means appropriate, plainly adapted, really calculated, the Legislature has unrestricted choice; but there can be no implied power to use means not within this description. Now, then, let it be considered what has actually been done in the provision of national currency. In July and August, 1861, and February, 1862, the issue of $60,000,000 in United States notes payable on demand was authorized (12 U. S. Statutes, 259, 313, 338). They were made receivable in payments, but were not declared a legal tender until March, 1862 (12 U. S. Statutes, 370), when the amount in circulation had been greatly reduced by receipt or cancellation. In 1862 and 1863 (12 U. S. Statutes, 345, 532, 709), the issue of $450,000,000 in United States notes payable not on demand, but in effect at the convenience of the Government, was authorized, subject to certain restrictions. As to $50,000,000, these notes were made receivable for the bonds of the national loans for all debts due to or from the United States, except duties on imports and interest on the public debt, and were also declared a legal tender. In March, 1863 (12 U. S. Statutes, 711), the issue of notes for parts of a dollar was authorized to an amount not exceeding $50,000,000. These notes were not declared a legal tender, but were made redeemable under regulations to be prescribed by the Secretary of the Treasury. In February, 1863 (12 U. S. Statutes, 669), the issue of three hundred millions of dollars in notes of National Banking Associations was authorized. These notes were made receivable to the same extent as United States notes, and provision was made to secure their redemption; but they were not made a legal tender. These several descriptions of notes have since constituted, under the various acts of Congress, the common currency of the United States. The notes which were not declared a legal tender have circulated with those which were so declared, without unfavorable discrimination. It may be added as a part of the history that other issues bearing interest at various rates were authorized and made a legal tender, except in redemption of bank notes for face amounts, exclusive of interest. Such were the one and two years' five per cent notes, and the three years' compound interest notes. (13 U. S. Statutes, 218. 245.) These notes never entered largely or permanently into the circulation, and there is no reason to think that their utility was increased or diminished by the act which declared them a legal tender for the face amount. They need not be further considered here. They serve only to illustrate the tendency, remarked by all who have investigated the subject of paper money, to increase the volume of irredeemable issues, and to extend indefinitely the application of the quality of legal tenders. That it was carried no further during the present civil war, and has been carried no further since, is due to circumstances, the consideration of which does not belong to this discussion.

LEGAL TENDER ON PRE-EXISTING DEBTS.

We recur, then, to the question under consideration. No one questions the general constitutionality, and not very many, perhaps, the general expediency of the legislation by which a note currency has been authorized in recent years. The doubt is as to the power to declare a particular class of these notes to be a legal tender in payment of pre-existing debts. The only ground upon which this power is asserted is, not that the issue of notes was an appropriate and plainly adapted means for carrying on the war, for that is admitted, but that the making of them a legal tender to the extent mentioned was such a means. Now we have seen that of all the notes issued those not declared a legal tender at all constituted a very large proportion, and that they circulated freely and without discount. It may be said that their equality in circulation and credit was due to the provision made by law for the redemption of this paper in legal tender notes, but this provision, if at all useful in this respect, was of trifling importance compared with that which made them receivable for Government dues. All modern history testifies that in time of war, especially when taxes are augmented, large loans negotiated, and heavy disbursements made, notes issued by the authority of the Government, and made receivable for dues to the Government, always obtain at first a ready circulation, and even when not redeemable in coin on demand, are as little and usually less subject to depreciation than any other description of notes for the redemption of which no better provision is made. And the history of the legislation under consideration is, that it was upon the quality of receivability, and not upon the quality of legal tender, that reliance of circulation was originally placed; for the receivability clause appears to have been in the original draft of the bill, while the legal tender

clause seems to have been introduced at a later stage of its progress. These facts certainly are not without weight as evidence that all the useful purposes of the notes would have been fully answered without making them a legal tender for pre-existing debts. It is denied, indeed, by eminent writers that the quality of legal tender adds any thing at all to the credit or usefulness of Government notes; they insist, on the contrary, that it impairs both. However this may be, it must be remembered that it is as a means to an end to be obtained by the action of the Government.

HOW FAR DOES LEGAL TENDER HELP THE GOVERNMENT?

That the implied power of making notes a legal tender in all payments is claimed under the Constitution; now, how far is the Government helped by this means? Certainly it cannot obtain new supplies, or services at a cheaper rate, for no one will take the notes for more than they are worth at the time of the new contract. The price will rise in the ratio of the depreciation, and this is all that could happen if the notes were not made a legal tender. But it may be said that the depreciation will be less to him who takes them from the government, if the government will pledge to him its power to compel his creditors to receive them at par in payments. This is, as we have seen, by no means certain. If the quantity issued be excessive, and redemption uncertain and remote, great depreciation will take place. If, on the other hand, the quantity is only adequate to the demands of business, and confidence in early redemption is strong, the notes will circulate freely, whether made a legal tender or not; but if it be admitted that some increase of availability is derived from making the notes a legal tender under new contracts, it by no means follows that any appreciable advantage is gained by compelling creditors to receive them in satisfaction of pre-existing debts. And there is abundant evidence that whatever benefit is possible from that compulsion to some individuals, or to the government, is far more than outweighed by the losses of property, the derangement of business, the fluctuations of currency and values, and the increase of prices to the people and the government, and the long train of evils which flow from the use of an irredeemable paper money. It is true that these evils are not to be attributed altogether to making it a legal tender, but this increases these evils. It certainly widens their extent, and protracts their continuance. We are unable to persuade ourselves that an expedient of this sort is an appropriate and plainly adapted means for the execution of the power to declare and carry on war. If it adds nothing to the utility of the notes, it cannot be upheld as a means to the end in furtherance of which the notes are issued; nor can it, in our judgment, be upheld as such if, while facilitating in some degree the circulation of the notes, it debases and injures the currency in its proper use to a much greater degree. And these considerations seem to us equally applicable to the power to regulate commerce and to borrow money. Both powers necessarily involve the use of money by the people, and by the Government, but neither, as we think, carries with it, as an appropriate and plainly adapted means to its exercise, the power of making circulating notes a legal-tender in payment of pre-existing debts.

EARLY LAWS AND OPINIONS.

There is another view which seems to us decisive. To whatever express power the implied power in question may be referred, in the rule stated by Chief Justice Marshall, the words "appropriate, plainly adapted, really calculated," are qualified by the limitation that the means must not be prohibited, but consistent with the letter and spirit of the Constitution. Nothing so prohibited or inconsistent can be regarded as appropriate, or plainly adapted, or really calculated means to any end. Let us inquire, then, first, whether making bills of credit a legal tender to the extent indicated is consistent with the spirit of the Constitution. Among the great cardinal purposes of that instrument, no one is more conspicuous or more venerable than the establishment of justice. And what was intended by the establishment of justice in the minds of the people who ordained it, is happily not a matter of disputation. It is not left to inference or conjecture, especially in its relations to contracts. When the Constitution was undergoing discussion in the Convention, the Congress of the Confederation was engaged in the consideration of the ordinance for the government of the territory north-west of the Ohio — the only territory subject at that time to its regulation and control. By this ordinance certain fundamental articles of compact were established between the original States and the people and States of the territory, for the purpose, to use its own language, "of extending the fundamental principles of civil and religious liberty, whereon these republics" (the States united under the confederation), "their laws and Constitutions are erected." Among these fundamental principles was this: "And in the just preservation of rights and property it is understood and declared that no law ought ever to be made or have force in the said territory that shall in any manner whatever interfere with or affect private contracts or engagements, *bona fide*, and without fraud, previously formed." The same principle found more condensed expression in that most valuable provision of the Constitution of the United States, ever recognized as an efficient safeguard against intrigue, that no State shall pass any law impairing the obligation of contracts. It is true that this prohibition is not applied in terms to the Government of the United States. Congress has express power to enact bankrupt laws, and we do not say that a law made in the execution of any other express power which incidentally only impairs the obligation of a contract can be held to be unconstitutional for that reason. But we think it clear that those who framed, and those who adopted the Constitution, intended that the spirit of this prohibition should pervade the entire body of legislation, and that the justice which the Constitution was ordained to establish was not thought by them to be compatible with legislation of an opposite tendency. In other words, we cannot doubt that a law not made in pursuance of an express power, which necessarily, and in its direct operation, impairs the obligation of contracts, is inconsistent with the spirit of the Constitution.

SANCTITY OF PRIVATE PROPERTY.

Another provision, found in the Fifth Amendment, must be considered in this connection. We refer to that which ordains that private property shall not be taken for public use without compensation. This provision is kindred in spirit to that which forbids legislation impairing the obligations of contracts, but unlike that it is addressed directly and solely to the National Government. It does not in terms prohibit legislation which appropriates the private property of one class of citizens to the use of another class; but, if such property cannot be taken for the benefit of all without compensation, it is difficult to understand how it can be so taken for the benefit of a part without violating the spirit of the prohibition. But there is another provision in the same amendment, which, in our judgment, cannot have its full and intended effect, unless construed as a direct prohibition of the legislation which we have been considering. It is that which declares that no person shall be deprived of life, liberty, or property, without due process of law. It is not doubted that all the provisions of this amendment operate directly in limitation and restraint of the legislative powers conferred by the Constitution. The only question is, whether an act which compels all those who hold contracts for the payment of gold or silver money to accept in payment a currency of inferior value, deprives such persons of property without due process of law. It is quite clear that whatever may be the operation of such an act, due process of law makes no part of it. Does it deprive any person of property? A very large proportion of the property of civilized men exists in the form of contracts. These contracts almost invariably stipulate for the payment of money; and we have already seen that contracts in the United States, prior to the act under con-

sideration for the payment of money, were contracts to pay the sums specified in gold and silver coin; and it is beyond doubt that the holders of those contracts were and are as fully entitled to the protection of this constitutional provision as the holders of any other description of property. But it may be said that the holders of no description of property are protected by it from legislation which, incidentally only, impairs its value, and it may be urged in illustration that the holders of stock in a turnpike, a bridge, or a manufacturing corporation, or an insurance company, or a bank, cannot by authorizing similar works or corporations reduce its price in the market; but all this does not appear to meet the real difficulty. In the cases mentioned, the injury is purely contingent and incidental. In the case we are considering it is direct and inevitable. If in the cases mentioned the holder of the stock was required to convey it on demand to any one who should think fit to offer half its value for it, the analogy would be more obvious. No one probably could be found to contend that an act enforcing the acceptance of 50 or 75 acres of land in satisfaction of a contract to convey 100 would not come within the prohibition against arbitrary privation of property. We confess ourselves unable to perceive any solid distinction between such an act and an act compelling all citizens to accept in satisfaction of all contracts for money half or three-quarters, or any other proportion less than the whole, of the value actually due according to their terms. It is difficult to conceive what act would take private property without process of law, if such an act would not. We are obliged to conclude that an act making mere promises to pay dollars a legal tender in payment of debts previously contracted, is not a means appropriate, plainly adapted, really calculated to carry into effect any express power vested in Congress; that such an act is inconsistent with the spirit of the Constitution, and that it is prohibited by the Constitution. It is not surprising that amid the tumult of the late civil war, and under the influence of apprehensions for the safety of the republic almost universal, different views, never before entertained by American statesmen or jurists, were adopted by many. The time was not favorable to considerate reflection upon the constitutional limits of legislative or executive authority. If power was assumed from patriotic motives, the assumption found ready justification in patriotic hearts. Many who doubted yielded their doubts; many who did not doubt were silent; some who were strongly averse to making government notes a legal tender felt themselves constrained to acquiesce in the views of the advocates of the measure. Not a few who then insisted upon its necessity, or acquiesced in that view, have, since the return of peace, and under the influence of calmer times, reconsidered their conclusions, and now concur in those which we have just announced.

Those conclusions seem to us to be fully sanctioned by the letter and spirit of the Constitution. We are obliged, therefore, to hold that the defendant in error was not bound to receive from the plaintiffs the currency tendered to him in payment of their note made before the passage of the act of Feb. 25, 1862. It follows that the judgment of the Court of Appeals of Kentucky must be affirmed.

MILLER, J., dissenting: The provisions of the Constitution of the United States, which have direct reference to the function of legislation, may be divided into three primary classes: First, those which confer legislative powers on Congress: second, those which prohibit the exercise of legislative powers by Congress; third, those which prohibit the States from exercising certain legislative powers. The powers conferred on Congress may be subdivided into the positive and the auxiliary, or, as they are more usually called, the express and implied power. As instances of the former class may be mentioned the power to borrow money, to raise and support armies, and to coin money and regulate the value thereof. The implied or auxiliary powers of legislation are founded largely on that general provision which closes the enumeration of powers granted in express terms by the declaration that Congress shall also have power to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any department or officer thereof.

The question which this Court is called upon to consider is, whether the authority to make the notes of the United States a lawful tender in payment of debts is to be found in Congress under either of these classes of legislative power. As one of the elements of this question, and in order to negative any idea that the exercise of such a power would be an invasion of the rights reserved to the States, it may be as well to say at the outset that this is among the subjects of legislation forbidden to the States by the Constitution. Among the unequivocal utterances of that instrument on this subject of lawful tender, is that which declares that no State shall coin money, grant bills of credit, or make any thing but gold and silver a tender in payment of debts, thus removing the whole matter from the dominion of State legislation. No such prohibition is placed upon the power of Congress over this subject, though there are, as we have already said, matters expressly forbidden to Congress, but neither this of legal tender, nor the power to emit bills of credit, or to impair the obligation of contracts, is among them; and though it must be obvious that, in prohibiting this legal tender power to the States, the attention of the Convention must have been directed to the propriety of a limitation of the power of Congress. On the contrary, Congress is expressly authorized to coin money, and to regulate the value thereof and of foreign coin, and to punish the counterfeiting of such coin and securities of the United States.

It has been strongly argued by many able jurists that these latter clauses, fairly construed, confer the power to make the securities of the United States a lawful tender in payment of debts. While I am not able to see in them, standing alone, a sufficient warrant for the exercise of this power, they are not without decided weight when we come to consider the question of the existence of this power as one necessary and proper for carrying into execution other admitted powers of the government, for they show that so far as the framers of the Constitution did go, in granting express power over the lawful money of the country, it was confided to Congress, and not to the States, and it is no unreasonable inference that if it should be found necessary in carrying into effect some of the powers of the government essential to its successful operation, to make its securities perform the payment of debts. Such legislation would be in harmony with the power over money granted in express terms.

It being conceded, then, that the power under consideration would not, if exercised by Congress, be an invasion of any right reserved to the United States, but one which they are forbidden to employ, and that it is not in terms either granted or denied to Congress, can it be sustained as a law necessary and proper, at the time it was enacted, for carrying into execution any of these powers that are expressly granted either to Congress or to the Government, or to any department thereof? From the organization of the Government under the present Constitution, there have been from time to time attempts to limit the powers granted by that instrument by a narrow and literal rule of construction, and these have been specially directed to the general clause which we have cited as the chief foundation of the auxiliary powers of the Government.

It has been said that this clause, so far from authorizing the use of any means which could not have been used without it, is a restriction upon the powers necessarily implied by an instrument so general in its language. The doctrine is, that when an act of Congress is brought to the test of this clause of the Constitution, it of necessity must be absolute, and its adaptation to the conceded purpose unquestionable. Nowhere has this principle been met with more emphatic denial or more satisfactory refutations than in this Court. That eminent jurist and statesman, whose official career of over 30 years as Chief Justice commenced very soon after this Constitution was adopted, and whose opinions have done as much to fix its meaning as those of any man living, or dead, has given this particular clause the benefit of his fullest consideration. In the case of the United States *v.* Fisher (2 Cranch, 358), decided in 1804, the point in issue was the priority claimed for the United States as a creditor of a bankrupt over all other creditors. It was argued mainly on the construction of the statutes; but the power of Congress to pass such a law was also denied. The Chief Justice said:

"It is claimed under the authority to make all laws which shall be necessary and proper to carry into execution the powers vested by the Constitution in the Government, or in any department thereof."

In construing this clause it would be incorrect, and would produce endless difficulties, if the opinion should be maintained that no law was authorized which was not indispensably necessary to give effect to a specified power, when various systems might be adopted for that purpose. It might be said, with respect to each, that it was not necessary, because the end might be attained by other means. Congress must possess the choice of means, and must be empowered to use any means which are in fact conducive to the exercise of the power granted by the Constitution. It was accordingly held that, under the authority to pay the debts of the Union, it could pass a law giving priority for its own debts in case of bankruptcy.

But in the memorable case of McCulloch, *versus* the State of Maryland (4 Whalen, 316), the most exhaustive discussion of this clause is found in the opinion of the same eminent expounder of the Constitution. That case involved, as is well known, the right of Congress to establish the Bank of the United States and to authorize it to issue notes for circulation. It was conceded that the right to incorporate or create such a bank had no specific grant in any clause of the Constitution; still less the right to authorize it to issue notes for circulation as money. But, it was argued, that as a measure necessary to enable the Government to collect, transfer and pay out its revenues, the organization of a bank with this function was within the power of Congress. In speaking of the true meaning of the word "necessary," in this clause of the Constitution, he says: "Does it always impart an absolute physical necessity so strong that one thing to which another may be termed necessary cannot exist without it?" We think it does not. If reference be had to its use in the common affairs of the world, or in approved authors, we find that it frequently imparts no more than that one thing is convenient or useful or essential to another; to employ means necessary to an end is generally understood as employing any means calculated to produce the end; and not as being confined to those single means without which the end would be unattainable. The word "necessary" admits, he says, of all degrees of comparison. A thing may be necessary, very necessary, absolutely, or indispensably necessary. The word, then, like others, is used in various senses, and in its construction the subject, the context, the intention of the person using them, are to be taken into view. Let this be done in the case under consideration. The subject is the execution of those great powers on which the welfare of a nation essentially depends. It must have been the intention of those who gave these powers to insure, as far as human prudence could insure, their beneficial execution. This could not be done by confining the choice of means to such narrow limits as not to leave it in the power of Congress to adopt any which might be appropriate and which were conducive to the end. This provision is made in a constitution intended to endure for ages to come, and consequently to be adapted to various crises of human affairs. To have prescribed the means by which the government should in all future time execute its powers would have been to change entirely the character of the instrument and give it the properties of a legal code. It would have been an unwise attempt to provide by immutable rules for exigencies which, if foreseen at all, must have been but dimly, and which can be best provided for as they occur. To have declared that the best means shall not be used, but those alone without which the power given would be nugatory, would have been to deprive the legislature of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances.

We have cited at unusual length these remarks of Chief Justice Marshall because, though made half a century ago, their applicability to the circumstances under which Congress called to its aid the power of making the securities of the government a legal tender, as a means of successfully prosecuting a war which, without such aid, seemed likely to terminate its existence, and to borrow money which could in no other manner be borrowed, and to pay the debt of millions due to its soldiers, which could by no other means be paid, seems to be almost prophetic. If he had had clearly before his mind the future history of his country he could not have better characterized a principle which would have rendered the power to carry on a war nugatory, which would have deprived Congress of the capacity to avail itself of experience, to exercise its reason, and to accommodate its legislation to circumstances by the use of the most appropriate means of supporting the Government in the crisis of its fate.

But it is said that the clause under consideration is admonitory, as to the use of implied powers, and adds nothing to what would have been authorized without. The idea is not new, and is probably intended for the same which was urged in the case of McCulloch *v.* The State of Maryland—namely, that instead of enlarging the powers conferred on Congress, or providing for a more liberal use of them, it was designed as a restriction upon the auxiliary powers incidental to every express grant of power in general terms. I have already cited so fully from that case that I can only refer to it to say that this proposition is there clearly stated and refuted. Does there exist, then, any power in Congress or in the Government, by express grant, to the execution of which this legal tender act was necessary and proper, in the sense here defined, and under the circumstances of its passage?

The power to declare war, to suppress insurrection, to raise and support armies, to provide and maintain a navy, to borrow money on the credit of the United States, to pay the debts of the Union, and to provide for the common defense and general welfare, are each and all distinctly and specifically granted in separate clauses of the Constitution. We were in the midst of a war which called all these powers into exercise and taxed them severely—a war which, if we were to take into account the increased capacity for destruction introduced by modern science and the corresponding increase of its cost, brought into operation powers of belligerency more potent and more expensive than any that the world has ever known. All the ordinary means of rendering efficient the several powers of Congress above mentioned had been employed to their utmost capacity, and with the spirit of the Rebellion unbroken, with large armies in the field unpaid, with a current expenditure of $2,000,000 per day, the credit of the Government nearly exhausted, and the resources of taxation inadequate to pay even the interest on the public debt, Congress was called on to devise some new means of borrowing money on the credit of the nation; for the result of the war was conceded by all thoughtful men to depend on the capacity of the Government to raise money in amounts previously unknown. The banks had already loaned their means to the Treasury; they had been compelled to suspend the payment of specie on their own notes. The coin in the country, if it could all have been placed within the control of the Secretary of the Treasury, would not have made a circulation sufficient to answer army purchases and army payments, to say nothing of the ordinary business of the country. A general collapse of credit, of payments, and of business, seemed inevitable, in which faith in the ability of the Government would have been destroyed; the Rebellion would have triumphed; the States would have been left divided, and the people impoverished. The National Government would have perished, and with it the Constitution which we are called upon to construe with such nice and critical accuracy.

That the legal tender act prevented these disastrous results, and that the legal tender clause was necessary to prevent them, I entertain no doubt. It furnished instantly a means of paying the soldiers in the field, and filled the coffers of the commissary and quartermaster. It furnished a medium for the payment of private as well as public debts at a time when gold was being rapidly withdrawn from circulation, and the bank currency was becoming worthless. It furnished the means to the capitalist of buying the bonds of the government; it stimulated trade, revived the drooping energies of the country, and restored confidence to the public mind. The results which followed the adoption of this measure are beyond

dispute. No other adequate cause has ever been assigned for the revival of government credit, the renewed activity of trade, and the facility with which the government borrowed in two or three years at reasonable rates of interest, mainly from its own citizens, double the amount of money there was in the country, including coin, bank notes, and the notes issued under the legal tender acts.

It is now said, however, as the calm retrospect of those events, that treasury notes suitable for circulation as money, bearing on their face the pledge of the United States for their ultimate payment in coin, would, if not equally efficient, have answered the requirement of the occasion without being made a legal tender for debts. But what was needed was something more than the credit of the Government. That had been stretched to its utmost tension, and was clearly no longer sufficient in the simple form of borrowing money. Is there any reason to believe that the mere change in the form of the security given would have revived this sinking credit? On the contrary, all experience shows that a currency not redeemable promptly in coin, but dependent on the credit of a promissor, whose resources are rapidly diminishing while his liabilities are increasing, soon sinks to the dead level of worthless paper. As no man would have been compelled to take it in payment of debts, as it bore no interest, as its period of redemption would have been remote and uncertain, this must have been the inevitable fate of any extensive issue of such notes. But when by law they were made to discharge the functions of paying debt, they had a perpetual credit or value equal to the amount of all the debts, public or private, in the country. If they were never redeemed (as they never have been) they still paid debts at their par value, and for this purpose were then, and have always been, eagerly sought by the people. To say, then, that this equality of legal tender was not necessary to their usefulness, seems to me unsupported by any sound view of the situation.

Nor can any just inference of that proposition arise from a comparison of the legal tender notes with the bonds issued by the government about the same time. These bonds had a fixed period for their payment, and the Secretary of the Treasury declared that they were payable in gold. They bore interest, which was payable semi-annually in gold by express terms on their face; and the Customs' duties which, by law, could be paid in nothing but gold, were sacredly pledged to the payment of this interest. They can afford no means of determining what would have been the fate of the Treasury notes designed to circulate as money, but which bore no fixed time of redemption, and by law could pay no debts, and had no fund pledged for their redemption.

The legal tender clauses of the statutes under consideration were placed emphatically, by those who enacted them, upon their necessity to the further borrowing of money and maintaining the army and navy. It was done reluctantly and with hesitation, and only after the necessity had been demonstrated and had become imperative. Our statesmen had been trained in schools which looked upon such legislation with something more than distrust. The debates of the two Houses of Congress show that on this necessity alone could this clause of the bill have been carried, and they also prove, as I think, very clearly the existence of that necessity. The history of that gloomy time is not to be readily forgotten by the lover of his country, and will forever remain the full, clear and ample vindication of the exercise of this power by Congress, as its results have demonstrated the sagacity of those who originated and carried through the measure.

Certainly it seems to the best judgment that I can bring to bear upon the subject that this law was a necessity in the most stringent sense in which that word can be used. But, if we adopt the construction of Chief Justice MARSHALL and the full Court over which he presided, a construction which has never to this day been overruled or questioned in this Court, how can we avoid this conclusion? Can it be said that this provision did not conduce toward the purpose of borrowing money, of paying debts, of raising armies, of suppressing insurrection? Or, that it was not calculated to effect these objects? or that it was not useful and essential to that end? It can be said that this was not among the chief means, if not the only means which were left Congress to carry on the war for National existence.

Let us compare the present with other cases decided in this court. If we can say indirectly that to declare, as in the case of the United States *v.* Fisher, that the debt which a bankrupt owes the government shall have priority of payment over all other debts is a necessary and proper law to enable the government to pay its own debts, how can we say that the legal tender clause was not necessary and proper to enable the government to borrow money to carry on the war? The creation of the United States Bank, and especially the power granted to it to issue notes for circulation as money, was strenuously resisted as without constitutional authority; but this court held that a bank of issue was necessary in the sense of that word, as used in the Constitution, to enable the government to collect, to transfer, and to pay out its revenues. It was never claimed that the government could find no other means to do this. It could not then be denied, nor has it ever been, that other means more clearly within the competency of Congress existed, nor that a bank of deposit might possibly have answered without a circulation. But because that was the most fitting, useful, and efficient mode of doing what Congress was authorized to do, it was held to be necessary by this court. The necessity in that case is much less apparent to me than in the adoption of the legal tender clause. In the Veazie Bank *v.* Fenno, decided at the present term, this court held, after full consideration, that it was the privilege of Congress to furnish to the country the currency to be used by it in the transaction of business, whether this was done by means of coin, of the notes of the United States, or of banks created by Congress, and that as a means of making this power of Congress efficient, that body could make their currency exclusive by taxing out of existence any currency authorized by the State. It was said that, having, in the exercise of undoubted Constitutional power, undertaken to provide for the whole country, it cannot be questioned that Congress may constitutionally secure the benefit of it to the people by appropriate means. Which is the more appropriate and effectual means of making the currency established by Congress useful, acceptable, perfect — the taxing all other currency out of existence, or giving to that furnished by the government the quality of lawful tender for debts? The latter is a means directly conducive to the end to be obtained, a means which attains the end more promptly and more perfectly than other means can do. The former is a remote and uncertain means in its effect, and is liable to the serious objection, that it interferes with State legislation. If Congress can, however, under its implied power, protect and foster this currency by such destructive taxation on State bank circulation, it seems strange indeed if it cannot adopt the more appropriate and the effectual means of declaring these notes of its own issue, for the redemption of which its faith is pledged, a lawful tender in payment of debts.

But it is said that the law is in conflict with the spirit, if not with the letter, of several provisions of the Constitution. Undoubtedly it is a law impairing the obligation of contracts made before its passage; but, while the Constitution forbids the States to pass such laws, it does not forbid Congress. On the contrary, Congress is expressly authorized to establish a uniform system of bankruptcy, the essence of which is to discharge debtors from the obligation of their contracts. And, in pursuance of this power, Congress has three times passed such a law, which, in every instance, operated on contracts made before it was passed. Such a law is now in force, yet its constitutionality has never been questioned. How it can be in accordance with the spirit of the Constitution to destroy directly the creditor's contract for the sake of the individual debtor, but contrary to its spirit to affect remotely its value for the safety of the nation, it is difficult to perceive. So it is said that the provisions that private property shall not be taken for public use without just compensation, and that no person shall be deprived of life, liberty or property without due course of law, are opposed to the acts under consideration. The argument is too fine for my perception by which the indirect

effect of a great public measure, in depreciating the value of lands, stocks, bonds, and other contracts, renders such a law invalid, as taking private property for public use, or as depriving the owner of it without due course of law. A declaration of war with a maritime power would thus be unconstitutional, because the value of every ship abroad is lessened 25 or 30 per cent, and those at home almost as much. The abolition of the tariff on iron, or sugar, would in like manner destroy the furnaces, and sink the capital employed in the manufacture of those articles. Yet no statesman, however warm an advocate of high tariffs, has claimed that to abolish such duties would be unconstitutional as taking private property. If the principle be sound, every successive issue of government bonds during the war was void, because by increasing the public debt it made those already in private hands less valuable. This whole argument of the injustice of the law—an injustice which, if it ever existed, will be repeated by now holding it void—and of its opposition to the spirit of the Constitution, is too abstract and intangible for application to courts of justice, and is above all dangerous, as a ground on which to declare the legislation of Congress void by the decision of a court It would authorize this court to enforce theoretical views of the genius of our government or vague notions of the spirit of the Constitution and of abstract justice by declaring void laws which did not square with them. It substitutes our ideas of policy for judicial construction, an undefined code of ethics for the Constitution, and a court of justice for the national legislature.

Upon the enactment of these legal tender laws, they were received with almost universal acquiescence, as valid payments were made in the legal tender notes for debts in existence when the law was passed, to the amount of thousands of millions of dollars, though gold was the only lawful tender when the debts were contracted. An equal, if not larger, amount is now due under contracts made since their passage, under the belief that these legal tenders would be valid payment. The two Houses of Congress, the President who signed the bill, and fifteen State Courts of last resort, being all but one that have passed upon the question, have expressed their belief in the constitutionality of these laws. With all this great weight of authority, this strong concurrence of opinion among those who have passed upon the question before we have been called to decide it—whose duty it was, as much as it is ours, to pass upon it, in the light of the Constitution, are we to reverse their action, to disturb contracts, to declare the law void, because the necessity for its enactment does not appear so strong to us as it did to Congress, or so clear as it was to other Courts? Such is not my idea of the relative functions of the legislative and judicial departments of this government. Where there is a choice of means, the selection is with Congress, not the Court. If the act to be considered is in any sense essential to the execution of an acknowledged power, the degree of that necessity is for the Legislature and not for the Court to determine.

In the case of "Wheaton," from which I have already quoted so fully, the Court says that, where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the Government, to undertake here to inquire into the degree of its necessity would be to pass the line which circumscribes the judicial department, and to tread on legislative ground. This Court disclaims all pretensions to such a power. This sound exposition of the duties of the Court in this class of cases relieves me from any embarrassment or hesitation in the case before me. If I had entertained doubts of the constitutionality of the law, I must have held the law valid until those doubts became convictions; but as I have a very decided opinion that Congress acted within the scope of its authority, I must hold the law to be constitutional, and dissent from the opinion of the Court.

I am authorized to say that Mr. Justice SWAYNE and Mr. Justice DAVIS concur in this opinion.

LEGAL PROCEDURE IN FRANCE.

France has not always had much reason to be proud, either of her laws or of her judges. Previously to 1789, there were few things so corrupt as a French court of law, and few people so untrustworthy as French magistrates. "Haute justice"—that is, justice in important cases—was administered by the parliaments; and "basse justice," by an infinite number of people; such as provosts, bailiffs, landed proprietors, and church dignitaries, who were supposed to decide by equity, but who, in reality, mostly sold their judgments to the highest bidder. In the parliaments, the traffic in justice was so notorious that any man of sense would sooner have sacrificed a third of his fortune at once than have risked the whole of it—even when he had right on his side—in a lawsuit. The posts of Conseiller au Parlement were as much coveted as colonelcies, and fetched as good a price. They were usually bought for younger sons of noblemen, who constituted what was called "la noblesse de robe," and made rapid fortunes out of unscrupulous pleaders. History has kept the names of a few upright judges—L'Hopital, D'Aguesseau, D'Thou, and some others—but they were rare exceptions, as is sufficiently proved by the immense veneration with which they are still regarded. The last who acquired a high reputation for impartiality was the Chancellor Du Harlay, under Louis XV's reign. He was an honest man, but one of the most uncouth mannered and gruff-spoken persons of his time. A characteristic story is told concerning him and the Duchess de Grammont, who, happening to have a lawsuit on hand, went as was customary, to pay a propitiatory visit, in order to see whether any bribing was possible. Du Harlay received her with about the same civility he would have shown a dog; so that the Duchess, who was used to the flattery of everybody who came near her, went out from his presence red with rage, and almost crying from mortification. Going down the steps of the palace, her passion exploded; and she said to her daughter, who was with her: "The man ought to be flogged. He's no better than an old baboon." But the words were hardly spoken than she turned pale with horror, for, on looking round, she saw the sardonic face of the chancellor, who had followed her out to her carriage. Naturally, she supposed that her suit was blasted, and when the cause came on trial could hardly credit her senses upon hearing Du Harlay give judgment in her favor. The conduct of the chancellor seemed to her so noble that she instantly asked for an audience, and thanked him with fervor. "Oh, madame," answered Du Harlay, grimly, "il n'y a point de remerciements a me faire. Un vieux babouin, est toujours enchante de rendre service a une vieille babouine."

At the Revolution, one of the first subjects which the National Assembly took up, with a view to instant reform, was the administration of justice. The criminal laws were then barbarous, and the jurisprudence in civil cases was founded upon a confused jumble of contrary edicts — some remounting to the time of the Merovingian dynasty, and *all* more or less autocratic and absurd. What made matters worse, too, was, that each province had its set of laws, just as each had its

scale of weights and measures; so that even in the remote contingency of a couple of pleaders having to do with thoroughly incorruptible judges, there was small chance of their obtaining a definite and binding adjudication if they resided in different provinces. Some suits were sent from parliament to parliament, until each side could boast of half a dozen judgments in support of its claims; and there were cases that were protracted in this way from generation to generation, until every body connected with the families of the suitors had died out.

The national assembly lost no time in remedying this disastrous state of things by enacting, first, that a code should be drawn up to serve for the whole kingdom; and next, that the judges should he elected by the people. This last reform was never fairly carried out; but a sort of code was drawn up by the Convention, and worked with tolerably good effect, until it was ultimately superseded by that to which Napoleon has attached his name, and which was elaborated under the Consulate. Most French lawyers are very proud of this code, which has certainly the merit of being so mathematically simple that every body who can read is able to judge for himself, without the help of a solicitor, what things he may and may not do. Of late years, however, there has been a growing opinion amongst the liberal minded and reforming portion of the French bar, that there is room for considerable improvement in the methods of procedure which the code lays down; and this opinion applies especially to the criminal procedure, which is both more intricate and more harassing in its effects than ours. France, as at present constituted, is divided for judicial purposes into tribunals of "first instance" and Imperial Courts — there being of the former one for every arrondissement, and of the latter twenty-seven in the whole empire. Above all, is one court of high appeal — the Court de Cassation, which sits in Paris. In civil cases a man can have recourse successively to five jurisdictions: first, he can apply to the justice of the peace of his canton, who has power to adjudicate as to all sums not exceeding a hundred francs; next, he can appeal to the tribunal of his arrondissement; after that he may be sent to the Court Imperiale of the district; then, if he wishes it, to the Court of Cassation, and finally, to the Council of State, which has power — though it seldom exercises it — to hear his case over again if he fancies himself maliciously wronged by one of his judges. There is no jury in civil cases. The trial in "first instance" takes place before three judges; in the Imperial Court, before five or seven; in the Court of Cassation, before twelve. In all cases the Procureur Imperial intervenes either for the plaintiff or defendant, as he thinks right, and it is very rare indeed that his intervention does not sway the verdict. In criminal cases a condemned man has three appeals — that is, to the court of the arrondissement, the Imperial Court and the Court of Cassation; after these all that remains is the *recours en grace*, which the counsel of a prisoner under sentence of death, or penal servitude, transmits to the Sovereign through the minister of justice. In the country, when a peasant commits a small misdemeanor, he is summoned before the justice of the peace of the canton, who may punish him with not more than two days' imprisonment, or with a fine not exceeding a hundred francs. At Paris it is the tribunal of simple police which takes cognizance of these minor offenses; and any stranger curious to see justice expeditiously administered would do well to pay a visit to this tribunal, where from ten in the morning to three in the afternoon, cabmen, costermongers and street boys defile in an unbroken procession to answer for peccadilloes, known as *delits de voirie* — *i. e.*, breaches of police and municipal regulations. In the case of offenses of a serious nature it is no longer the juge de paix or the tribunal of simple police to whom the accuser is deferred, but to the Procureur Imperial. For example, when an indictable offense has been committed, the first person to be informed of it — if the delinquent have not been arrested on the spot — is the Commissaire de Police, with whom the complaint is lodged. There are eighty of these commissaires in Paris, and their functions are rather more extensive than those of English inspectors of police, for they may, at their discretion, liberate prisoners who are simply charged with drunkenness or riotous conduct. Four times a day the commissaires send reports to the Prefecture de Police, whence all complaints are directly forwarded to the Procureur Imperial, or public prosecutor, who immediately issues against the parties accused, either a summons (*mandat de comparution*), or a warrant, (*mandat d' amener*). It needs an incredible amount of tact and judgment to discharge the functions of public prosecutor with equity; but it cannot be said that, as a rule, the Procureurs Imperial come up to the desirable standard. They are a very ill paid class. Their salaries vary from £60 a year in the country districts, to £240 a year in large towns; and even the procureurs-general, or public prosecutors-in-chief, of whom there are but twenty-eight in the whole empire, receive only £640. These emoluments are too small to tempt men who have the slightest chance of making their way at the bar, and the government is obliged to select from among those who, however honest and painstaking they may be, are, at best, lawyers of quite second-rate capacity. The Procureur Imperial and his deputies sit every day, and divide the business between them. When a defendant appears to answer a summons, or comes up in custody under warrant, his examination is conducted in strict privacy, and the procureur, who is often overdone with work, seldom takes more than a few minutes in deciding whether there are grounds for a prosecution or not. If the charge seems a frivolous one, or if the *prima facie* evidence be insufficient, he may at once dismiss the case; in the contrary event he hands over the *inculpe* to the examining magistrate, or juge d' instruction, who either liberates the defendant on bail (though this is very rarely done), or orders his provisory incarceration under a *mandat de depot*. We may remark that great latitude is always allowed by French magistrates toward journalists charged with press offenses, and towards men in good social position indicted for such misdemeanors as dueling, assault, or rioting. We may add, too, that although in press prosecutions the printer of a paper is generally indicted with the editor, and sentenced to a month or two of confinement, it is not customary for

the Procureur to insist upon the carrying out of the sentence. There are printers in Paris who, during the last twenty years, have had two or three years of imprisonment meted out to them in installments, and who yet have never slept a single night in gaol.

So much has been already written, both in English and foreign papers, concerning the slow torture system to which French justice has recourse in order to screw confessions out of prisoners, that we will say nothing more on the subject, further than to point out how immense is the discretionary power confided to a juge de instruction. All that goes on in his study is a profound mystery to the outer world. There is no one to control his actions; and if it suits him to hush up a case, he may do so with perfect safety, without having any thing unpleasant in the way of newspaper comments to dread. Whether French examining magistrates ever do hush up cases where influence is brought to bear upon them from high quarters, is another question; but the bare fact that they should be able to abuse these powers with impunity, sufficiently justifies the opinion of liberal Frenchmen that the functions of the juge d' instruction should be exercised openly, as in England. After a probationary term, which varies according to the more or less difficulty there may be in extracting the truth from him, a prisoner is either committed straightway to take his trial before the tribunal of correctional police, or, if the charge be one of felony, is sent back to prison to await the decision of the *chambre des mises en accusation*, a sort of judicial grand jury, whose business it is to see whether the indictments are clear enough to warrant a committal to the court of assize. The tribunal of correctional police sits all the year round; the court of assize holds two sessions a month in Paris, and four a year in the twenty-seven other Imperial courts. The difference between the two jurisdictions is that, in the former, the trial rests with three judges, whilst in the latter the prisoner is arraigned before a jury.

Most persons who have visited Paris must have been to see the correctional tribunals, rendered famous by the numerous press trials of the Second Empire. They consist of two chambers, the sixth and seventh, both identical in appearance. There is a rich, well-furnished look about them, which one is not always accustomed to find in a court of justice. The paper on the wall is green, with large gold bees; all round the room runs a carved wainscoting of oak; to the right, on a pedestal, is a marble bust of the Emperor; to the left, on a fellow pedestal, a handsome clock; and at the end of the room, over the dais of the three judges, a life-size picture of the Saviour on the cross. On the right of the judge's dais, which is warmly carpeted with a thick green rug, is the dock where the prisoner stands between two gendarmes; opposite it a low pulpit, with a comfortable arm-chair for the public prosecutor; down the centre of the court a sort of "fop's alley," with rows of seats on each side for the public, like the pews in a church. The trials in a correctional police court never last long. The judges adopt an aggressive tone in their questions, which indicate pretty plainly that their opinion as to the prisoner's guilt is made up beforehand. The public prosecutor, on his side, never fails to observe that, unless the accused can prove his innocence, his culpability must be taken for granted; and so the trial generally ends in a condemnation, which may vary from one day's to five years' imprisonment.

In the Court of Assize the proceedings are altogether more formal, and allow a prisoner much better chance of an acquittal. The oath which the jury are made to swear is an extremely beautiful one, and it is impossible to hear it without feeling moved. Lifting up their hands one after another, they declare that "without malice and without favor, without prejudice and without weakness, they will examine the evidence with an impartial desire to ascertain the truth, and convict or acquit as they shall consider just, on their honor and conscience as honest men." There are three judges at the assize trials as at those at the Police Correctionnelle, but the same reproach may be addressed to the former as to the latter — of always summing up dead against the prisoner. As a compensation, however, French juries are exceedingly jealous of their prerogatives, and not unfrequently acquit solely to assert their independence. The verdict is not rendered by "guilty" and "not guilty," as in this country, but by the answer "yes" or "no" to a long series of questions enumerated by the presiding judge. In cases of murder, with robbery, these questions sometimes amount to as many as fifty or sixty; for the indictment is made to include all the minor counts of aggravated assault, simple assault, etc. So that if the prisoner be acquitted on the charge of murder, there shall be no need to begin a fresh trial to convict him of manslaughter.

In France, it is with the jury that lies the prerogative of admitting "extenuating circumstances;" in Belgium, it is with the judges. There is much to be said for both systems — the main objection to the French method being that juries often admit "extenuating circumstances" without any relation to the merits of the case, but simply because they object to capital punishment. Many a French murderer has owed his life to the fact of a tender-hearted juryman's having read M. Victor Hugo's "Denier Jour d'un Condamne," or Beccaria's essay against the Penalty of Death.

CURRENT TOPICS.

The members of the bar of New York city have inaugurated a measure which we hope to see extensively followed. A meeting was recently held to take steps to form a permanent association for the creation of more intimate relations between its members than now exists, and to sustain the profession in its proper position in the community. In the report of the proceedings, it is said:

"There was a unanimous feeling expressed that it was the duty of the bar, and for the interest of the whole community, that there should be a thorough organization of its members, and that when this result was satisfactorily attained, the field of organized activity was broad and inviting. The standard of professional morality and attainment needed to be elevated, the spirit of reckless and unjust censure of lawyers and judges should be rebuked; all cases of professional delinquency should be made to feel the weight of the authoritative censure of the profession; an up-town library and club-room are needed where members of the bar may meet for consultation and

social intercourse; and such intercourse can be made to strengthen all the better elements of professional life. The bar was admitted to be in some measure responsible for, or at least to have the ability to ameliorate, some of the evils attending the present administration of justice now so generally complained of. They ought to aid the bench in the administration of justice, and not to make application for any thing but justice according to the forms and precedents of law. They ought to point out the defects of the existing laws and Constitution, and to lend their active co-operation for their improvement. They ought to have some control of admissions to the bar, or they should not be held responsible for the character and conduct of those who are admitted to practice. Those laws which have made access to the bar as easy as to a theater, and which have made elections to the bench to depend, not on high professional character and attainment, but on the ability to command a popular or merely partisan majority — have reduced the legal profession to a trade, have multiplied litigation and legal perplexities, and in a thousand ways have been the prolific source of those demoralizing influences which have alarmed the people and dishonored the bench and the bar.

"These dangers must be boldly confronted, and it becomes the lawyers to promptly and fearlessly perform their share of the work of regeneration; and those now present enter upon the work of reform, and invite their brethren here and elsewhere, and the public press, and all citizens who desire good laws, honest administration, upright judges, safety for life and property, or reputation, or even the perpetuity of the State and nation, are invited to join them in the work."

We have, on several occasions, urged the formation of local, state, and national law associations. There are considerations of grave importance, both to the profession and the public, that demand a national convention of lawyers, and there is no surer or more satisfactory way of securing such a convention than by the formation and united effort of local associations. We urge upon the profession in other cities the formation of associations similar to that begun in New York.

The New York Code of Procedure, while making sweeping changes in the practice before courts of record, has done comparatively little toward simplifying that before those of justices of the peace. Although the latter are considered so much the courts of the people, that no provision whatever is made for appearance by attorney therein, their method of procedure is extremely complicated and to the last degree technical. Indeed, it requires far more skill and experience to properly conduct actions before justices of the peace than is necessary for successful practice in the Supreme Court. In the higher court, where the parties are represented by counsel presumedly skilled in the law, a liberality prevails which renders loose and careless practice almost harmless; but in the inferior court, where the attorney is unrecognized, and the suitor, though ignorant and stupid, must, in theory at least, conduct his own case, a trifling mistake is fatal. Litigation in justices' courts is also very expensive. The disbursements reach such an amount, that it is a saving of money to sue the larger claims over which a justice has jurisdiction in the Supreme Court, and the risk and expense of prosecuting a small claim is such as to render it better to lose the debt than attempt to collect it by suit. These are familiar facts not only to the profession, but to the whole business community. That there is need of improvement here, there can be no doubt. We do not think extensive changes need at first be made. But we believe that if the present statutes were so amended as to give a jurisdiction as to persons in all cases in which some one of the parties resides in the county; to authorize attorneys to practice as such in justices' courts, and to issue process therein to the extent now allowed in the higher courts; to permit the service of a summons by any person other than a party, and to provide for the verification of pleadings, these courts would become more popular, and would better effect the purposes for which they were created.

A writer in *Appleton's Journal* has discovered a precedent for the celebrated "Crowner's quest law," as laid down by the grave digger in "Hamlet." It is found in the case of *Hales* v. *Pettit*, decided during the fourth or fifth year of the reign of Queen Elizabeth, and reported in Old Plowden. We confess to have entertained some doubt as to the analogy of the case, but an examination convinced us that Shakspeare must have at least got the hint for his argument from Plowden. The writer in *Appleton's* gives the following statement, which is substantially correct: "Sir James Hales, a justice of the Common Pleas, committed suicide by throwing himself into a water-course. The coroner sat upon his body, and presented that, 'passing through ways and streets of the said city of Canterbury, he, the said James Hales, did voluntarily enter the same, and did himself therein, voluntarily and feloniously, drown.' Suicide being a felony, this felony worked a forfeiture of his estates. But, in answer to this his successors pleaded: that Sir James did not commit suicide; he only threw himself into the water, and suicide implying death, as he did not die during his life, he committed no suicide. The question was, then, Did Sir James commit suicide during his life? For, if he only threw himself into the water in his life-time, throwing himself into the water is no felony, and the suicide not being complete until his death — it being impossible for him to have died during his life — *ergo* he committed no felony. This perplexing proposition was argued by six sergeants-at-law, and their wearying dialectics, here recorded in solemn black letter, are fully as mirth-provoking as is Shakspeare's travesty."

The President sent to the Senate on the 7th inst. the names of Joseph P. Bradley, of New Jersey, and Judge Wm. Strong, of Pennsylvania, to be Justices of the Supreme Court, the former *vice* Judge Hoar rejected, and the latter *vice* Judge Stanton deceased. If the statements of correspondents are to be relied upon, neither nomination will be confirmed. The opposition to Judge Strong arises mainly from the fact that, during the war and while a Judge of the Supreme Court of Pennsylvania, he made a decision on the legal tender act, similar to that recently pronounced by the U. S. Supreme Court. The nomination of Judge Bradley was entirely unexpected, as he has never before been prominently before the public. He is said to be a very able lawyer, but, as Judge Hoar's rejection was claimed to be on the ground of locality, it is very probable that Mr. Bradley will be rejected for the same reason.

The decision of the United States Supreme Court, rendered on the 7th inst., declaring the legal-tender act inoperative as to pre-existing contracts, is of such grave importance that we give it in full elsewhere, to the exclusion of other matter. This decision will surprise nobody, as the *status* of a majority of the court was very clearly foreshadowed in the opinions rendered in *Bronson* v. *Rhodes* and *Butler* v. *Hartwitz*. The opinion of Chief-Justice CHASE presents a very able review of the questions before the court, and its conclusions are clearly in accordance with the dictates of justice and equity. The decision does not necessarily involve the constitutionality of the legal-tender act itself, but simply construes that clause of the act which provides that the notes "shall also be lawful money and a legal-tender in payment of all debts public or private," etc., as not applicable to "debts" contracted before its passage. The question of its validity as to debts contracted after its passage was not before the court, and was, therefore, not passed upon, though the logical deductions from the decision would seem to concede its constitutionality in that respect. It would have been of vastly more importance to the business interests of the country, had this decision been made years ago. The great bulk of the debts existing at the date of the enactment of the legal tender act, have been paid in accordance with the heretofore accepted construction of that act, and there are no means of rectifying the errors into which parties have been thus led. But even at this late day, the decision may be justly regarded as one of the most important ever promulgated by that tribunal, not only to the business interests of the country, but as settling, at least for the present, the limitations of the powers of Congress over monetary questions.

LEGAL NEWS.

The Pittsburg courts sit on Sunday.

Hon. John Dix, Chief Justice in Nueces county, Texas, died January 18th.

One thousand and three divorces were granted in the Ohio courts last year.

The United States Supreme Court at Washington is to have a stenographer at an annual salary of $2,500.

Judge McKensie, of Canada, for certain legal work for the United States Government, presents a bill of $40,000.

Senator J. J. Wright, formerly of Pennsylvania, has been elected Judge of the Supreme Court of South Carolina.

A case will soon come before the United States Supreme Court involving the right of the State of Kansas to the Pacific Railroads.

Alexander Mendoza has been appointed a justice of the peace by the Governor of Florida, but, being a foreigner, he cannot qualify.

The judiciary committee of the United States Senate have at last reported favorably on the nomination of Judge Pearce for Judge of the Circuit, embracing Maryland.

Judge Williams, of Clayton county, Iowa, has accepted the appointment of Judge of the Supreme Court of that State *vice* Judge Dillon promoted to the United States bench.

The Court of Appeals has confirmed the decision of the Supreme Court of the eighth district, sustaining the right to deed land subject to the condition that no liquor shall be sold on the premises.

In 1865, the Supreme Tribunal of Madrid gave final judgment in a suit which had been in litigation for two hundred and forty years. The suit involved the succession to the inheritance of Pizarro.

The Louisiana House has appointed a committee to inquire into the charges against Judge Leanmont, of the Fifth District Court, of illegal decisions and incompetency, with a view to his impeachment.

A Buffalonian who was expelled from a local benevolent society for refusing to pay a fine of twenty-five cents, sued out a mandamus before the court, and is now restored to the privilege of exercising benevolence.

Judge Leaumont, of the fifth district, Supreme Court of Louisiana, has decided that the Legislature of that State has no right to order the collection of taxes and revenues in any other currency than the lawful currency of the United States.

A bill has passed the Pennsylvania Senate allowing husband and wife to testify in their own behalf, in any proceeding for a divorce, in every case where the personal service of a subpœna is made on the opposite party, or where the party appears and defends.

In reply to the objections of the counsel for the defense in a case being argued before a Virginia justice, that official declared that he "didn't care about 'consecutions,' and would try the case right away; if dey didn't get satisfaction, den dey could repeal agin his excision."

Judge Edmund H. Bennett, and not "Judge Hunt," as formerly stated by us, has been appointed lecturer at the Harvard Law School. Judge Bennett is one of the editors of "Leading Criminal Cases," which was noticed in a recent number of THE LAW JOURNAL, and is one of the most profound jurists in the country. He is to lecture on "Criminal Law, Wills and Administration."

Judge Blatchford has refused to grant discharges in bankruptcy to Ganet S. Bellis and James Milligan, formerly heavy grain merchants in New York, on the ground that they did not keep proper books of account, and omitted to make entries of goods purchased and sold to the amount of many thousand dollars, thus rendering it impossible to ascertain in what manner they transacted their business.

In the matter of Staats D. Wolford, a bankrupt, the question arose as to the power of the court to compel the wife of the bankrupt to appear and testify before the Register in relation to her husband's assets. Judge Blatchford decided that the wife must appear for examination as a witness the same as any other person subpœnaed as a witness, and that if she refuses, she may be committed for contempt.

The Massachusetts Supreme Court, on the question of the right to summarily destroy gambling implements seized by legal process, has decided that the owners of such property cannot constitutionally be deprived of them without notice actual or constructive, and an opportunity to be heard; and the court cannot lawfully cause them to be destroyed without giving such reasonable notice to the owners personally, if known, and by advertisements if not known, as circumstances will admit.

BOOK NOTICES.

A Treatise upon the United States Courts and their Practice: Explaining the enactments by which they are controlled; their Organization and Powers; their Peculiar Jurisdiction, and the Modes of Pleading and Procedure in them, with numerous Practical Forms. By Benjamin Vaughan Abbott and Austin Abbott. Vol. 1. Enactments, Organization, Jurisdiction. New York: Diossy & Company. 1869.

The great majority of the lawyers of the country know about as much concerning the practice in the United States courts as they do concerning that in the French courts. They usually devote themselves almost exclusively to the procedure of the courts of their own particular

State, without deeming it necessary to extend the circle of their acquisitions so as to include the Federal courts and practice. But every year is made more apparent the necessity to every lawyer in active practice of a knowledge of the jurisprudence and methods of procedure in those courts. Under the existing tendency toward centralization, their jurisdiction is being gradually extended, and the business brought before them is rapidly increasing in amount and variety. There are very few lawyers that are not liable, at one time or another, to be called upon to advise upon or prosecute causes in those tribunals. It is, therefore, of importance that every lawyer should acquire some knowledge of the practice and proceedings in existence therein. The book before us is calculated to impart just that knowledge, and no lawyer can afford to be without it. It is well arranged, accurate and comprehensive, and sufficiently minute in details to guide the unskillful through the mazes and intricacies of a rather mazy and intricate practice. Those subjects which most frequently arise in every-day practice, such as Bankruptcy, Copyright, Extradition, Crimes, Patents, etc., have been treated with especial fullness, and will be found very valuable. The success of the Messrs. Abbott in their other and former works sufficiently attests the completeness and accuracy of this. The second volume is in press and will be shortly issued.

Reports of Practice Cases: determined in the Courts of the State of New York: By Benjamin Vaughan Abbott and Austin Abbott. Vol. 7 N. S., No. 2. New York: Diossy & Company. 1870.

This, the second monthly part of vol. 7, of Abbott's Practice Reports, contains four cases, each of them of considerable length. The first is that of *Fake* v. *Smith*, of which an abstract was given in the "Court of Appeals Abstract," in No. 3 of the LAW JOURNAL. The second and third cases involve the questions of actions on forged papers, proof, pleading, etc., and the fourth case is one of the Susquehanna-Erie embroglio decisions—that of Judge BALCOM on a motion to vacate a preliminary injunction and other orders in *Ramsey* v. *The Erie Railway*.

An Analytical Index of Parallel References to the Cases cited in the New York Reports: By Charles Francis Stone, of the New York Bar. Second edition. New York: Diossy & Company. 1869.

The author says, in his preface: "The design of the following index is to show what cases have been cited in the New York Court of Appeals, and where those citations are to be found. To this end, a complete alphabetical list of those cited cases is here presented, and opposite every one of the cases in this list is printed a reference to every page in the New York Reports on which that case is cited, either by the court or by counsel. For example, by turning to the case of *Mason* v. *Bovet*, 1 Denio, 69, on page 205 of this work, the following references appear: 18 N. Y. 312; 19 N. Y. 474; 23 N. Y. 272; 26 N. Y. 227; showing that that case has been cited in our court of last resort four times, on the pages there referred to." The practical value of a work of this kind will be obvious to every lawyer who has had occasion to trace the history of a case for the purpose of ascertaining its weight and authority. It is often of great moment to know what views subsequent courts have entertained of some particular decision. Our courts of last resort frequently modify, overrule, limit, doubt, or affirm cases cited by or before them, and no reliable practitioner would ever think of resting a cause on a decision, or any number of decisions, without first ascertaining whether they had been subjected to any such subsequent modifications. The book before us renders this a matter of ease. It will also frequently prove valuable as an aid in finding authorities on the question decided in any particular case. How accurately Mr. Stone has done his work, it would be impossible to say, without subjecting it to the test of practical use, but we have no doubt that it will prove sufficiently accurate to answer the end for which it was designed, and that it will be found to be a valuable hand-book to the profession. The cases are brought down to the 40th New York.

OBITUARIES.

EX-JUDGE JAMES MONCRIEF.

The Hon. James Moncrief, Ex-Judge of the Superior Court of New York, whose death occurred in that city on the 1st instant, was a sound lawyer, an upright, able judge, and a worthy citizen. He was born in Harrison county, Ohio, in September, 1822, and was therefore, at the time of his death, in his 48th year. He began the study of the law at the early age of fourteen years in the office of Gen. Philip S. Cook, New York city. Directly after his call to the bar, and at the age of twenty-one years, he became a partner of Daniel B. Tallmadge, after whose death he formed the same relations with Hon. John H. McCunn. He was admitted to practice in the United States Supreme Court at the age of twenty-five.

In 1858, he was elected to fill the vacancy on the bench of the Superior Court, occasioned by the death of Chief-Justice Duer. In 1859, he was re-elected for the full term of six years.

HON. HORACE BINNEY, JR.

The Hon. Horace Binney, Jr., died at his residence in Philadelphia, on the 3d instant, in the 61st year of his age. Mr. Binney was a graduate of Yale College. After completing his collegiate course, he entered the law office of his father, Horace Binney, then, as now, one of the most eminent jurists in the country. Soon after his admission he won a high place at the bar, which he maintained to the time of his death. His father survives him.

GOVERNOR WASHBURN.

The Hon. Peter Thacher Washburn, Governor of Vermont, and a well-known and able lawyer of that State, died at his residence in Woodstock, on the 7th inst. He was born in Lynn, Mass., in 1814, graduated at Dartmouth College in 1835, and immediately after commenced the study of the law in the office of his father, who had removed to Vermont. He afterward studied for a few months in the office of Hon. Wm. Upham, an eminent lawyer of Montpelier, and was admitted to the bar in 1838. Directly after his admission, he opened an office at Ludlow, and remained there until 1844, when he removed to Woodstock. In 1844 he was elected reporter of the Supreme Court, and continued to hold that office until 1851. He published eight volumes of reports, and displayed marked ability in the discharge of his duties.

During the same time, he prepared and published, in two volumes, a digest of the Vermont Reports, and at the time of his death had nearly completed a third volume, bringing the decisions down to the present time. In 1854, he represented Woodstock in the Vermont Legislature. In 1861 he was elected Adjutant and Inspector-General of the State, and continued in that office to the end of the war. He was elected Governor of the State at the last general election. As a lawyer, Governor Washburn ranked among the first in the State, and had a large and lucrative practice.

TERMS OF SUPREME COURT FOR COMING WEEK.

2d Monday, General Term, Kings.
2d Monday, Circuit and Oyer and Terminer, Rensselaer, Peckham.
2d Monday, Circuit and Oyer and Terminer, Utica, Mullin.
2d Monday, Circuit and Oyer and Terminer, Ontario, Dwight.
2d Monday, General Term, Buffalo.

DAMAGES BETWEEN VENDOR AND PURCHASER OF REAL ESTATE.

The recent case of *Engell* v. *Fitch*, on appeal to the Exchequer Chamber from the Court of Queen's Bench (L. Rep. 4 Q. B. 659), shows an important distinction in the principles which govern the breach of a contract between vendor and purchaser. *Fleureau* v. *Thornhill* (2 W. Bl. 1078) established the doctrine that a contractor for a purchase of a real estate to which the title proves, without collusion, defective, is entitled to no satisfaction for the loss of his bargain. "These contracts," said Mr. Justice BLACKSTONE, "are merely upon condition, frequently expressed, but always implied, that the vendor has a good title." In *Engell* v. *Fitch*, the facts were different. The vendor was able to make a good title, but the mortgagee was in possession. He might have been ejected by the vendors, but they declined to complete the sale. The court held them liable to the purchaser for the loss of the bargain, because the vendors had not taken the necessary steps to secure the possession.

The difference between these two cases is very important as affecting damages recoverable for the breach of a contract to sell real estate. In *Fleureau* v. *Thornhill* the plaintiff recovered no damages for the breach, but obtained the return of the deposit with interest and costs. Commenting on this case, Chief Baron KELLY observes (L. Rep. 4 Q. B. 666), that it decided "simply that, under a contract between vendor and purchaser of real estate, the vendor shall not be liable for any other damages, beyond the deposits and costs of investigating the title, when he is unable to perform his contract by reason of his inability to make out a good title. That has been truly called an exception or qualification to the rule of common law (I need not go so far as to call it an anomaly) founded entirely upon the difficulty that a vendor often finds in making a title to real estate; not from any default on his part, but from his ignorance of the strict legal state of his title. That was all that was decided in *Fleureau* v. *Thornhill*, and we are far from dissenting from that proposition in the most extensive terms it can be laid down."

On the other hand, in *Engell* v. *Fitch*, the plaintiff was held entitled to recover as damages for non-completion of the sale the difference between the contract price and the amount realized on the resale by the defendants. It was contended for the latter that a resale was not in contemplation of the parties to the contract, and that there was no evidence whereby to estimate the damage sustained. The court were with the defendants as to the fact that the market value was not shown, but they held that the fact that there was a resale at the enhanced price was evidence that the market value had advanced to that extent, there being no evidence to the contrary, and no cross-examination on the subject.

On the point of principle, the Exchequer Chamber adopt the language of the Lord Chief Justice in the court below, which must now be recognized as the best modern law on breaches of contract of this nature. He says: "There is an obvious difference between the case of a man who, being in possession, and the undoubted owner of real property, is unable to make out a marketable title, and that of one who, not being owner, but having only a contract for the purchase of real estate, takes upon himself to sell it to another as his own and as if the title were his to convey. The difficulty of making out a title which exists in the one case, and forms the foundation of the rule, and the justification of the departure from ordinary principle, is wholly wanting in the other. It is upon this distinction, as it appears to us, that the Court of King's Bench proceeded in *Hopkins* v. *Grazebrook* (6 B. & C., 31). It merely comes to this, that a man who undertakes to sell what he has not secured the command of has only himself to blame, and is not protected by a rule which has reference solely to the difficulty in making out a title. The matter is put upon its true footing by Baron PARKE, in *Robinson* v. *Harmon* (1 Ex., at p. 855; 18 L. J. at p. 204), where precisely the same point having arisen the court without hesitation adopted the principle of *Hoskins* v. *Grazebrook*' Baron PARKE there says: "The rule of the common law is that where a party sustains a loss by breach of contract he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed."

It is important to consider, in estimating damages arising from breach of contract, how far the contemplation of the parties is to be regarded. Our readers are familiar with the decision of *Hadley* v. *Baxendale*, and the rule in this case, and that adopted in analogous American cases, is concisely stated by Mr. Sedgwick (on Damages, p. 81). He says, having referred to a ruling of Mr. Justice Selden, in *Griffen* v. *Colver* (16 N. Y. 480), "It will be observed that there is an apparent difference, in one respect, between the English and the American authority. In the English case (*Hadley* v. *Baxendale*) the rule by which the damages are to be ascertained in cases of breach of contract is divided into two alternative heads. Under the one those damages are to be allowed which would arise naturally or according to the usual course of things from the breach of the contract, and under the other those which may fairly be supposed to have been contemplated by the parties as the probable result of such breach. In the American case this distinction is not observed, for the reason apparently that the two heads are regarded as equivalent to each other, or, indeed, as identical; and the damages, which may properly be supposed as having entered into the contemplation of the parties in making the contract, are considered to be the same with those which would naturally or usually follow its violation. In most instances this is so."

Applying these remarks to *Engell* v. *Fitch*, the difficulty as to a resale, not being in contemplation of the parties, is got rid of, because the damage resulting naturally, and according to the usual course of things, ought to be taken as that which was contemplated.

The court, therefore, has done that which, upon legal principle, and according to the common sense of mankind, ought to be done between parties in the event of a violation of a contract.—*London Law Times.*

A bill has been introduced by Senator Murphy which provides that no appeal to the Court of Appeals from a judgment in a personal action, where the amount is under $500, shall hereafter be taken or allowed.

GENERAL TERM ABSTRACT.

THIRD DISTRICT—JANUARY TERM.

INSURANCE.

When policy deemed canceled.—The plaintiffs had procured through an agent, and from the general agents of the defendants, a renewal of an insurance policy on a steamboat. The policy reserved to the company the right of cancellation. On the day following the defendants notified their general agents that they must get a higher rate of insurance on the boat or cancel the policy, without limiting the time within which it was to be done. The agents went to the agent of the plaintiffs and demanded a higher rate or they would discontinue the risk. The plaintiffs' agent refused to pay a higher rate, but asked and received time till the next day to substitute another policy. On the next day the time was again extended to the day following, when a new policy in another company was procured and taken to the plaintiffs' office and exchanged for the one from defendants, and the latter was delivered to defendants' agents and canceled. Plaintiffs had no knowledge of the change. On the night prior to the exchange the boat was burned. *Held*, that the delay granted was not unreasonable nor an abuse of discretion on the part of defendants' agent; that until there was an actual cancellation of the insurance it continued, not by force of any agreement made by the agents, but by force of the renewal of the policy; that the insured was entitled to reasonable notice of the determination of the company to cancel such risk, and where the company omitted to prescribe the time within which the process of cancellation should be perfected, and intrusted the same to its agent, nothing short of an absolute abuse of discretion by the agent, or fraud on his part, would relieve the principal from liability. *Joseph McLean et al.* v. *The Republic Fire Ins. Co.* Opinion by INGALLS, J.

NONSUIT.

When granted.—The plaintiff being engaged in painting a house adjoining defendant's had, without defendant's permission, attached one of the ropes on which the scaffold was suspended to the defendant's chimney. This rope gave way precipitating plaintiff to the ground and injuring him severely. It was proved that the rope was securely fastened to the chimney, and that it did not break. There was some evidence tending to show that the defendant had removed the rope from the chimney, or loosed it so that it gave way. A nonsuit was granted at Circuit. *Held*, 1st, that the nonsuit should not have been granted. "To justify the court in withholding a cause from the jury, the case should be very clear, so much so that no reasonable doubt can be entertained in regard to the facts." "In cases where the evidence is conflicting, and particularly so where a question of credability is raised, it is unusual to withhold the case from the jury; 2d, that the defendant was not justified in detaching the rope, although it had been attached without his permission." That right must be exercised in such a manner as not to betray a reckless disregard of the safety of others. A technical trespass would not justify the infliction of irreparable injury, and the assertion of a right must be qualified by a reasonable regard for the security of others. *William H. Phillips* v. *Joseph Wilpers.* Opinion by INGALLS, J.

PAROL AGREEMENT.

For sale of lands: statute of frauds.—The husband of the defendant, in his own name and without disclosing that the defendant was the owner, entered into a written contract with the plaintiff, by which he agreed to sell and convey a lot of land, of the defendant, to the plaintiff for the sum of $2,500, of which $50 was paid at the signing of the contract, and the balance was to be paid when the deed was to be delivered. The defendant had, prior to the agreement for the sale, given her husband parol authority to sell the premises, and after she was informed of the sale, she made a parol agreement with the plaintiff similar in its terms to the written agreement. She also received the $50 paid upon the execution of the agreement to her husband. *Held*, that the parol agreement made by the defendant was void by the statute of frauds, and that the plaintiff was not entitled to a specific performance of the contract as against the defendant. *Albert Squire* v. *Maria Norris.* Opinion by MILLER, J. To appear in 1 Lansing's Reports.

PROMISSORY NOTE.

Forgery: evidence.—In an action upon a promissory note where the defense was forgery, it was held that evidence upon the cross-examination of the defendant of a correspondence between the defendant and another person in regard to another note, in which the defendant denied he had given said note, or any other note, was inadmissible and improper. *Alonzo B. Voorhies* v. *James McCarroll.* Opinion by MILLER, J.

RAILROAD.

1. *Assessments for lands taken: confirmation of report.*—On appeal from an order of Special Term refusing to confirm, on motion of defendant, the report of commissioners appointed to appraise the compensation to be paid by a railroad company for land taken by such company for their road. *Held*, 1st. That under the statute (Edmonds' Statutes at Large, vol. 3, p. 623, § 17), the motion to confirm the report can only be made by the railroad company, and not by the owner of the land. 2d. That the court has no authority to compel the company to move for the confirmation of the report or to pay the damages reported. *In the Matter of the Albany & Susquehanna R. R. Co.* v. *James McCloskey.* Opinion by PECKHAM, J.

2. *Contract to build.*—On appeal by defendants from a judgment for plaintiffs, entered on report of referee, it appeared that the parties had entered into a contract by which plaintiffs were to construct a certain part of defendants' road in a certain manner and by a certain time. The contract contained a clause, that if, in the opinion of defendants' engineer, the plaintiffs should not be making such progress with the work as, in his opinion, to insure its completion by the prescribed time, that he might give notice thereof to plaintiffs, and that if the latter should not within ten days thereafter make the necessary increased exertion, the engineer should notify the plaintiffs and defendants of the fact, and that the contract might then, in the opinion of the defendants, be declared void. In the latter event the defendants were to be at liberty to employ other persons to complete the work, and the plaintiffs were to be liable for any damage caused by their neglect to fulfill the contract. In case of failure to perform, any money due plaintiffs was declared forfeited and to be retained by the company to be applied to the payment of any increased cost of the work, should there be any. The plaintiffs did not fulfill their contract, notice was given, and the same was declared void by defendants. The work was then completed by defendants at a cost beyond the contract price. *Held*, that such contract was perfectly clear and valid, and that the referee's report was unsupported by the facts and judgment rendered. *Patrick Phelan and another* v. *Albany & Susquehanna R. R. Co.* Opinion by PECKHAM, J.

3. *Report of commissioners to appraise land damages.*—Upon an appeal from order of Special Term, confirming the report of commissioners appointed to appraise the damages sustained for the taking of land, and from the appraisal and report of said commissioners. *Held*, 1. That affidavits could not be used either on the motion to confirm or on the appeal from the appraisal to contradict the report of the commissioners. 2. That if the report was untrue in any material respect, or the proceedings of the commissioners have been irregular, and the report fails to state the irregularity, the proper remedy is to apply to the court to set aside and vacate the report. 3. That the report itself must show that an error has been committed or that injustice has been done to enable the court upon appeal to reverse the proceedings. *Matter of the Rondout and Oswego Railroad Co.* v. *Richard Fields et al.* Opinion by MILLER, J. To appear in 33 How.

RAPE. See *Assault and Battery.*

RECEIPT IN FULL.

Compromise: gift.—In an action on account to recover a balance due, it appeared that there was a balance due plaintiff of some $800. That sometime prior to the action, defendant having learned the amount of the balance against him, went to plaintiff very much excited and wanted to deed a part of his farm in payment. Whereupon plaintiff offered to *give* defendant the amount of the balance due. The defendant having expressed fears that the gifts would not be valid, the plaintiff said he might pay a dollar and take the receipt in full; the dollar was paid and the receipt in full to balance all book accounts given. There was no dispute as to the account, except that defendant claimed credit for three hides of the value of about six dollars. The referee on the trial found that there were "disputed matters of account between the parties, and that the account had been *compromised* by the payment of the one dollar, and the giving of the receipt." *Held*, that the facts presented were not sufficient to justify the referee in finding that there were disputed matters of account, and that the transaction did not amount to a *compromise* of the claim, as it clearly appeared the dollar had been paid to validate the gift.

Whether the transaction might have been sustained as a gift, not having been considered by the referee, nor any facts found by him in reference thereto, the court did not pass upon that question. *Cyrus Gray* v. *William Barton.* Opinion by PECKHAM, J.

STATUTE OF FRAUDS. See *Parol Agreement.*

SUPERVISORS.

Mandamus against: bounties.—A board of supervisors passed a resolution in 1864, to the effect that a bounty of $400 be paid for each and every person who had already, or who might thereafter enlist as a volunteer, and who had or might thereafter be accredited to the county on the call then just issued, in the naval or military service, etc., on the certificate of the provost marshal that said volunteer had been duly mustered into the service, to the proper credit. The relator had theretofore enlisted in the naval service, and had been properly credited, but no certificate of the provost marshal was produced. It appears that the office of provost marshal had been discontinued in that county in 1865, and that no certificate could be produced; also, that persons who enlisted in the naval service did not come under the supervision or inspection of the provost marshal, but were enlisted and credited through commissioners of naval credits, and that said commissioners had sent to the common council of the city of Hudson, in said county, proper certificates of credit for said relator to said county. *Held*, that a peremptory mandamus issue to compel the defendants to pay the amount claimed.—*People ex. rel. John L. Peak* v. *Board of Supervisors of Columbia county.* Opinion by PECKHAM, J.

FOURTH DISTRICT—JANUARY TERM.

AGREEMENT.

Parol to convey land; equity of redemption; effect of assignment not under seal.—The plaintiff's assignor, Abiel Stoddard, had entered into an agreement in writing with certain parties, for the purchase, by him, of the premises in question. At the time stipulated for the performance of such agreement the said Abiel was in embarrassed circumstances, and unable to raise the money, whereupon the defendant agreed by parol, as a friend of said Abiel's, to advance or procure the money and take the conveyance to himself as security, and that the said Abiel might redeem said premises on paying the money so advanced by defendant, with the interest thereon, and all costs, expenses, etc., to which defendant had been subjected. The premises were thereupon conveyed to defendant, who declined to fulfill his agreement to reconvey to said Abiel Stoddard, on payment of advance. The said Abiel Stoddard afterwards assigned all his right, title and interest in said premises to the plaintiff by an instrument not under seal. *Held.* 1st. That the defendant took the title to the premises as trustee for Abiel Stoddard, and under the agreement between himself and Abiel Stoddard, was bound to convey the premises to him or his assignees upon being reimbursed the sum advanced, and the expenses incurred with compensation for services. 2d. That the assignment from Abiel Stoddard to the plaintiff not being under seal, could not convey to the plaintiff any title, interest or estate in the premises, and that therefore the plaintiff was not in a position to enforce the agreement between Abiel Stoddard and the defendant. *Sylvester Stoddard* v. *John E. Whiting.* Opinion by ROSEKRANS, J.

ASSESSMENTS.

Certiorari to assessors.—On a writ of certiorari to review the proceedings of the assessors of the city of Ogdensburgh, it appeared that the relators were bankers in that city. The charter of the city requires the assessors to prepare the assessment roll in each year "before the first day of July." The relators alleged that the profits of their business, amounting to $24,000, had been divided between them on the 30th day of June, and that that sum had been erroneously assessed against them as a firm. The relators stipulated that the writ of certiorari should not have effect to stay the collection of the general taxes of the city of Ogdensburgh, and the assessors had completed their duties and delivered the roll to the proper officer, and the necessary warrants had been delivered to the collector, and a portion of the tax collected. *Held*, that the assessment roll having passed out of the control of the assessor the court could render no judgment in the case that could affect the matter. 2d. That, in contemplation of law, the assessment was completed under the charter on the 30th day of June, and that, in the absence of proof to the contrary, the court would presume that the assessment roll had been completed before the division of the profits. *People ex rel., Averell et al* v. *Mattheson et al.*—Opinion by ROSEKRANS, J.

BOUNDARIES.

Courses and distances; natural movements.—In an action to recover a narrow strip of land about a foot wide, bordering a creek, it appeared that the parties claimed title from a common source; that the defendant claimed title under a deed which, after fixing the place of beginning on the west line of Mechanic street, described the premises owned by defendant as follows: "Running thence two hundred and eighty-five feet to the east bank of the Kayaderosseras Creek; thence north one hundred feet; thence east two hundred and eighty-five feet to the west line of Mechanic street; thence south one hundred feet to the place of beginning." The deed also contained a grant of a right to draw a limited amount of water from the grantor's dam situated a few feet above the premises. Defendant insisted that the description in the deed, i. e. "285 feet to the east bank of the Kayaderosseras Creek," did not limit the west line to the exact distance of 285 feet, but gave title to the creek at low water mark. *Held*, that while as a general rule in the description of lands in a deed natural objects and fixed monuments will prevail over courses and distances; yet, this rule is subordinate to the intent of the parties to the instrument, and that where it can be fairly deduced from the whole instrument that the parties intended to be governed by the courses and distances given, the court will give effect to such intent. The point of termination of a line thus described will be controlled by other parts of the description, and will be varied in its exact locality so as to be reconcilable and harmonious with such other parts. The decision of the referee limiting defendant's line to 285 feet was sustained. *Hovey* v. *Harris and ano.* Opinion by BOCKES, J.

CONTRACT.

1. *For labor and materials.*—In every contract for the furnishing of materials and the performance of work, in the absence of special provisions, there is an implied agreement on the part of the party who is to perform the work and furnish the materials that they shall not be of an in-

sufficient and inferior description and value, and that the work shall not be totally inadequate to answer the purpose for which it was undertaken to be performed; and though the agreement was that a specific sum should be paid for the work and materials, the claim may be reduced by showing that the work and materials were of an insufficient and inferior description and value, or it may be wholly defeated by showing that they were totally inadequate to answer the purpose for which they were to be furnished. *Van Hovenburgh* v. *Lindsay*. Opinion by ROSEKRANS, J.

2. *When rendered void by statutes of other States.*—The defendant, at his hotel in the State of Vermont, gave an order to the soliciting agent of the plaintiff, who resided in New York and did business there, for a specified amount of liquor, agreeing with the said agent upon the price and manner of shipping. Said agent forwarded the order to the plaintiff in New York, who filled out the order and shipped the liquor as directed by the defendant. In an action for the value of the liquor the defendant interposes for a defense the statute of the State of Vermont which provides that no action shall be had in any court in that State upon the sale of spirituous liquors. The court below granted a motion for non-suit, and the plaintiff excepted. *Held*, 1st. That the contract was made and performed (except as to payment) in New York when the order was filled and the goods shipped to the defendant, and that, therefore, the statutes of Vermont were no defense. 2d. That the place of payment would not vitiate the contract. 3d. That it was not necessary to request the court to present the cause to the jury in order to present the question of non-suit on appeal; that the exception of the plaintiff to the ruling of the court was sufficient. 4th. That the case should have been submitted to the jury. *Backman* v. *Jenks*. Opinion by BOCKES, J.

CONVERSION.

2. *Title in third person.*—In an action for wrongful conversion of property it appeared that the plaintiff had a chattel mortgage of the property which had been stowed by the mortgagor in a depot for sale after the mortgage and before the alleged conversion. The answer set up a general denial, and also title in defendants by purchase from mortgagor. Evidence was introduced at the trial by the defendants, to prove property in a third person, but without connecting defendants with such third person. The judge refused, on request, to charge, that if it appeared that such third party owned the property at the time of the alleged conversion, plaintiffs could not recover, but charged the reverse; that defendant's not having set up title under such third party, could not claim any rights under him. *Held*. 1st. That the property not having been taken from plaintiff's possession, defendants had a right to show that the title was in a third party without connecting themselves with such title. 2d. That the general denial put plaintiff's title in issue, and that evidence of title in third party was admissible under it. *Spoor* v. *Jordan*. Opinion by BOCKES, J.

CONSTITUTIONAL LAW.

Common school fund: local bills. — Chap. 254, Laws of 1868, incorporates the Schenectady Astronomical Observatory, authorizes it to obtain from Union College a site for the edifice, and requires the Comptroller to loan to the trustees of the observatory, upon their complying with the terms of the act, the sum of $60,000, out of moneys belonging to the capital of the common school funds, to be repaid with interest, and secured by mortgage upon the observatory and site: *Held*, that the act is not in violation of Art. IX of the State Constitution, which ordains that "the capital of the common school fund shall be preserved inviolate." The right to determine what shall be adequate security for the investment of the fund rests with the legislature, and it may provide by special act for each individual case of loaning. Neither is the act in violation of sec. 16 of art. III of the Constitution, which declares that "no private or local bill passed by the legislature shall embrace more than one subject and that shall be expressed in the title." All provisions may be inserted in an act, the object or tendency of which is to effectuate the general purpose expressed by or fairly suggested by the title. It is sufficient if the provisions are auxiliary or incidental to the general purpose indicated by the title. *The People ex rel., The Schenectady Astronomical Observatory* v. *Allen, Comptroller*. Opinion by BOCKES, J.

FORGED PAPER.

Liability of vendor of, to subsequent purchaser. — The defendants were the owners of a promissory note for $1,000, made by one Joseph Whitney and purporting to be indorsed by one Daniel Whitney, which note had been discounted in the regular course of business. The note not being paid at maturity, an action was commenced against the indorser. Afterward the plaintiff called on the defendants, at the request of the indorser, to see what claims the bank had against him, as he had indorsed heavily for Joseph Whitney, and was informed that the bank held only the note mentioned above. Plaintiff then proposed to give his own note for the said note, which offer was accepted by the bank. A few days afterward plaintiff returned to the bank and demanded his own note, and offered to return the one he had received, on the ground that the indorsement was a forgery. The demand was refused, and the defendants afterward transferred the plaintiff's note to another bank, which sued plaintiff and recovered judgment. The plaintiff then brought action on said note against the alleged indorser, Daniel Whitney, but was defeated therein on the ground that the indorsement was a forgery. Notice of both actions was given defendants. Plaintiff then brought this action to recover the amount of the judgment recovered against him on his note and the costs in that suit, also the costs in the suit commenced by him. The jury found for plaintiff. *Held*, 1st, that the court erred in charging the jury that, if the defendant became the holder of the plaintiff's note without fraud the plaintiff could not recover, even though the indorsement on the note given in exchange by the bank was a forged; 2d, that the refusal of a jury to follow an erroneous charge as to the law in reference to matters not involved in the case is no ground for granting a new trial; 3d, that if plaintiff voluntarily bought the note under the mistaken belief of both parties that the indorsement was genuine, he was entitled to recover; 4th, that the court properly refused to charge that the plaintiff could not recover the costs in the suit against him on his note, also those in his action against the alleged indorser; that plaintiff, by tendering back the forged paper before defendants had parted with his note, was entitled to rescind the contract and receive his own note, or, in case of refusal, to recover its value; and the bank having improperly transferred said note, after such demand, were liable to indemnify plaintiff against all costs. *Whitney* v. *The National Bank of Potsdam*. Opinion by ROSEKRANS, J.

FRAUD.

In purchase of goods.—In an action to recover the possession of personal property, it appeared that the plaintiffs were merchants and that they had been in the habit of selling goods to one Rich, on credit; that said Rich had usually paid for goods so sold him at the expiration of the term of credit; that on the 4th of May, 1868, said Rich ordered from plaintiffs a bill of goods to be forwarded to him by railroad; that plaintiffs' shipped said goods and that they reached Rich on the 11th or 12th of May, 1868; that a few hours after the arrival of said goods Rich made an assignment for the benefit of his creditors, to the defendant as assignee; that said goods were included in such assignment; that plaintiffs were not included among the preferred creditors. It also appeared that at the time of making the order for the goods there were two judgments agaist Rich, and that the sheriff had levied on his property under them, but that he gave no information

to the plaintiffs of this fact, nor made any representations whatever as to his solvency: *Held*, that these facts were sufficient to justify the Referee in finding that the defendant's assignor had obtained the goods fraudulently, and that the plaintiffs had never parted with the lawful title thereto. *Foot et al.* v. *Jones.* Opinion by POTTER, J.

INSURANCE.

Stock note and premium note. — In an action on a note in the usual form, "given in consideration of Policy No. 76, dated August 1, 1851, issued by said insurance company," to the defendant, the note was payable in such portions, and at such times as the company might, agreeably to their charter and by-laws, require. The plaintiffs claimed that such note was an original stock note, given on the organization of the company, and, therefore, due without an assessment, which claim was denied by the defendant, who alleged that it was an ordinary premium note, and had been misappropriated and diverted from the purposes for which it was given. *Held*, that the form of the note raised the presumption that it was given as a premium note, and not as a stock note, and that in the absence of countervailing proof that presumption would prevail and be held conclusive of the purpose for which it was made. *Sands, Receiver*, v. *Burt's Exrs.* Opinion by BOCKES, J.

PRACTICE.

Conforming pleadings to proof. — In an action of claim and delivery to recover the value of personal property, the complaint was dismissed on trial before a referee, on the ground that it did not present a cause of action. The alleged defect was the omission to state that at the time of the taking or of the commencement of the action, the plaintiff was either the owner or entitled to the possession of the property, or that the taking was wrongful. At the trial all the necessary facts to constitute a cause of action were proved by the evidence. *Held*, that it was the duty of the referee at the trial, with or without special application, after a cause of action was duly made out by the proofs, to have conformed the pleadings to the case as proved, with a view to substantial justice. *Held*, also, that the referee had power to make the amendment at any time while the cause was before him, and until his report thereon. *Harry G. Hough* v. *Charles H. Blower* Opinion by POTTER, J.

SALE OF LAND.

Mistake as to quantity: action to recover money paid by mistake. — The plaintiff and the defendant entered into a parol agreement whereby the defendant was to convey to the plaintiff a farm at an agreed price, represented by the defendant to contain 100 acres. This agreement was afterward consummated by the payment of the agreed price for 100 acres and the delivery of the deed. On examining the deed the plaintiff discovered that it purported to convey only a trifle over 98 acres, "more or less," and called defendant's attention to the fact, who said he always supposed it contained 100 acres, and rather than have it called less he would have it surveyed. Thereupon plaintiff took the deed and entered into possession under it. The farm contained 91½ acres. Plaintiff brought action to recover money overpaid, on the ground of fraud, mistake or accident. The ground of fraud was abandoned on the trial. The jury found for plaintiff: *Held*, that the parol agreement for the purchase and sale of the land was rescinded by the deed, and the deed accepted in place of full performance of the contract, and made the sale one in gross, or bulk, and not by the acre, and that the transaction being consummated the plaintiff could not maintain his action to recover the money paid by mistake or accident. *Murdock* v. *Gilchrist.* Opinion by ROSEKRANS, J.

STATUTE OF DISSOLUTION.

Amended summons and complaint. — Where, in an action commenced before the statute of limitation had commenced to run, an order of the court was obtained, after the time limited in such statute, allowing the plaintiff to amend his summons and complaint, and thereafter a summons and complaint were served without any allusion to the former summons and complaint, or to the order permitting an amendment, and there was no evidence outside of these papers, showing that such summons and complaint had been served and accepted under the order allowing an amendment,—*Held*, that the summons and complaint, and answer thereon, must be regarded as constituting a new and independent action, and therefore barred by the statute. *Sands, Receiver*, v. *Burt's executors.* Opinion by BOCKES, J.

TRANSFERS OF STOCK.

Interpleader. — J. R. was a holder of twenty shares of stock in the Schenectady Bank. On February 1, 1859, for a valuable consideration he transferred the same to C. R., by assignment indorsed on the back of the certificate of stock. The transfer was not entered upon the books of the bank until December 20, 1859, nor were the officers of the bank notified of such transfer until that time. On the 28th of April, 1859, J. R., in consideration of the indorsement of his paper, amounting to $6,327.77, by the defendant Potter, assumed to transfer the same stock as security to such defendant; which transfer was properly entered upon the books of the bank. The certificate was not present at the transfer, but Potter knew nothing about the previous transfer, and indorsed the paper on the faith and pledge of the stock as security. The paper and indorsements were renewed on the 30th of June, 1859, and ten days thereafter a part thereof, amounting to $1,002.49, was paid by J. R. Potter was charged with the remainder as indorser, and paid the same. The transfer of stock to Potter was then canceled on the bank books at the request of J. R., but without the knowledge of Potter. On the 20th of December, 1859, C. R. presented the assignment to him, and caused the stock to be transferred to him upon the books of the bank. A dividend was subsequently paid to him. The bank brings an action of interpleader to determine the rights of the executors of C. R. and Potter as to the stock. It was proved on the trial that the stock was worth only $750. *Held*, that an action of interpleader was properly brought; that the bank was not estopped by paying the dividend to C. R.; that such payment was not inconsistent with the plaintiff's averment of indifference between the defendants. 2d. That evidence of the nature of the transfer from J. R. to Potter was properly excluded, as J. R. was not a party in his own right to this action, and no application for the admission of such evidence is made by any party claiming under him. 3d. That, the defendant Potter being *bona fide* assignee of the stock, with the first valid transfer thereof on the books of the bank, his prior and better right to it was beyond dispute. *Cady and others* v. *P. Potter and the executors of Colba Reed.* Opinion by BOCKES, J.

WILLS.

Construction of.—The testator left a will in which he first gave to his widow the rents, etc., of his homestead farm during life, and also for a like period the use of all the household furniture, etc., and "personal property (not including bonds, notes or evidences of debt)," upon his homestead farm at the time of his death. Also, one thousand dollars absolutely. The personal property and farm named to go at the death of the widow (subject to certain legacies) to a nephew named in the will. The remainder of the estate to be divided among the testator's nephews and nieces. There was, at the time of making the will, and at the testator's death, a quantity of gold coin and an unlocated land warrant, both belonging to him, in his dwelling-house upon the homestead farm. *Held*, that, as the testator made an exception of certain kinds of "personal property," he intended to use those words in their general and not in a restricted sense, and that the gold coin and land warrant went under the will to the widow for life, and to the nephew to whom the homestead farm, etc., was devised, and not to the residuary legatees. *Terry* v. *Terry.* Opinion by BOCKES, J.

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LAW AND LAWYERS IN LITERATURE.*

VI.

KNOWLES.

In Sheridan Knowles' charming comedy, "The Love Chase," the same old tune is sung by Sir William Fondlove, for whom the lawyers are drawing up a marriage settlement:

"*Sir Wil.:* How many words you take to tell few things;
Again, again say over what, said once,
Methinks were told enough!
First Lawyer: It is the law
Which labors at precision.
Sir Wil.: Yes, and thrives
Upon uncertainty—and makes it, too,
With all its pains to shun it. I could bind
Myself, methinks, with but the twentieth part
Of all this cordage, sirs."

However much men may complain of the verboseness of lawyers in fastening marriage upon them, I believe they are never known to find any fault with waste of words in unfastening the "cordage;" but this is a question fitter for the meridian of Chicago than for ours.

EDWARD EVERETT

had a great admiration for our profession, for one who was educated as a clergyman. He says: "The lawyer must be able to reason from the noblest principles of human duty, and the most generous feelings of human nature; he must fully comprehend the mighty maze of the social relations; he must carry about with him a stock of learning almost boundless; he must be a sort of god to men and communities, who look up to him in the dearest peril of their lives and fortunes; and he must, at the same time, be conversant with a tissue of the most senseless fictions and arbitrary technicalities that ever disgraced a liberal science."

His remarks on the engrossing nature of our professional duties are quite appreciative: "He passes his days in his office, giving advice to clients, often about the most uninteresting and paltry details of private business, or in arguing over the same kind of business in court; and when it comes night, and he gets home, tired and harassed, instead of sitting down to rest or to read, he has to study out another perplexing cause for the next day; or go before referees; or attend a political meeting and make a speech; while every moment which can be regarded in any degree as leisure time, is consumed by a burdensome correspondence. Besides this, he has his family to take care of. It is plain that he has no more leisure for the free and improving cultivation of his mind, independent of his immediate profession, than if he had been employed the same number of hours in mechanical or manual labor. I have no doubt there are many, of very respectable standing, who do not, in any branch of knowledge not connected with their immediate profession, read the amount of an octavo volume in the course of a season."

He might have added, if he had known the profession as well as I do, that there is a great deal of "loafing" done by them. Valuable hours are wasted at the "post-office," (that's where we usually tell our wives we are going, after supper), or at the tavern, and even in our offices, with our heels higher than our heads. To such the example of Everett might be recommended, who always carried a classic in his pocket for perusal while in the water-closet. An eminent lawyer of this State, formerly a judge of our highest court, has found time to make himself one of the ablest microscopists in the country; and I know another who has become well versed in history, literature and science, by the habit of burning the gas all night over the head of his bed, and occupying his wakeful hours with a book.

FIELDING,

who himself was a lawyer and a justice of the peace, has several gibes at the lawyers in "Don Quixotte in England," a comedy little known. Sancho sings the following song:

"Rogues there are of each nation,
Except among the divines;
And vinegar, since the creation,
Hath still been made of all wines.
Against one lawyer Lurch
A county scarce can guard;
One parson does for a church,
One doctor for a churchyard.

Brief, a lawyer, is cudgeled and delivers himself as follows: "I'll have satisfaction; I won't be used after this manner for nothing, while there is either law, or judge, or justice, or jury, or crown-office, or actions of damages, or on the case, or trespasses, or assaults and batteries. I am abus'd, beaten, hurt, maimed, disfigured, defaced, dismembered, kill'd, massacred and murdered by this rogue, robber, rascal, villian. I shan't be able to appear at Westminster half the whole term. It will be as good a three hundred pounds out of my pocket as ever was taken." A physician suggests that the offender is mad. Brief replies: "Pshaw, the man is no more mad than I am. I should be finely off if he could be proved non compos mentis; 'tis an easy thing for a man to pretend madness ex post facto. Very fine doctrine! very fine indeed! A man's beating of another is a proof of madness. So that if a man be indicted he has nothing to do but to plead non compos mentis, and he's acquitted of course; so there's an end of all actions of assault and battery at once." (This is worthy of study by those lunatic statesmen and generals who murder men in a fit of jealousy, and after acquittal for madness, have a lucid interval all the rest of their lives.) Don Quixotte argues that the lawyer himself is mad, "or he would not have gone into a scuffle, when it is the business of men of his profession to set other men by the ears and keep clear themselves." The piece winds up with a song in which it is sung that

"Lawyers are for Bedlam fit,
Or they never
Could endeavor
Half the rogueries to commit
Which we're so mad to let 'em."

In his farce, "An Old Man taught Wisdom," Wormwood, a lawyer, asks: "What would you do without lawyers? Who'd know his own property?" In "Pasquin, a Dramatic Satire on the Times," being the rehearsal of two plays, viz.: a comedy called "The Election," and a tragedy called "The Life and Death of Common Sense," Law is one of the characters of the tragedy, and conspires with Physic to overthrow Common Sense, saying:

"While that drowsy queen
Maintains her empire, what becomes of us?
Thou knows't, my Lord of Physic, I had long
Been privileg'd by custom immemorial,
In tongues unknown, or rather none at all,
My edicts to deliver thro' the land;
When this proud queen, this Common Sense, abrig'd
My power, and made me understood by all.

Physic: My lord, there goes a rumor thro' the court
That you descended from a family
Related to the queen; Reason is said
T' have been the mighty founder of your house.

Law: Perhaps so; but we have rais'd ourselves so high,
And shook this founder from us off so far,
We hardly deign to own from whence we came."

The Queen of Common Sense enters and says:

"My Lord of Law, I sent for you this morning;
I have a strange petition given to me;
Two men, it seems, have lately been at law
For an estate, which both of them have lost,
And their attorneys now divide between them.

Law: Madam, these things will happen in the law.

Q. C. S.: Will they, my lord? then better we have none;
But I have also heard a sweet bird sing,
That men, unable to discharge their debts
At a short warning, being sued for them,
Have, with both power and will their debts to pay,
Lain all their lives in prison for their costs.

Law: That may perhaps be some poor person's case,
Too mean to entertain your royal ear.

Q. C. S.: My lord, while I am queen, I shall not think
One man too mean, or poor, to be redress'd;
Moreover, lord, I am inform'd your laws
Are grown so large, and daily yet increase,
That the great age of old Mathusalem
Would scarce suffice to read your statutes out."

Queen Ignorance invades the realm, and is supported by the conspirators, including "attorneys all completely arm'd in brass." *Queen Common Sense* is overcome and slain; but while *Ignorance* is thanking *Law* and *Physic* for their aid, and assuring them that she will not forget their services, the ghost of the dead queen arises and routs the whole crowd.

Fielding seems to think, however, that there is one occupation more infamous than that of the lawyer:

"The lawyer who's been
In the pillory seen,
While eggs his complexion made yellow:
Nay, the devil's to blame,
Or he'll own to his shame,
That a stock-jobber has no fellow."

This of course seems extravagant to us in the year 1870.

In "Rape upon Rape, or the Justice caught in his own Trap," we find evidence that law was not, in Fielding's time, administered, in the petty tribunals, with that purity which now characterizes our justices' courts. *Justice Squeezum*, and *Quill*, his clerk, come upon the scene:

"*Squeez.:* Did mother Bilkum refuse to pay my demands, say you?

Quill: Yes, sir, she says she does not value your worship's protection of a farthing; for that she can bribe two juries a year to acquit her in Hicks' hall, for half the money which she hath paid you within these three months.

Squeez.: Very fine! I shall shew her that I understand something of juries as well as herself. Quill, make a memorandum against mother Bilkum's trial, that we may remember to have the panel No. 3; they are a set of good men, and true, and hearken to no evidence but mine.

Quill: Sir, Mr. Snap, the bailiff's follower, hath set up a shop, and is a freeholder. He hopes your worship will put him into a panel on the first vacancy.

Squeez.: Minute him down for No. 2. I think half of that panel are bailiffs' followers. Thank Heaven! the laws have not excluded those butchers.

Quill: No, sir, the law forbids butchers to be jurymen, but does not forbid jurymen to be butchers.

Squeez.: Quill, d'ye hear? Look out for some new recruits for the panel No. 1. We shall have a swinging vacancy there the next session. Truly, if we do not take some care to regulate the juries in the Old Bailey, we shall have no juries for Hicks' hall.

Quill: Very true, sir. But that panel hath been more particularly unfortunate. I believe I remember it hanged at least twice over."

Squeezum elsewhere says: "The laws are turnpikes, only made to stop people who walk on foot, and not to interrupt people who drive through them in their carriages. The laws are like a game at loo, where a blaze of court cards is always secure, and the knaves are the safest cards in the pack."

In "Amelia," also, Fielding has some observations on the British laws and their administration. He speaks of the absurdity of appointing as constables and watchmen, decrepit old people, who from want of bodily strength are incapable of getting a livelihood by work. "These men, armed only with a pole, which some of them are scarce able to lift, are to secure the persons and houses of his majesty's subjects from the attacks of gangs of young, bold, stout, desperate, and well-armed villains. If the poor old fellows should run away from such enemies, no one, I think, can wonder, unless it be that they were able to make their escape." He also makes the startling statement that he has "been sometimes inclined to think that this office of a justice of the peace requires some knowledge of the law, for this simple reason, because in every case which comes before him, he is to judge and act according to law. Again, as these laws are contained in a great variety of books—the statutes which relate to the office of a justice of peace, making of themselves at least two large volumes in folio, and that part of his jurisdiction which is founded on the common law being dispersed in above a hundred volumes—I cannot conceive how this knowledge should be acquired without reading." He depicts the character of Justice Thrasher, who "was never indifferent in a cause, but when he could get nothing on either side." To one who is accused of assault and battery, he says: "Sirrah, your tongue betrays your guilt. You are an Irishman, and that is always sufficient evidence with me." True British justice, that, even to this day! Justice Thrasher proposed to commit an accuser who failed to make out his case, for perjury, but his clerk dissuaded him, by suggesting that he could not do it before indictment, "because it is not against the peace till the indictment makes it so." "Why, that may be," cries the justice, "and indeed perjury is but scandalous words, and I know a man cannot have a warrant for those, unless you put for rioting them into the warrant." This refers to the state of the law by which abusive words

were not punishable by the magistrate; and to the practice which had grown into vogue of construing a little harmless scolding into a riot, and of committing scores of old women to prison for the licentious use of their tongues, which is the natural prerogative of their sex. Fielding also animadverts with severity against the distinction then drawn between perjury and larceny, the former being a misdemeanor only and therefore bailable, and the latter a felony and non-bailable. He also refers to the law of Charondas, the famous lawgiver of Thurnim, by which men who married the second time were removed from all public councils, it being deemed unreasonable "to suppose that he who was so great a fool in his own family, should be wise in public affairs." He denounces the injustice of the law which declares a larcenous breach of trust to be no crime, unless it be committed by a servant, and then only in case the goods taken amount in value to forty shillings, and in this connection makes the magistrate say: "Such are the laws, and such the method of proceeding, that one would almost think our laws were made rather for the protection of rogues, than for the punishment of them." He makes another magistrate deny an application for a search-warrant to discover stolen title-deeds, on the ground that they "savoured of the realty, and it was not felony to steal them. If indeed they were taken away in a box, then it would be felony to steal the box."

STERNE.

In Tristram Shandy, we find a learned argument on the proposition "That the mother is not of kin to her child." The adjudication to this effect in the Duke of Suffolk's case, "cited in Brooke, taken notice of by Coke, and found in Swinburn on Testaments," is thus stated by Sterne:

"In the reign of Edward the Sixth, Charles, Duke of Suffolk, having issue a son by one venter, and a daughter by another venter, made his last will, wherein he devised goods to his son and died; after whose death the son died also, but without will, without wife and without child; his mother and his sister by the father's side (for she was born of the former venter) then living. The mother took the administration of the son's goods, according to the statute of the 21st of Harry the Eighth, whereby it is enacted: That in case any person die intestate, the administration of his goods shall be committed to the next of kin. The administration being thus (surreptitiously) granted to the mother, the sister by the father's side, commenced a suit before the Ecclesiastical Judge, alleging, 1st, that she herself was next of kin; and 2dly, that the mother was not of kin at all to the party deceased; and, therefore, prayed the court that the administration granted to the mother might be revoked, and be committed unto her, as next of kin of the deceased, by force of the said statute. Hereupon, as it was a great cause, and much depending upon its issue, and many causes of great property likely to be decided in times to come, by the precedent to be then made, the most learned, as well in the laws of this realm as in the civil law, were consulted together, whether the mother was of kin to her son or no? Whereunto, not only the temporal lawyers, but the church lawyers, the juris-consulti, the jurisprudentes, the civilians, the advocates, the commissaries, the judges of the consistory and prerogative courts of Canterbury and York, with the master of the faculties, were all unanimously of opinion that the mother was not of kin to her child." This sage decision was based on the civil maxim: *Liberi sunt de sanguine patris et matris, sed pater et mater non sunt de sanguine liberorum.* "Let the learned say what they will, there must certainly, quoth my uncle Toby, have been some sort of consanguinity betwixt the Duchess of Suffolk and her son. The vulgar are of the same opinion, quoth Lorick, to this hour."

I doubt the active participancy of the temporal lawyers in this decision, and am inclined to give the entire credit of it to those tribunals of which Clarendon wrote: "I have never yet spoken with one clergyman, who hath had the experience of both litigations, that hath not ingenuously confessed he had rather, in the respect to the trouble, charge, and satisfaction to his understanding, have three suits depending in Westminster Hall than one in the arches, or any ecclesiastical court." It would probably be time wasted for the members of our profession to look for this case in the books, as I suspect, that, notwithstanding its *vraisemblance*, it had its origin in Sterne's fantastic brain.

Sterne, also, in "The Author's Preface," draws a picture representing an extraordinary state of things, in which persons of the learned and cultivated professions agree instead of disagreeing, and are directed by laudable, natural, and sensible motives instead of those selfish and inconsistent ones that usually guide their conduct. Thus he speaks of "fiddlers and painters, judging by their eyes and ears," and of physicians "feeling their patients' pulse instead of their apothecary's." As to lawyers, he observes:

"In that spacious hall, a coalition of the gown, from all the bars of it, driving a damn'd, dirty, vexatious cause before them, with all their might and main, the wrong way! kicking it *out* of the great doors, instead of *in!* and with such fury in their looks, and such a degree of inveteracy in their manner of kicking it, as if the laws had been originally made for the peace and preservation of mankind; perhaps a more enormous mistake committed by them still, a litigated point fairly hung up; for instance, whether *John o' Nokes* his nose could stand in *Tom o' Stiles* his face, without a trespass, or not? rashly determined by them in five-and-twenty minutes, which, with the cautious pros and cons required in so intricate a proceeding, might have taken up as many months; and if carried on upon a military plan, as your honors know an ACTION should be, with all the stratagems practicable therein, such as feints, forced marches, surprises, ambuscades, mask-batteries, and a thousand other strokes of generalship, which consist in catching at all advantages on both sides, might reasonably have lasted them as many years, finding food and raiment all that term for a centumvirate of that profession."

LEVER.

An amusing example of how ignorant of the forms and substance of legal procedure a famous author can afford to be, is furnished in Charles Lever's novel entitled "The Daltons, or Three Roads in Life." He details the fortunes of a family of the Irish gentry, whose decayed condition compelled them to pass their

lives in exile on the Continent. The scene opens at Baden Baden in the decade from 1820 to 1830. Peter Dalton, the head of this family of exiles, dies at Baden Baden. His family get an inkling that an accusation is to be set on foot in Ireland against their deceased father, charging him with having murdered a kinsman by the name of Godfrey, before leaving Ireland. The family hasten to Ireland to make defense against the charge. On their arrival in Ireland it turns out that an indictment against the dead Dalton, for the murder of Godfrey, had been concocted in a lawyer's office without the intervention of a grand jury. All parties prepare for trial. The trial is held at Kilkenny, so famous for its cat combat, but that struggle was nothing compared to the scene which is now depicted. Meekins, the chief witness for the prosecution, is put on the stand, and tells an awful story; but by a skillfull cross-examination is made, not only to exculpate the deceased accused, but to inculpate himself as the murderer, is ordered by the judge into the dock on the spot, the trial goes on against *him*, without intermission, under the same indictment and before the same jury, and he is convicted, sentenced and executed! Now, as Squeers would say, here's "richness." The author is as credulous as an old woman as to the fearful effects of cross-examination. Hear him: "If they can involve him (the witness) in a narrative, be it ever so slight or vague, these lawyers exercise a kind of magic power in what is called cross-examination; and can detect a secret fact by tests as fine as those by which the chemist discovers a grain of poison." It would be exact chemistry indeed that could discover a grain of sense in such writing as this. Truly, this is not one of the Levers by which Archimedes promised to move the world, and yet it is from such books that nine-tenths of the novel-reading world get their ideas of law and its administration.

If any thing could atone for such blundering, it would be the picture of Irish justice, as drawn in the same novel — Peter Dalton aforesaid, in his life-time, being the artist:

"Look at the shouts of laughing in the law coorts; at any trial — murder, if you like — see how the fun goes on — the judge quizzing the jury, and the counsel quizzing the judge, and the pris'ner quizzing all three. There was poor old Norbury — rest his soul! — I remember well how he couldn't put on the black cap for laughing. Many's the time in Ireland, when, what between the blunderin' of the crown lawyers, the flaws of the indictment, the conscientious scruples of the jury — you know what that means — and the hurry of the judge to be away to Harrowgate or Tunbridge, a villain gets off. But instead of going out with an elegant bran new character, a bit of joke — a droll word spoken during the trial — sticks to him all his life after, till it would be just as well for him to be hanged at once, as be laughed at from Pill Lane to the Lakes of Killarney. Don't I remember well, when one of the Regans — Tim, I think it was — was tried for murder at Tralee; there was a something or other they couldn't convict upon. 'Twas his grandmother's age was put down wrong, or the color of his stepmother's hair; or the nails in his shoes wasn't described right; whatever it was, it was a flaw, as they called it; and a flaw in a brief, like one in a boiler, leaves everybody in hot water," etc.

MISS EDGEWORTH,

also, in her comedy "Love and Law," portrays the litigious spirit of the Irish in an admirable manner. Counsellor O'Blaney says: "In Ireland it would as ill become a gentleman to be any way shy of a law-shute as of a duel." To the suggestion that law is expensive, he answers: "But 'tis the best economy in the end; for when once you have cast or non-shuted your man in the courts, 'tis as good as winged him in the field. And suppose you don't get sixpence costs, and lose your cool hundred by it, still it's a great advantage, for you are let alone to enjoy your own in pace and quiet ever after, which you could not do in this county without it." Carver, a justice, says: "The poor have nothing to do with the laws." O'Blaney: "Except the penal." Carver: "True, the civil law is for us men of property." Catty Rooney, a termagant, law-loving widow, speaking of a law-suit she has with a neighbor about a bit of bog, says: "I'll drive all the grazing cattle, every foor-footed baast off the land, and pound 'em in Ballynavogue; and if they replevy, why I'll distrain again, if it be forty times, I will go. I'll go on distraining, and I'll advertise, and I'll cant, and I'll sell the distress at the end of eight days. And if they dare for to go for to put a plough in that bit of reclaimed bog, I'll come down upon 'em with an injunction, and I would not value the expense of bringing down a record a pin's pint; and if that went again me, I'd remove it to the courts above, and welcome; and, after that, I'd go into equity, and if the chancellor would not be my friend, I'd take it over to the House of Lords in London, so I would, as soon as look at 'em; for I'd wear my feet to the knees for justice, so I would."

HOW SOME MEN HAVE GOT ON AT THE BAR.

II.

Unlike either Eldon or Erskine, Lord Thurlow, in his youth, affected the character of an idler; and, while in reality he studied law very assiduously, pretended to devote his time to society, light literature and amusements. He was in the habit of giving out that he was going to walk, and of then shutting himself in his room and devoting the whole morning to "Coke upon Littleton" and "Plowden." He was a constant attendant at Westminster Hall, and gave great attention to the arguments, though seeming to be entirely indifferent. His evenings were mostly spent at Nando's coffee house near Temple Bar — a very popular resort of the lawyers of that day — where he held nightly disputations with all comers on politics, law, the merits of a favorite actress, or any other subject that might be propounded. Returning to his chambers, he would read law "till his candles turned dim in the morning light."

Thurlow, in pretending to be an idler, reversed the rule of conduct usually deemed most advantageous to the young lawyer. It is now, and was in those days, thought to be the thing to put on an appearance of great industry where genuine industry was wanting. The author of the "Pleader's Guide" thus describes one phase of the early professional career of John Surrebutter, Esq., barrister at law:

"But if while capering at my glass,
Or toying with a favorite lass,
I heard the aforesaid Hawk a-coming,
Or Buzzard on the staircase humming,
At once the fair, angelic maid
Into my coal-hole I convey'd;
At once with serious look profound,
Mine eyes commencing with the ground,
I seemed like one estranged to sleep,
And fixed in cogitation deep,
Sat motionless, and in my hand I
Held my Doctrina Placetandi."

Thurlow, though well up in the law on his call to the bar, soon found that a reputation for idleness was not profitable. He went the circuit for some seven or eight years without doing any thing. His father had expected that fees would flow in upon him directly on his admission, and therefore withdrew the moderate allowance which he had before given him. The result was that the future Lord Chancellor was reduced to the greatest pecuniary straits. Campbell tells the following story of the stratagem to which Thurlow was compelled to resort to procure a horse to ride the circuit. He went to a horse dealer, and said to him that he wished to purchase a good roadster — price being no object to him — but that he must have a fair trial of the animal's paces before he concluded the bargain. The trial being conceded, he rode off to Winchester; and, having been well carried all the way round, but still without any professional luck, he returned the horse to his owner, saying that "the animal, notwithstanding some good points, did not altogether suit him."

At last, after years of waiting, the fickle goddess, Fortune, began to smile upon him. By some means he got a brief in a case at Guildhall. The leader on the other side was a very arrogant man, and had tyrannized for a long time over the attorneys. He began the trial by treating the young junior with great contempt, which Thurlow resented with much spirit. An altercation followed, in which the latter, by a mixture of argument and sarcasm, completely worsted his opponent. A large number of attorneys were present, and many of them resolved to patronize the young man who had displayed such spirit and ability.

The chief event, however, which lifted Thurlow into success occurred in this wise, and we can but mark the similarity of the accident to that which made Erskine's fortune. The Scotch Court of Sessions had decided that the alleged son of Lady Jane Douglass was a supposititious child procured at Paris. The matter excited great attention all over Europe, and was the subject of discussion at most of the coffee houses. One evening while Thurlow was at Nando's, as usual, some one present commended the judgment of the Scotch court. Thurlow at once took the contrary side, and, having read the evidence attentively, handled the question with marked ability. He gave a succinct statement of the gist of the evidence, and pointed out clearly those parts that bore most strongly in favor of legitimacy of the young heir. His adversary was almost entirely unacquainted with the real merits of the case, and was, besides, no match for the young barrister at an argument. He was, therefore, quickly put down, and Thurlow retired in triumph. It so happened that two Scotch law agents, who had come to London to enter the appeal, had dropped into Nando's — having heard that it was the resort of the leading lawyers of the day — and were sitting quietly at a side table, unknown to any one present, during the discussion. After Thurlow's departure they inquired of the landlady who he was; and the next morning a retainer in the case was left at his chambers, with an immense pile of papers and a large fee. He gladly undertook the preparation of the cause. Every deposition, document, pleading or other paper that had been brought forward in the suit he went over time and again, carefully weighing every statement and balancing the testimony; and at length drew such a masterly case as, according to Lord Campbell, mainly to have led to the success of the appeal.

His connection with this celebrated case brought him business; and it also brought him the acquaintance of the Duchess of Queensbury, who obtained for him from Lord Bute an appointment as King's Counsel. His success was now assured, and a seat on the wool sack came in due time.

Lord Camden, though son of a Lord Chief Justice, an Etonian and Cantab, and a thorough Student of law, was even more unfortunate than Thurlow in getting on at the bar. He went the western circuit for ten or twelve years without a client. "He attended daily in the Court of King's Bench," says Lord Campbell, "but it was only to make a silent bow when called upon 'to move;' — he sat patiently in chambers, but no knock came to the door, except that of a dun, or of a companion as briefless and more volatile."

Year out and year in he rode the Circuit where his father had once been famous, without receiving fees enough to pay the toll at the turnpike gates. At last, thoroughly disheartened, he resolved to quit the bar and to seek some other and more remunerative business. This coming to the knowledge of Henley, afterward Lord Northington, the latter urged him to try one more circuit. At the first assize town on the next circuit, Henley managed to get his young friend retained as his junior in a case of some importance. When the case was called on, Henley pretended to have a severe attack of gout, and left the court. The lead was suddenly cast upon Camden, who managed the case with great ability, and won. The fame thus achieved preceded him, and during the Circuit and his whole after life he prospered.

Dunning was a briefless barrister for several years after his call to the bar. Mr. Polwhele, the historian of Devonshire, says of him: "He traveled the Western Circuit, but had not a single brief, and had Lavater been at Exeter in the year 1759 he must have sent Counsellor Dunning to the hospital of idiots. Not a feature marked him for the son of wisdom." An opportune fit of the gout, which disabled one of the leaders of the circuit, opened the way for him. Dunning took his brief and made the most of the opportunity. Soon after Wilkes, whose acquaintance he had made at Nando's, got him a brief in a celebrated case involving the legality of general warrants. His argument in the case was a masterly effort, and lifted him into a very lucrative practice.

Lord Mansfield is said to have owed his success to the same fortunate circumstance that has opened the way to so many others — the illness of a leader. The story goes, that, after years of "no business" he was retained as junior in the case of *Cibber* v. *Sloper*, and that Sergeant Eyre, his leader, being seized with a fit, the conduct of the defense devolved upon Mansfield, who made such an excellent speech that clients rushed

to him in crowds. It is related that Sarah, the famous Duchess of Marlborough, having heard of the success of the young lawyer, sent him a retaining fee of a thousand guineas. Mansfield returned nine hundred and ninety-five, with the remark that "a retaining fee was never more nor less than five guineas." She proved, however, notwithstanding her munificence, a rather troublesome client,—frequently making her appearance at his chambers after midnight. On one occasion during his absence she called, and his clerk, giving an account of her visit next morning, said: "I could not make out, sir, who she was, for she would not tell me her name, but she *swore* so dreadfully that she must have been a lady of quality."

Lord Hardwick was more fortunate in his beginning than most lawyers have been. His father was a small attorney at Dover, and placed his son under the tuition of Mr. Salkeld, a very eminent London attorney, who very soon formed a strong attachment for his protege, and succeeded in placing him in the highway to success. Lord Chief Justice Parker, afterward Lord Macclesfield, went to Mr. Salkeld sometime after Hardwick had become his pupil, and inquired if he could tell him "of a decent and intelligent person who might serve a sort of a law tutor to his sons." The attorney at once recommended his clerk Hardwick, who was at once engaged, and managed by his manner and ability to secure the warmest attachment of the Chief Justice. He began his practice in the Court of King's Bench, over which his patron presided, and the marked favoritism which the Chief Justice exhibited for him brought him a large amount of business. He was only twenty-nine years of age when his patron succeeded in securing his appointment as Solicitor-General.

The rise of Sir Samuel Shepherd—who, by turns, declined the Chief Justiceship of the Queen's Bench and of the Common Pleas—is thus described by his son:

"For the first two or three years his advancement was slow, but gradual; it was not long, however, before good fortune, or undeviating attention, brought him into greater notice.

"Two of his earliest arguments of any importance, for which he had made copious notes, were called on successively upon the same day. In the first he was much embarrassed; at the commencement of the second, he fortunately dropped his papers, which became displaced and useless; this obliged him to trust to his memory, which did not fail him for the cases previously collected; his eye was thus unshackeled from that constant reference to notes, so often injurious to the effect of a good argument; and being thrown upon his own resources, his manner, naturally excellent, became more free and impressive, and he received a great compliment from Lord Mansfield at the conclusion of the argument. The court, too, suspended the judgment they were about to pronounce against him, and which they afterward pronounced upon further deliberation. From this time he came into full practice, as appears by the frequent recurrence of his name in the reports of that period."

Romilly's account of his own early life contains some useful hints. After describing the mode of life at Circuit he says:

"This sort of amusement, however, was for a considerable time the only profit that I derived from the Circuit. Many of the barristers upon it had friends and connections in some of the counties through which we passed, which served as an introduction of them to business; but for myself, I was without connections everywhere, and at the end of my sixth or seventh circuit I had made no progress. I had been, it is true, in a few cases; but all the briefs I had had were delivered to me by London attorneys, who had seen my face in London, and who happened to be strangers to the juniors on the circuit. They afforded me no opportunity of displaying any talents if I had possessed them, and they led to nothing. I might have continued thus a mere spectator of the business done by others, quite to the end of the sixteen years which elapsed before I gave up every part of the circuit, if I had not resolved, though it was very inconvenient to me on account of the business which I began to get in London, to attend the quarter sessions of some midland county. There is, indeed, a course by which an unconnected man may be pretty sure to gain business, and which is not unfrequently practiced. It is to gain an acquaintance with the attorneys at the different assize towns, to show them great civility, to pay them great court, and to effect before them a display of wit, knowledge and parts. But he who disdains such unworthy means may, if he do not attend the quarter sessions, pass his whole life in traveling round the circuit, and in daily attendances in court, without obtaining a single brief. When a man first makes his appearance in court, no attorney is disposed to try the experiment whether he has any talents; and when a man's face has become familiar by his having been long a silent spectator of the business done by others, his not being employed is supposed to proceed from his incapacity, and is alone considered as sufficient evidence that he must have been tried and rejected."

It is rather curious to note by what singular accidents and disappointments men have been forced into greatness. Lord Tenterden's early history is an illustration. In 1776 there was a vacant place in the Cathedral choir at Canterbury. Two boys of fourteen or fifteen years of age were rivals for the position. One was Charles Abbott, son of a Canterbury barber. The parents and friends of either lad were eager for the appointment, for it was deemed an excellent situation. In time the lucky candidate would get a salary of £70. The trial came and Charley Abbott was rejected. He went home nearly broken-hearted. After a little he returned to school, and in time became Lord Chief Justice of the King's Bench and a peer of the realm. Years after, in company with Mr. Justice Richardson, he attended service at Canterbury Cathedral. At the close of the service, he said to his friend: "Do you see that old man there among the choristers? That is the only man I ever envied; when at school in this town we were candidates together for a chorister's place; he obtained it; and if I had had my wish, he might have been accompanying you as Chief Justice and pointing me out as his old school-fellow, the singing man."

Lord Loughborough commenced practice at the Scotch Bar. Having got into an altercation with the Lord President, which was likely to prove serious to him, he left Scotland and joined the English Bar. Every one prophesied his ruin; but happily the incident turned out the making of him.

Romilly said that what principally influenced his decision to come to the bar was, that he might leave his small fortune with his father instead of buying a sworn clerk's seat with it. "At a later period of my life, after a success at the bar which my wildest and most sanguine dreams had never pointed to me—when I was gaining an income of £8,000 or £9,000 a year—I have often reflected how all that prosperity

had arisen out of the pecuniary difficulties and confined circumstances of my father." How true it is that—

> "There's a divinity that shapes our ends,
> Rough-hew them as we may."

JUDICIAL LEGISLATION.

II.

Having, in a previous article, illustrated, by the most striking examples drawn from the history of English and American jurisprudence, the power which the courts have claimed and exercised to create and abrogate law, we now propose to inquire into the source of this power and its legitimacy.

First, as to its source: All government, whether human or divine, despotic or democratic, exercised by king or people, implies, primarily, the existence of only two forces or powers, (1) to legislate or make the laws, (2) to execute or enforce them.

This division, simple and correct in theory, is found incorrect in practice, from the infirmity of human nature. It implies perfect legislation. It implies a system of written laws, capable of embracing every complication affecting the rights of person or of property. It must anticipate every need in the ever advancing tide of human progress, and must provide for every advancement in the refinements of property.

This is a field that no merely human legislation could occupy. Such legislation could only emanate from that "Power to whom the present, the past and the future are alike known."

Human legislation then, being imperfect and incapable of providing, except in a general and imperfect manner, for the wants of civilized life, a vast field of legislation is left unoccupied. And the inquiry arises, to which of these two great powers of government belongs the right to provide, on the moment, as it were, for those cases that no rule or known law is adapted to meet?

The history of all free governments—all those in which the legislative and executive departments are separate—shows, that that power has ever been claimed and exercised by the executive branch. Under the constitution of the Roman republic, the senate, in theory, made the laws and the consul executed them. He also exercised the transcendent power of construing the laws enacted by the senate, and of formulating rules for those cases for which the legislature had failed to provide. But in the contest that took place between the *plebes* and patricians, respecting the right to hold the office of consul, which was terminated about the year of Rome 384 by the election of a plebian to that office, the patricians, more skilled in the science of government, and knowing the weight in the State of the highest judicial power, stipulated, as a condition for their consent to such election, that the judicial power should be separated from the consular office, and that a pretor should be appointed who should always be a patrician.

So also, under the English Constitution, in the earlier periods of its history, the king was the highest judicial officer. He sat in the *aula regis*, and dispensed justice in person. But the increasing cares of state finally compelled him to delegate this power to others, from which in process of time came the present organization of their courts, though justice is still dispensed in the king's name in all the courts of that kingdom; and Sir Wm. Blackstone informs us that the king is still supposed to be present in person at the sittings of the King's Bench.

The king is also termed the "fountain of justice," and the "courts are" regarded as "emanations from the royal prerogative." From these courts our own are largely copied, and the same power exercised by the king in the *aulia regis* has descended to and is exercised by our own courts.

But it was not until long after the English courts had assumed to construe, and, even, by the aid of fictions, to abrogate, the enactments of parliament, that the king would concede to the courts the right to decide any thing pertaining to his profit or power without consulting him; and the memorable contest between King James I and his judges, which resulted in the deposition of Lord Chief Justice COKE from his office, arose from the refusal of that sturdy judge to concede to the king the right of being personally consulted in the decision of matters concerning his prerogatives.

These illustrations sufficiently show that the power to construe laws already made, and to create others, where the legislature have not acted, as the exigencies of society require, has ever been claimed and exercised by the executive department. Though in theory, as we have before stated, the right to occupy every field in legislation—to create every rule that pertains to person and property—belongs to the legislature—yet a moment's reflection will show us that the exercise of this power by the executive was, under the simple division of legislative and executive, necessary.

It is by this branch that the defect in the law is first ascertained, and the delay and expense attendant upon the legislature coming from all parts of the country, to say nothing of their lack of the requisite knowledge and training, to declare the proper rule of law in all cases that might arise when assembled, render their action practically impossible in such cases, even if it were claimed by them.

The origin, then, of this power of legislation by the courts arises, 1st, from the inherent imperfection of human legislation, its inability to provide *a priori* for the needs of a progressive civilization, which requires another power with better training and more knowledge to supplement and perfect their work; or, 2d, from express delegation from the executive branch which formerly exercised those powers. The legitimacy of the exercise of this power has necessarily been somewhat embraced in the inquiry into its source. But there are several other modes by which its legitimacy may be more fully tested:

1. By its adaptation, as at present exercised, to produce the best results;—but of this we shall treat more fully in a subsequent chapter on the advantages of its exercise by the courts:

2. By its being a legitimate representative of the powers exercised by the Roman pretors in the best days of the republic, and of the power expressly delegated by the English kings:

Or, 3d, from necessity, since society could not be restrained and governed, unless there were some

power to which ready appeal might be made to redress wrong and protect the rights of person and property, in the absence of written law.

All governments of law rest on an implied social compact, by which the individual surrenders a portion of his rights for the sake of that protection which governments give.

This social compact implies, as a fundamental principle, that, in consideration of each individual giving up a portion of his natural rights, the remainder should be more secure. And how could this be effected were there not always present this reserve power—this power of instant legislation—the power of furnishing a remedy for every wrong as rapidly as it might be developed? Otherwise, failing to obtain the stipulated security, disorders would arise, and the bonds of society would be loosed, and individuals would become the self-constituted executives of the land; for "justice delayed is rank injustice."

We shall reserve an examination into the various modes by which our laws are created and abrogated by the courts, as well as the advantages of the exercise of this power by them, till another article.

THE BREACH OF PRIVILEGE CASES.

On the 21st day of January last, a subpœna was issued under the authority of the court, requiring one Henry Ray to appear and testify in a certain criminal proceeding pending before the Grand Jury of the Saratoga Oyer and Terminer. The subpœna was served on Mr. Ray, at the city of Albany, who declined to obey its mandates, and pleaded in excuse his privilege as a member of the Assembly of the State of New York. The district attorney of that county thereupon applied to the court presided over by Mr. Justice Potter, and procured an attachment against Mr. Ray for such disobedience. Upon this attachment Mr. Ray was arrested, taken before the Grand Jury, and required to testify in such proceedings.

The arrest of Mr. Ray at once created a commotion in the Assembly, of which he was a member, as it was claimed to be a flagrant violation of the privilege of that body. A committee was thereupon appointed to investigate the matter of the arrest, which committee has recently made its report.

As the proceeding is somewhat novel in character, and the question involved one of great importance, we feel justified in giving place to the following lengthy extract from the committee's report, in which is embraced a review of the authorities on the question of legislative privilege.

After setting forth the facts of the arrest, and of the examination of Mr. Justice Potter and others, relative thereto, the committee proceed as follows:

"The question therefore arises, and the only question which your committee is called upon to consider is, whether or not Mr. Ray was exempt from arrest under the process issued in this case.

"The privilege of legislative bodies is as old as the common law, from which we have gathered our liberties, and by which the rights of the people have been and are to be protected. It is older than Magna Charta, older than the writ of habeas corpus, older than the courts either of law or equity, and from the parliament of a nation and legislatures of the States have come those laws and rules of practice which are calculated to secure to the citizen all the benefits and privileges conferred by the government under which he may live. Your committee, in the examination of the question, have found that, in this country, the violations of parliamentary privilege, either of members of Congress or of members of State Legislatures, have been rare. In the earlier history of the British Parliament, when the House of Commons, for long years, struggled against the prerogative of the crown, against the overbearing aristocracy of the lords, and against the assumption of power on the part of the courts, which were for centuries the mere servants and tools of the crown, we find many instances where the Commons secured and maintained the privileges of members of that body.

"In the case of Shirley *v.* Fagg, as far back as 1675, Mr. Fagg, a member of the House of Commons, was summoned on an appeal, issuing from the Court of Chancery, to appear before the bar of the House of Lords and plead to an appeal. The House of Commons held this to be an unquestioned violation of its privilege, and passed on the 18th of May, 1675, the following resolution:

"'*Resolved*, That it is the undoubted right of this House that none of their members be summoned to attend the House of Lords during the session or privileges of the Parliament.' (3 *Grey*, 170).

"On the 20th of May, 1675, Sir Thomas Leigh, from a committee appointed by the House of Commons, gave the following, among other reasons, why a member of the Commons was not compelled to appear before the bar of the House of Lords, and this, it will be borne in mind, was when the House of Lords was sitting as a Court of Appeals of the British realm, 'The privilege of a member is the privilege of the House, and is a restraint to the proceeding of inferior courts, but not to the House itself;' thus implying that the House whose privilege has been violated is the only body possessing the right to pass upon the question whether such privilege has or has not been violated. (2 *Grey*, 399.) It is laid down as a principle in parliamentary law, in England, that the privilege of Parliament extends to all cases except three, treason, felony and breach of the peace. (4 *Inst.*, 25; *Lex. Parl.*, 381.)

"Sir William Blackstone lays down the following as the privileges of Parliament: '1st. They are at all times exempted from question elsewhere for anything said in their own House during the time of privilege. 2d. Neither a member himself, his wife or servants, for any matter of their own, may be arrested on mesne process, in any civil suit. 3d. Nor be detained under execution, though levied before the time of privilege. 4th. Nor impleaded, cited or *subpœnaed* in any court. 5th. Nor summoned as a witness or juror. 6th. Nor may their lands or goods be distrained. 7th. Nor their persons assaulted or character traduced.' (1 *Blackstone*, 163-4.)

"Mr. Thomas Jefferson, in his note upon this quotation of Blackstone, says: 'The Constitution of the United States has only privileged Senators and Representatives themselves from the single act of arrest in all cases except treason, felony and breach of the

peace, during their attendance at the session of their respective Houses, and in going to and returning from the same, and from being questioned in any other place for any speech or debate in either House.'

"'Under the general authority to make all laws necessary and proper for carrying into execution the powers given them, they may provide by law the details which may be necessary for giving full effect to the enjoyment of this privilege.' He goes on and says further: 'The act of arrest is void, *ab initio*. (2 *Strabo*, 989.) The member arrested may be discharged on motion. The arrest, being unlawful, is a trespass for which the officer and others concerned are liable to action or indictment in the ordinary courts of justice, as in other cases of unauthorized arrest. The court before which the process is returnable, is bound to act as in other cases of unauthorized proceeding, and liable also, as in other similar cases, to have its proceedings stayed or corrected.' He says further: 'This privilege from arrest, privileges of course against all process, the disobedience to which is punishable by an attachment of the person (*the very case in point*), as a subpœna *ad respondendum* or *testificandum* or a summons on a jury; and with reason, because a member has superior duties to perform in another place.' He goes on to say: 'When a Representative is withdrawn from his seat by summons, the people whom he represents, lose their voice in the debate and vote, as they do in his voluntary absence. When a Senator is withdrawn by summons, his State loses half its voice in debate and vote, as it does in his voluntary absence. The enormous disparity of evil admits of no comparison.'

"In December, 1795, the House of Representatives of the United States, committed two persons of the names of Randall and Whitney, for attempting to corrupt the integrity of certain members, which they considered as a contempt and breach of the privilege of the House; and the facts being proved, Whitney was detained in confinement a fortnight and Randall three weeks, and was reprimanded by the Speaker. The editor of the *Aurora*, of Philadelphia, William Duane, was, for defamatory articles, declared to be guilty of breach of the privilege of the Senate.

"In the debate in the Duane case, Mr. Senator Pinckney, who opposed the proceedings, after citing the privileges of Congress, says that each House has power to enforce complete order and decorum within their own chamber; to clear the galleries if an audience is unruly, and to punish their own members; to take care that no arrests except for treason, felony or breach of the peace, shall keep their members from their duty. There can be no doubt but that the Legislature of the State of New York has as extensive if not more extensive privileges than the Congress of the United States. It is the successor of the colonial Legislature which derived its privileges from the parliamentary law of England, and is not restricted in its privileges by the Constitution of the State. Mr. Pinckney, in the speech quoted above, seemed to intimate that the privileges of State Legislatures were more in their discretion than those of Congress.

"The Constitution of this State of 1777, declares that the Assembly should enjoy the same privileges and do business in like manner as the Assembly of the colony of New York of right formerly did.

"It is admitted that the Parliament of England, and the courts of law, have cognizance of contempt, and are authorized to punish for such contempts. It is also admitted that the State Legislatures have equal authority, because their powers are plenary; they represent their constitutents completely, and possess all their powers, except such as their constitutions have expressly denied them; that Congress has no natural or necessary power, nor any powers, but such as are given to it by the Constitution. Therefore, the Constitution expressly and directly exempts members of Congress from personal arrest, and, therefore, with Congress no further law is necessary, the Constitution itself being the law; still under the provision of the Constitution, which confers upon Congress the right to make all laws necessary and proper for carrying into execution the powers vested by the Constitution in them, it would be within their power to establish any regulation of law in regard to the breach of their privilege, which they might desire. It is laid down by parliamentary writers that, 'even in cases of treason, felony and breach of the peace, to which privilege does not extend, as to substance, yet in Parliament a member is privileged as to the mode of proceeding. The case is first to be laid before the House, that it may judge of the fact and of the grounds of the accusation, and how far forth the manner of the trial may concern their privilege. Otherwise it would be in the power of other branches of the government, and even of every private person, under a pretence of a charge of treason, felony and breach of the peace, to take any man from his service in the House, and so as many, one after another, as would make the House what he desired it should be.'

"The rule in this country has not been carried to this extent, but the ruling is well established that, where any body desires the appearance of a member of the Legislature, or of Congress, as a witness, or in any other manner, first the permission of the House of which he is a member is asked, and then the question is before the House, whether they will or will not grant permission to the member to attend before any court or other House of Parliament. The Senate of the State of New York has no right to summon within its presence, or before any committee of that body, any member of the Assembly, without first, in due and courteous form, asking permission of the Assembly that such member may be summoned. If then, the Senate of the State has no such power, can it, in reason be contended, that a court, an inferior body, and, to a great extent, under the direction and control of the Legislature, shall have the power to subpœna, at its will, a member of either House of the Legislature and take him from his duties as a representative of the people? Your committee are of the opinion that no such doctrine can be maintained upon any well settled and grounded principles of parliamentary law, as applicable either to the Parliament of England, or to any legislative bodies in this country, and your committee can readily see the great danger to which such assumption of power on the part of the courts would inevitably lead.

"Your committee have examined, with great care, the instances of breaches of privilege of the Congress of the United States, the first parliamentary body in this country, and they find but few instances where the privileges of either House of Congress have been violated. On the 22d of June, 1822, it seems that an assistant doorkeeper of the Senate of the United States had been subpœnaed to appear before a committee of the House of Representatives, when Mr. Senator Holmes, from the State of Maine, offered a resolution that said assistant doorkeeper be permitted to attend as such witness. During the debate on the resolution, Mr. Foote, a Senator from Connecticut, used the following language: "That as the officers of the Senate were not subject to be taken from their duties by the process of any court, so neither could a doorkeeper, by any process from the other House, be taken from his duties." It was conceded that the doorkeeper was only required to attend before the committee during the recess of the Senate, and therefore the discussion ceased. This statement by Senator Foote seems to show the fact to be, that up to that time, there was no question but what members of Congress and the officers thereof, were exempt from obeying any writ of subpœna, whether issued by a court or by either House of Congress. Your committee have found two English cases in their researches, which would in the least question the principles they believe govern questions of this character. The one is the case reported in 1 *Saukeld*, 279, *Dominux Rex* v. *Dominux Preston*. There Lord Preston had been committed by the Court of Quarter Sessions for refusing to appear and testify before the grand jury in a case of high treason. He was brought before the Court of King's Bench on a writ of habeas corpus, when Lord Holt used the dictum that it was a great outrage, and had he been present at the commital he would have imposed a fine. It does not appear that Lord Preston was even a member of Parliament, or that Parliament was in session at the time, nor does it appear that he pleaded his privilege either as a member of Parliament or as a peer of the realm. And under the English rule, as your committee understands it, had Parliament not been in session, and had the time of exemption after the session of Parliament expired, then Lord Preston would not have been exempt from testifying before the grand jury in a case of high treason. The next is the case of Lord Ferrers, which occurred in 1757. An attachment issued against Lord Ferrers out of the Court of Westminster Hall for refusing to obey a writ of habeas corpus which had been issued, requiring him to produce in the Court of Westminster Hall the body of Lady Ferrers, she alleging by prayer addressed to the chief justice, that the conduct of her husband was so harsh, tyrannical and abusive, and so endangered her peace of mind and her life, that she required to be present at the court to present her petition, and ask its protection. In that case it was a refusal to obey a writ of habeas corpus, where the party who was required to obey such writ had, as appeared to the court, been guilty of a breach of the peace, to wit: Physical abuse to Lady Ferrers. Under these circumstances the House of Lords passed the following resolutions:

"'It is hereby ordered and declared that no peer or lord of Parliament hath privilege against being compelled by process of the courts of Westminster Hall, to pay obedience to a writ of habeas corpus directed to him.' The writ of habeas corpus requires not the presence of the member himself, but the production of some person alleged to be in his custody or under his control, and therefore can be complied with without the necessity of the member being absent from his duties upon the House of which he may be a member, and is very different from arrest under a process issued out of court which actually takes the body of the member, and therefore takes him from his duties in the House to which he has been elected.

"The people of the State of New York very early took into consideration this question of privilege; and the Legislature, as far back as the 20th of February, 1788, passed the following statute:

"'Every member of the Legislature shall be privileged from arrest on civil process during his attendance at the session of the House to which he shall belong, except on process issued in any suit brought against him for any forfeiture, misdemeanor or breach of trust in any office or place of public trust held by him.' (*Laws of* 1788; 1*st ed. of Revised Statutes, vol.* 1, *p.* 154.)

"This qualification would indicate that in all other cases the member was absolutely exempt from arrest.

"The gentlemen who appeared before the committee seemed to press very strongly the idea that an attachment was not a civil process. There can be no question but what the subpœna issued in this case was a civil process, and, under the authorities above cited, void *ab initio*. Therefore your committee cannot see by what force of reasoning an attachment issued against a person for non-compliance with a summons of subpœna can be tortured into a criminal process. In other words, your committee are of the opinion that the proceedings are void from the beginning, and that no legal process can be founded upon one which was void of itself. If a member was privileged from attending on the summons of a grand jury in the first place, his refusal was no contempt of the court out of which such process issued, for he had committed no offense. He had simply availed himself of a right which the statute of the State and parliamentary law gave him; and your committee is of opinion that it is a novel doctrine, dangerous in itself, that a person availing himself of the privilege granted to him by the laws and Constitution of the land, becomes guilty of a crime and is liable to arrest for the exercise of the privilege thus conferred upon him. The distinguished judge himself admitted the danger to which the construction of the statute, which he seemed to desire to press upon the committee, would lead, and it needs no argument to show how dangerous it would be if such a course were allowed to be pursued. There are sixty-two counties in this State. There are sixty-two grand juries sitting, many of them during the session of the Legislature. Suppose it established that a member is liable to arrest for disobeying a summons to appear before a grand jury. How easy would it be for designing men to thus deprive the House of members to an extent sufficient to embarrass its business; or again, for designing persons to change the political complexion of the House from

one party to another, by getting up fictitious charges before a grand jury, and issuing subpœnas to members, and on their non-compliance, issuing attachments, and causing their arrest and transportation to the different shire towns of the counties. Your committee deem it not necessary to follow this line of argument. The mere statement of it is sufficient to show how dangerous such a rule would be.

"Finally, your committee, in full view of the facts, and after a full consideration of the law and precedent governing cases of this kind, have come to the conclusion that the arrest of the Hon. Henry Ray, on January 21, 1870, a member of the Assembly from the first district of the county of Ontario, on an attachment issuing out of the court of Oyer and Terminer, then being held in the county of Saratoga, of which the Hon. Platt Potter was presiding justice, was a high breach of the privileges of this House by said Potter, and deserves the censure of this House; and your committee are further of the opinion, that W. B. French, in causing the issuing of such attachment, was guilty of a high breach of the privileges of this House, and that the said Windsor B. French, district attorney as aforesaid, deserves the censure of this House. Your committee are also of the opinion, that the arrest of Henry Ray, in the city and county of Albany, by Mr. Elisha D. Benedict, a deputy sheriff of the county of Saratoga, was a high breach of the privileges of this House, and that said officer deserves the censure of this House."

Thereupon a series of resolutions were passed that the Hon. Platt Potter, Windsor B. French, district attorney of the county of Saratoga, and Elisha B. Benedict, the officer who executed the writ, be summoned to appear before the bar of the House for a high breach of its privilege.

In pursuance of such resolutions these gentlemen appeared at the bar of the House at noon on Wednesday last. Mr. Justice Potter, being asked to render his excuse for the breach of privilege, requested to be heard by counsel, which request was denied. Thereupon he proceeded to read a very carefully prepared and able argument defending the course he had pursued. He began by denying the right of the House to summon before its bar a judge of the Supreme Court to answer for a judicial act, and stated that he appeared not in obedience to their mandate, but out of courtesy to their honorable body, and he proceeded to show, *first*, that the Supreme Court was co-ordinate with the Legislature, and that one branch of the government could not summon before it, or subject to censure, a co-ordinate branch; *second*, that the attachment for contempt was not a civil process, and therefore not covered by the privilege of the House. The argument of the learned judge was very elaborate, and was listened to with much attention by the members. After considerable discussion a motion was passed censuring Mr. Justice Potter, but expressing the opinion that he had acted conscientiously and without intent to violate the privilege of the House.

While we fully coincide with the views of the committee as to the privilege of the House, and as to the necessity of maintaining that privilege, yet we fail to discover any thing in their report or in the proceeding that can justify the censuring of Mr. Justice Potter. The committee were in error in supposing that the only question to be determined was that of privilege. There never was any question about that. The exemption of members of legislative bodies from arrest on civil process, has been an established fact for centuries, and is expressly provided by statute. The most important question for them to have determined was as to who was properly censurable for the violation of that privilege. We are very clear that the court could in no wise be charged with dereliction. It does not appear that it was in any manner brought to the knowledge of the court that Mr. Ray was a member of the Assembly, and Justice Potter himself claimed before the committee, that the writ was issued by him without a knowledge of that fact. This may very well be, for there is nothing that would require the fact to be set forth in the application for an attachment. The judge had an undoubted right to rely on the papers and evidence before him, and was in no wise bound to make outside investigation as to the *status* of the delinquent witness.

We do not discover any difference between this case and one where a member is arrested on an order of arrest granted in a civil action. The privilege of a member arises simply from his temporary condition. An expulsion from the House, or an adjournment, strips him of that privilege, and he may be arrested the same as any other person. Now, suppose that, instead of issuing an attachment, Justice Potter had granted an order of arrest against Mr. Ray, and that the day following the granting of such order the Legislature had adjourned, and Mr. Ray had returned home and been there arrested on such order. It would not be for a moment claimed that Mr. Justice Potter had been guilty of a breach of the privilege of the House, in granting such order. But if it were a breach of that privilege on his part, that breach occurred, and he became liable to censure, upon the instant of granting the order, so that the subsequent adjournment could not in the least affect the question. If therefore it is no breach of the privilege, on the part of the Justice, to grant an order of arrest against a member during the session of the Legislature, which order is not served until after the adjournment of that body, it is no more a breach to grant an order which is served during such session. We take it that the breach of privilege does not occur in *granting* an order, but in *serving* it; and that only those implicated in the *arrest* are guilty. When Mr. Ray pleaded his privilege to the sheriff who held the process, that officer was bound to satisfy himself as to its correctness, and, in making the arrest, acted at his peril. There is nothing in the report of the committee, or in the authorities cited by them, that in any manner elucidates this question.

They should have found whether or not a judge, in granting an attachment, or a mesne process, is bound to satisfy himself as to the condition of the party affected. If he is not, we fail to discover by what logic he can be made amenable to censure. It may be that a court of justice is bound to take judicial cognizance of who are members of the Legislature, but the committee fail to find such to be the fact. There is not on the Bench of the State a more honor-

able or conscientious judge than Judge Potter, nor one who would be less likely, knowingly, to infringe upon any of the high prerogatives of the Legislature, and the indignity which the Assembly thus needlessly put upon him, is to be regretted.

CURRENT TOPICS.

It is rumored that an effort is being made by some western delegations to secure the appointment of Senator Drake, of Kentucky, to one of the vacant seats on the United States Supreme Court Bench. If there be one position more than another for which Senator Drake has demonstrated his unfitness, it is that of Judge of the Supreme Court. His bill to deprive that court of jurisdiction over acts of Congress could never have emanated from a sound lawyer, for no lawyer of any consideration would ever advocate a measure to override and trample under foot the Constitution of his country.

As we have heretofore predicted would be the case, the appeal of Governor Hoffman to the Legislature to cease special legislation, has effected nothing. The number of bills introduced relating to special and local matters, is fully equal to, if not in excess of, those introduced in former years. The Hon. John L. Flagg recently made in the Assembly a very strong protest against this perversion of legislation, but he might as well have talked to the winds. The honorable legislators will persist in trading their birthright for a mess of pottage, and the only hope there is to the people is, that the Governor will have the stamina to exercise largely his veto power.

A bill is before the Legislature which authorizes banks doing business, under the State law, to take seven per cent interest on loans, discounts, etc., and to take it in advance. Charging a higher rate than that specified, entails a forfeiture of the entire interest, and renders the bank liable for double the amount of interest paid. But the purchase, discount or sale of a *bona fide* bill of exchange note or other evidence of debt, payable at another place at not more than the current rate of exchange for sight drafts, or a reasonable charge for collecting the same, in addition to the interest, is not usurious. The intent of the bill is to place State banks on a footing of equality with National banks, but we should have regarded it more highly, if it had simply abolished all usury laws.

The New York *Times*, which has been "shrieking" about the corrupt judiciary for so many months, has at length discovered that there are one or two upright judges in the State. The confession would have come with more grace at an earlier day. It is a fact known to the profession, that these wholesale denunciations of the bench and bar usually come from men ignorant of the law and of the prescribed methods of administering justice. For a lawyer to defend a prisoner whom they regard as guilty, or for a judge to grant some writ or order that to them seems improper, is conclusive evidence of corruption, and straightway the wail goes up. Confined to this class it is a matter of no serious consequence, but when such papers as the *Times* and others of that ilk, who ought to and do know better, take up the cry, the evil becomes grave. The dignity and authority of the bench is lessened, and the people come to look upon the judges and their decisions with contempt—a very long step toward anarchy and misrule. The judges of this State are, as a class, learned, faithful and upright. That there may be one or two exceptions is quite possible, and by no means wonderful. If the Saviour could not select twelve disciples without getting one Judas, it is hardly to be expected that the people should be more fortunate in selecting forty or fifty judges; and it would be just as sensible and consistent for the public press to condemn the whole number of the apostles for the treason of Iscariot, as it is to denounce the entire judiciary for the derelictions of one or two.

Mr. Justice Barnard, of the Supreme Court, does not purpose to allow counsel to aid and abet, with impunity, the violation of an injunction order. An order was recently issued restraining Ramsey & Co. from proceeding in a certain suit against the Erie railroad company, but the order was disregarded and the proceedings continued. The judge said it was manifest that the plaintiffs did not proceed without the intervention and assistance of counsel, and ordered a reference to ascertain whether any officer of the court had so far disregarded his duty and violated his professional obligation as to advise or assist the disobedience alleged. On another point, of interest to the profession, the judge expressed himself as follows

"It appears upon the papers before me that Mr. D. B. Eaton was, at the commencement of this action, one of the attorneys for the plaintiff; that he was formerly the general attorney and counsel for the defendant, the Erie railway company; and if Mr. Eaton drafted the complaint in this action, as I have reason to believe, no one can doubt for a moment that he acquired his intimate knowledge of the secret history of the Erie railway company, the proceedings of private meetings of its board of directors in former years, and of its various negotiations and transactions, while he was counsel for that company, and the court knows no more flagrant nor odious violation of professional confidence than for an attorney who has been dismissed by his client to use his knowledge of that client's affairs, acquired as his counsel, in bringing an action for a stranger against his former client. An attorney will be restrained by injunction from communicating to a party who is suing a former client knowledge or matters of evidence which have come to him in his employment for such client, and a party will be restrained from using in his action or otherwise any documents or matter of evidence which the attorney had so obtained. On the same principle the court will, upon its own motion, ascertain if an attorney of this court has been guilty of such breach of trust, and, if so, will disbar him."

We rejoice to see that our law schools are, almost without exception, in a prosperous condition. These institutions are doing much to counteract the evils which threaten the administration of civil justice from too great laxity in the admission of candidates to practice at the bar. Although many excellent lawyers are unfriendly to the law school, we believe that the profession at large consider it a valuable if not an essential aid in legal training. While there is much that cannot be learned in the school, there is vastly more that the office does not teach. In the technicalities of practice, in the rules of pleading and evidence, and the application of the law to the concerns of daily life, the routine of the office furnishes the best, nay the only instruction. But here its benefit ends. If

the student is satisfied with its teachings, he may become a sharp attorney but never a great lawyer.

If he, however, desires that larger cultivation which will fit him for the higher walks of the profession, he must look elsewhere, and we know of no better place to direct him than to a good law school. By following faithfully the course of study required or recommended by almost any one of the institutions established in various parts of our country, he cannot fail to gain a comprehensive knowledge of the principles of legal science. The school will not alone, indeed, nor can it be expected to prepare him to take part at once in the trial of causes. It must be supplemented by an apprenticeship in the office. But it will so ground him in the fundamental maxims of the law, that he may hope, if diligent and patient, not only to obtain reputation and profit, but to become an ornament and honor to his profession. While there may, at this time, exist many defects in the organization and methods of conducting our law schools, they are such as time and experience will no doubt amend. We trust that the profession will see to it that our schools be sustained as not only instruments for the education of students, but as a means of elevating the character of the profession, and of conferring benefit upon the country at large.

THE LATE JAMES T. BRADY.

The Law Institute of New York city, of which Mr. Brady was President at the time of his death, shortly after that event, appointed a committee to procure a marble bust of the deceased. This bust having been procured, the ceremony of presenting it to the Institute took place in the General Term Chambers in that city on the 9th inst. A very large number of the members of the bench and bar was present, including Ex-Judges John W. Edmonds and John K. Porter; Judges Ingraham, Cardozo, Monell, Barbour, Van Brunt, Daly, Spencer, and others. James W. Gerard was chosen chairman of the meeting, and having taken the chair, the bust was unveiled and presented to the Institute by Judge Edmonds. After detailing the proceedings of the Law Institute appointing a committee to procure the bust, he proceeded as follows:

"In behalf of that committee, I am now here to report to you our action and unfold to you the work we have accomplished. I should be unfaithful to the feelings of the committee, if I should, in the performance of the duty now devolving upon me, omit to call attention to what they deem the deep significance of this, the greatest effort ever made by the bar of New York, to do honor to the memory of one of its members. The event which is now being consummated in your presence is not merely in commemoration of the virtues which adorned his private and political life, though their disinterestedness at once warmed the hearts of the good, and put to shame the aspirations of the selfish; not so much in memory of his wit and eloquence, though the one was 'as gentle as bright, and ne'er bore a heart-string away on its blade,' and the other was as 'rapid and deep and as brilliant a tide as ever bore freedom aloft on its wave;' not so much to call to mind the warm-heartedness which ever placed at the service of the friendless his powers and his purse; not so much even to bring to the view of the beholder that gleam of inspiration, those tints of glory, which in his loftier moods caused his face to glow with the elevated expression which the artist has so happily portrayed in the figure before us; but rather to perpetuate and, by the force of his example, extend the influence of that lofty and even fastidious integrity which marked his whole professional career. No man that ever practiced among us had a livelier sense of the duty which that integrity imposed upon him as a lawyer — duty to his client, to the suffering and the friendless, to his brethren of the profession, to the judges on the bench, to the administration of justice among men, and to the whole people. Who ever knew him to betray the secrets of his client? Yet, amid his varied employments, how often must he have been intrusted with secrets affecting life, liberty, reputation, and property! Who ever knew him to abandon or even neglect the cause of his clients? Yet how often must it have happened that his advocacy of that cause has conflicted with his wishes and his interests! Who ever knew him wrongly to advise his clients, when such advice would have given the excuse of his sanction to a false position, though it would have poured wealth into his pockets? Who ever knew him to falsify his word to a brother in the profession, or by sharp practice to take advantage of a slip of his adversary? Who ever knew him to pander to popular prejudice by a willing advocacy of a palpable wrong? Who ever knew him to be so unjust as to impute to his adversary, as matter of personal offense, the ebullition which zeal in a client's cause might have made obnoxious? No! in none of those things did he fall or even falter in the course which the sternest integrity demanded of him, and in these respects he has indeed left us an example well worthy our admiration.

"But it was in his deportment toward the judiciary that his example stands out before us in noontide splendor. He saw — none more clearly — how painful was, at times, the position of the judges, and how utter was their dependence on the bar for protection. Aware, as he was, of the hostility to which the judges were exposed from the wrath of disappointed litigants; beholding how much the system of an elective judiciary had exposed its members to the assaults of the unthinking, who came to look upon them as occupying representative positions, which they could control, rather than independent ones above the noisy clamor of the multitude; conscious that the purity of the bench — the last anchor of our safety — was in danger, not from actual corruption, but from suspicion of partiality and favoritism; and seeing how the very height of the judicial position forbade its occupants from entering into any controversy of self-defense, he was fully conscious that it was the bar alone which could preserve the ermine from contamination, and he never shrank from the duty thus devolving upon the whole brotherhood of the profession. He performed that duty with characteristic wisdom — not by clamoring from the house-top, but by so deporting himself in his professional life that no judge could even be suspected of impropriety through any act of his. Of this integrity he gave a striking example when his brother was elevated to the bench. From that hour — and so during the whole residue of his life — he abstained from ever practicing in the court over which that brother presided; and this in the hey-day of his reputation, when he could have commanded retainers without stint. Noble act of integrity that it was! Thus, not merely guarding himself from what to his sensitive nature would have been offensive importunities, but screening that brother from all imputation of nepotism or partiality — an imputation at all times most damaging to a judge — but also proffering to us an example from imitating which we cannot, dare not, must not shrink. That example, cherished as we shall cherish it, will be as widespread in its influence as is the fame he has left behind him, and as enduring as this memorial that will henceforth be so constantly before us; and thus, through his brothers of the profession, will he contribute his aid toward the attainment of that model republic of which Cicero sang, and which was so long an earnest aspiration of his inmost soul. Let us on, then, Mr. Chairman, and brethren of the bar, guided by his example, and listening to the voice which thus speaks to us from his tomb, let us on and faint not in our determination to maintain the might and majesty of the law, and to preserve unsullied and unsuspected the purity of its administration. Sirs and gentlemen, our task is done, and this memorial of his greatness and your appreciation of it is now at your command." (Applause.)

At the conclusion of Judge Emonds' remarks, Mr. Gerard, the chairman, arose and said, in substance, that:

As Vice-President of the Institute, and on its behalf, he accepted the beautiful work of art — the bust of one of the most esteemed members of the bar, and one of the most honored of our citizens. But a year ago, he whose memory they were now met to honor, saw the last of earth. His body was committed to the dust from whence it came, under the splendid ceremonials of the Catholic Church, and his spirit ascended to the realms of happiness above. He, Mr. Gerard said, stood within touching distance of his sarcophagus surrounded by weeping relatives and friends, and those who loved, esteemed, and honored him. As he stood there, a gleam of sunshine broke through one of the stained windows and fell upon the bier, and the speaker thought it a beautiful association with the flight of his spirit. A lawyer, he said, has no immortality. It was proper, therefore, that they who esteemed him should raise in his honor a bust or statue, or pronounce a eulogium. His fame was evanescent. The poet, statesman, and philosopher live in their works; the lawyer's reputation is confined within the narrow limits of the court-room, and is preserved only by the recollection of the judge and the jury and surrounding friends, and by the power of the press. His works are a breath, and they pass away and die. It was, therefore, most proper that there should be respect paid to the memory of one who, like Mr. Brady, had for nearly a third of a century been the splendid light of the New York bar, at a time when bright luminaries were shining all around. And it was proper that the institute should be the deposit of the memorial, and that they should assemble to recount those great merits which made him one of the most illustrious orators and one of the most able lawyers — for he was both orator and lawyer. Mr. Gerard spoke at length of Mr. Brady's high qualities of mind and character, and

of his general classical as well as legal learning. His wit was the lightning flash; his tact was inimitable; his reply was spontaneous beyond all description; he was an honest lawyer; there was no spot upon his legal escutcheon. There were two grand conservative elements of a free government — the press and the bar; and in our city they had always maintained the honor, rights, and credit of each other. The bar had never forsaken the press in their hour of need, and the press of this city had been the great supporters of the bar. How would the lawyers of our city have ever gained any reputation except through the all-powerful press? May the press and the bar in this city ever be the two strong conservative agencies which shall support the fabric of society. The Romans had no press, but they had a bar which for six hundred years maintained the rights and liberties of the republic. He appealed to his brethren to maintain the character of the bar. There was one thing in which they were lacking — they had no *esprit du corps* — there had been none for thirty years. In former days the bar was influential legally, socially, and politically, and it was so now in Boston and Philadelphia. Here, very few of them knew each other socially, and they rarely met at table. If they often came together in that way, they would soon feel the influence. They needed something more than meetings of the bar which had not a social result.

OBITER DICTA.

N. St. John Green, an able lawyer, of Boston, has been appointed instructor in Philosophy at Harvard University. This will not interfere with his practice in Boston.

A new volume of the United States Digest will be out this spring. Since the war, work accumulated rather rapidly, and one or two years now remain to be digested.

One of the most eminent lawyers in New England used to tell young practitioners that the finest line in modern poetry was Scott's; "Charge, Chester, charge!"

It was rather cruel to say it, but perhaps the subject of the remark deserved it, that "that fellow never showed any signs of a lawyer except the tin ones on his door."

Some one, speaking of a lawyer, who had, some years ago, been for a short time on the bench, said: "He borrows a good deal from the civil law." "Yes," added a professional brother who knew him, "and from everybody else."

A Boston lawyer, who is noted for a grotesque way of putting things, was called as a witness the other day to testify to a party handwriting. "His clerk," said he, 'writes an elegant hand; his is plain, but *inartistic!*"

The Hon. Charles O'Conor must have been somewhat out of humor when, being asked, in the Court of Appeals Chamber, who it was addressing the court, replied: "That is Daniel Lord, *Jr.*, and he puts the *junior* after his name, so that he may not be mistaken for the Lord Almighty."

We learn from very good authority that Mr. William Wait, author of Justice Court Treatise and Wait's Digest, is engaged in the preparation of a work on Practice. A good work on Practice is a desideratum, and we know of no one more competent to prepare such a one than Mr. Wait.

Oliver Wendell Holmes, Jr., a son of the poet, is a promising young lawyer of Boston. He has just been appointed Instructor in Constitutional Law, etc., at Harvard College. He is also engaged in preparing the notes for a new edition of Kent's Commentaries, to be edited by I. B. Thayer, Esq., of the Suffolk bar.

A good many lawyers believe that it would be just as well for the community if the civil action of slander were abolished. The fact is, almost universally this class of suits is brought by parties whose reputation is not helped very much by a verdict. When a man of well-known character is assailed, by letting the slander alone it dies of itself.

Henry B. Stanton, of New York, is writing a historical sketch of the bench and bar of the State, with incidental notices of some of the distinguished judges and lawyers of other States. It is said that he obtained much of the valuable information he is weaving into his book in regard to the early lawyers of New York from the late Daniel Cady; and in regard to those of modern periods from the late Joshua A. Spencer and Nicholas Hill. Mr. Stanton is himself a lawyer of ability and a gentleman of culture, and is every way qualified to do full justice to the subject he has in hand.

The Columbus correspondent of the Cleveland *Herald*, in speaking of the examination of law students at Columbus, gives the following question as having been propounded to the class by one of the examiners: "A great many years ago there lived a gentleman named Lazarus, who died possessed of chattels, real and personal. After this event, please inform us, young man, to whom did they go?" The student replied: "To his administrator and his heirs." "Well, then," continued the examiner, "in four days he came to life again; inform us, sir, whose were they then?" It does not appear what was the answer of the "young man," nor have we been able to find anything in "Bingham on Descents" that meets the question.

LEGAL NEWS.

It is said that the price of divorces in Chicago has declined to $10.

The lawyers in Chicago advertise to procure a divorce in three days or no pay.

Justice Bonton, of Chicago, has sued the *Post* of that city for libel, placing his damages at $30,000.

Miss Julia F. Caffinbery has been appointed a notary public in Michigan.

John H. Flagg, Esq., of Bennington, now principal legislative clerk of the United States Senate at Washington, has been admitted to practice in the Supreme Court of the United States.

A story is going round of a New York lawyer who compelled a female client to sell her underclothes to pay his fees.

Judge Cohnan, of Georgia, has decided that a freed person is not liable for a purchase made while a slave, although he subsequently made a promise to pay it.

Francis Kernan, for several years Reporter of the Court of Appeals, has been appointed Regent of the University of the State of New York.

Governor Bowie, of Maryland, has appointed Col. William P. Maulsby Chief Judge of the Sixth Judicial district, composed of the counties of Frederick and Montgomery, to fill the vacancy caused by the death of Hon. Madison Nelson.

A suit has been instituted in the United States Circuit Court against the sureties of Talliaferro, late postmaster of New Orleans, for a deficit of nearly $29,000 in the sale of postage stamps.

Judge Harrison, of the Seventh Judicial district of West Virginia, has been impeached by the Legislature.

A man at Paris has just been sentenced to two months' imprisonment for dead-heading his way into a theatre by claiming to be a reporter.

The English courts have recently decided that a newspaper has a copyright in every word and letter of every original article contained in its pages; that no other person has a right to reprint them without permission; and that a copy is not legalized even by acknowledging its source.

B. C. Hill, formerly a telegrapher in Ohio, has been for ten years confined to his chair by rheumatism, unable to stand or walk; and in that plight has mastered several languages and the law, and has just been admitted to practice at the Ashtabula County Court.

In the Pennsylvania Legislature a bill has been introduced which provides that in actions for libel the truth of the matter charged as libelous may be given in evidence. It also provides for a change of *venue* to the place where the original publication was made.

The Governor of Pennsylvania has refused to approve the bill directing the Supreme Court to review evidence and decide capital cases on their merits.

Mrs. Amilia Hobbs has been elected a justice of the peace for Jersey Landing Township, in Jersey county, Ill., by a majority of 26 votes. This is the first woman ever elected to office in Illinois. Under the recent decision of the Supreme Court of that State, in the matter of the application of Myra Bradwell to be admitted to the bar, it is very likely that Mistress Hobbs will be held ineligible.

In the Supreme Court at Washington, last week, the case of the Providence Rubber Company, appellant, against Charles Goodyear, executor, etc., came up on appeal from the Circuit Court of the United States for the district of Rhode Island. The validity of Goodyear's patent and reissues to executors of patentees was in question. The decision of the Supreme Court affirms the decision of the Rhode Island Circuit Court against the Providence Rubber Company and others for infringement of patent.

TERMS OF SUPREME COURT FOR COMING WEEK.

3d Monday, Special Term (Issues), Kings, Gilbert.
3d Monday, Circuit and Oyer and Terminer, Greene, Miller.
3d Monday, Circuit and Oyer and Terminer, Chenango, Boardman.
3d Monday, Circuit and Oyer and Terminer, Angelica, Marvin.
3d Monday, Circuit and Oyer and Terminer, Canton, James.
3d Tuesday, Special Term, Oswego, Foster.
4th Tuesday, Circuit and Oyer and Terminer, Malone, James.
4th Tuesday, Circuit and Oyer and Terminer, Salem, Rosekrans.
Last Monday, Circuit and Oyer and Terminer, Tioga, Parker.
Last Monday, Circuit and Oyer and Terminer, Chemung, Murray.
Last Monday, Special Term, Monroe, J. C. Smith.
Last Tuesday, Special Term, Albany, Peckham.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME JUDICIAL COURT OF MASSACHUSETTS.*

ACTION.

1. One who, to become a member of a corporation, signs a by-law which pledges members to be liable "in their individual as well as their collective capacity," for all moneys lent to it, is not thereby personally liable for money subsequently lent to the corporation, without other evidence that it was lent on the credit of the pledge in the by-law than that the preamble thereof sets forth that the design of the corporation is to afford to persons desirous of saving their money the means of employing it to advantage. *Flint* v. *Pierce.*

2. The owner or occupant of land is liable in damages to those coming to it, using due care, at his invitation or inducement, express or implied, on any business to be transacted with or permitted by him, for an injury occasioned by the unsafe condition of the land, or of the access to it, which is known to him and not to them, and which he has negligently suffered to exist, and has given them no notice of. *Charleton* v. *Franconia Iron and Steel Co.*

3. The owner of a wharf procured a vessel to bring a cargo to it to be there discharged, and suffered her to be placed there, at high water, over a rock sunk and concealed in the adjoining dock. Of the position of the rock and its danger to vessels he had long been aware, but gave no notice thereof to the owners of the vessels, or any one in their employment. Without negligence on their part, the vessel settled down upon the rock with the ebb of the tide, and was bilged by it. *Held*, that he was liable in damages whether or not he owned the soil of dock, and whether or not his wharf was a public wharf. *Ib.*

4. One who maintains a vault so that with his knowledge filthy water habitually filters from it, whether above or below the surface of the ground, into land of a neighbor, where it injures a cellar and well, is liable in damages for the injury without other proof of negligence. *Ball* v. *Nye.*

ARBITRAMENT AND AWARD.

1. In an action on an award of arbitrators, under a submission *in pais*, by which the defendant undertook to do an act which he was not legally competent to perform, which undertaking was the consideration for the submission on the part of the plaintiff: *Held*, that the submission, not being binding on both parties, was binding on neither, and, with the award, was void. *Yeomans* v. *Yeomans.*

2. The submission of a cause of action to four arbitrators by whose "final award" the parties promised to abide, their award "that we come to the final conclusion that in the amount of damages we do not agree, but our agreement is that each party pay his own arbitrators" a certain sum each; and the payment of one of the arbitrators by the plaintiff, are no bar to another action by the same plaintiff against the same defendant, on the same cause. *Smith* v. *Holcomb.*

BANKS.

An action against a bank for the conversion, or the loss by gross negligence of valuable articles deposited with it, as bailee, without hire, cannot be sustained on evidence from which the inference that the articles were stolen by servants of the bank, selected and continued in its employment without negligence, who, in the proper course of business, had access to them, is equally deducible with any other inference. *Smith* v. *First National Bank.*

BANKRUPT.

The provisions in the United States bankrupt act (U. S. St. of 1867, chap. 176, § 14), that an assignment under the act shall vest in the assignee the title to all the bankrupt's property, "although the same is then attached on mesne process," and "shall dissolve any such attachment made within four months next preceding the commencement of said proceedings" in bankruptcy, does not prevent the enforcement of a judgment against the bankrupt on a portion of his property attached in the action more than four months before he commenced proceedings in bankruptcy. *Bates* v. *Tappan.*

COLLATERAL SECURITY.

It is competent for a creditor who holds a mortgage or other security for a subsisting debt to absolve the debtor from personal obligation, and agree to have recourse to the security alone for payment. *Ball* v. *Wyeth.*

CONTRACT.

No demand or notice is necessary before bringing an action on a contract after the expiration of a definite time, which, by the terms of the contract, was fixed for its performance. *Negus* v. *Simpson.*

CORPORATION.

To decree an absolute and final dissolution of a corporation, at the suit of an individual, is no part of the general jurisdiction of a court of law or of equity, and can be justified only by express statute. *Folger* v. *Columbian Insurance Co.*

COSTS.

1. In an action at law neither party has a legal claim for costs against the other until after final judgment. *Ross* v. *Harper.*

2. The costs of a bill in equity, brought by executors and trustees to obtain the instruction of the court as to the construction of a bequest, are to be borne by the residuary assets. *Bowditch* v. *Soltyk.*

DAMAGES.

In assessing damages for assault and battery the jury may consider as an aggravation of the tort the mental sufferings of the plaintiff from the insult and indignity of the defendant's blows. *Smith* v. *Holcomb.*

DEED.

1. A warranty deed of land, duly executed and recorded, raises a presumption that the grantor had a title which

* From 99 Mass., H. O. Houghton & Co., Boston.

he could convey, and that he, by his deed, vested a seisin of the premises in the grantee. *Farwell* v. *Rodgers.*

2. Influence properly gained, although used for a selfish purpose, and to obtain an unjust advantage, will not avoid a deed thereby procured, unless there is fraud or duress, or unless it is so exerted as to substitute the will of him exerting it for that of the grantor to such a degree that the latter is no longer a free agent. *Howe* v. *Howe.*

EASEMENT.

If the grantor of a lot of land reserves "the right to pass and repass over the granted premises for the purpose of repairing his building" on an adjoining lot, "at all times when necessary," the grantee is entitled to reasonable notice of the intention of the grantor to make repairs, before being liable to an action for obstructing the right of way. *Phipps* v. *Johnson.*

ESTOPPEL.

A verdict and judgment are conclusive by way of estoppel only as to facts without the existence and proof or admission of which they could not have been rendered. *Burlen* v. *Shannon.*

EVIDENCE.

1. On trial of the issue of the insanity of a woman during a certain period, evidence of her general reputation in the neighborhood at that time as insane, and of declarations of her parents and others, since deceased, that she was then insane, and opinions of witnesses personally acquainted with her, but not experts, as to her mental condition at that time, are inadmissible. *Commonwealth* v. *James.*

2. The usage of a trader to withhold from his agents authority to sell goods on credit is immaterial, and so inadmissible, on the question whether he specially conferred such authority upon an agent, who admits that it was not contained in his original contract of agency. *Bell* v. *Smith.*

FRAUDULENT REPRESENTATIONS.

Evidence that at the time of the sale of an express which was run over the line of a railroad, the seller, having notice from the railroad corporation that on a certain day it would take back the privileges which it had allowed to express men over the road, in order to make such arrangements for the future as might be desirable, did not mention this to the purchaser, and represented to him that he could continue to run the express over the road, and would have no difficulty in making arrangements with the corporation for the purpose, but that the purchaser knew that the seller had no arrangement with the corporation which would prevent it from withdrawing at any time the privilege of running the express over the road, is not sufficient to sustain an action by the purchaser against the seller for false and fraudulent representations. *Putney* v. *Hardy.*

JUDGMENT.

In a suit, based on the N. Y. Revised Statutes, part 3, title 4, chap. 8, art. 2, § 47, of a stockholder of a corporation chartered under the law of New York, against the corporation, for a violation of its charter in declaring and paying a dividend out of its capital stock, a decree of the Supreme Court of New York declaring the corporation dissolved, is in access of the jurisdiction of the court, and, therefore, entitled to no faith and credit in this Commonwealth as a judicial proceeding. *Folger* v. *Columbian Insurance Co.*

LARCENY.

If goods of a master fraudulently appropriated by his servant were, at the time of such appropriation, in the possession of the master, whether actual or constructive, although in the custody of the servant, the crime is larceny. *Commonwealth* v. *Berry.*

LICENSE.

In an action of tort by a married woman for quarrying and carrying away stone from her land, evidence that she saw the stone (which was quarried within fifty rods from her dwelling house) carried by her door from time to time during a year, knowing that the defendant supposed himself to have a license to quarry and remove it, is competent evidence of a license from her to him to do so. *Merrick* v. *Plumley.*

MILL AND MILL PRIVILEGES.

1. If the owner of a mill and reservoir dam on the same stream renders intermediate land wet and less valuable for cultivation, by letting down water from the dam in the dry season of the year, he is not liable in damages, if the water which he lets down is reasonably necessary for the use of his mill, and does not increase the volume of the stream beyond its usual limit, or overflow its natural channel; nor is liable in damages for flowage if the water which he lets down, and which, if unobstructed, would not flow the intermediate land, does flow it by filling a pond which is raised by the dam of another mill-owner, who has a right to flow it by that dam at all seasons of the year. *Drake* v. *Hamilton Woolen Co.*

2. The owner of a mill on a stream, who has a right to draw from his reservoir more or less than the natural flow of the stream, at his pleasure, to work his mill, is entitled to relief in equity against the owner of an intermediate dam which delays the passage of the water by the time necessary to fill the defendant's pond, and by its leaky condition, allows the water to run so to waste, when the plaintiff's mill is not at work, as to make it necessary to fill the pond from day to day. *Brace* v. *Yale.*

PROMISSORY NOTE.

1. In an action by an indorsee against the indorser on a promissory note, evidence of a waiver of demand and notice is sufficient to support an allegation in the declaration of demand and notice. *Harrison* v. *Bailey.*

2. In an action by an indorsee against the indorser on a promissory note, evidence that after the note fell due the defendant promised the plaintiff to pay it, is admissible with other evidence as tending to show a waiver of demand and notice. *Ib.*

SALE.

A buyer sent an order for goods to the seller in another State, who there delivered them to a carrier for transportation to the buyer. *Held*, that the sale was completed in the State where the seller resided, although the terms thereof were originally agreed on by agents of the parties at the residence of the buyer. *Kline* v. *Baker.*

TRUST.

A testatrix, in her will, gave "the improvement of my property in trust to" a trustee named, "the income to be paid equally to my brother and my sister during their natural lives, and, at their death, the principal I give to my nephews and nieces then surviving." The brother died after the death of the testatrix and left the sister surviving. *Held*, that the whole income of the property was payable thereafter to the sister until her death, until which time the gift over in remainder to the nephews and nieces was not to take effect. *Loring* v. *Coolidge.*

SUPREME COURT OF ILLINOIS.*

AGENCY.

1. *Evidence of.* — Where a person in charge of a warehouse purchases grain, and ships it in the name of the owner of the warehouse, and he advances money to him on such shipments, and the purchaser ships none in his own name, it may be inferred that the person making the purchases is the agent of the person in whose name it is shipped, and the latter will be held liable to a person to pay for grain of whom a portion so shipped was purchased. *Malburn* v. *Schreiner.*

2. *Liabilities of agent to principal: agent in treating with principal: must disclose all things connected with his agency.* — Where a party accepts the position of an agent to take charge of the lands of his principal, collect the rents and

* From N. L. Freeman, State Reporter; to appear in volume 49, Illinois Reports.

royalty, and pay the taxes, a fiduciary and confidential relation is thereby created in regard to everything relating to such lands; and in treating with his principal for the property, the agent is bound to make the fullest disclosures of all matters connected therewith, within his knowledge, which it is important for his principal to know, in order to treat understandingly. *Norris and Foltz* v. *Taylor.*

3. *Concealment of facts by an agent — avoids the sale.* — And when an agent, occupying such a relation to his principal, purchases the property at a greatly inadequate price, by concealment of facts and information, relating thereto, which he was bound to disclose, the sale will be set aside. *Ib.*

4. *Of a party purchasing from the agent with knowledge of the agent's fraud.* — And when a party purchases from the agent, a portion of the property so purchased from the principal, with full knowledge of the transactions between the agent and his principal, the sale cannot be sustained *Ib.*

BILLS OF EXCHANGE.

1. *Discounted by acceptor before maturity: does not lose its negotiability: and if re-issued: indorsers are liable.* — The principle is well settled, that a bill of exchange, discounted by the acceptor before maturity, does not lose its negotiability, and if re-issued by the acceptor, before it falls due, to a stranger who takes it in good faith, and for a valuable consideration, the parties whose names appear on the bill as indorsers, are liable to the holder, the same as if it had not passed through the hands of the acceptor. *Rogers* v. *Gallagher.*

2. *What considered a sufficient consideration for the transfer by the acceptor.* — And in such case, where the party to whom the bill is re-issued, takes the same on account of indebtedness of the acceptor to him, such indebtedness constitutes a sufficient consideration to support the transfer. *Ib.*

CAUSE OF ACTION.

1. *Where injury complained of occurred after suit brought: can be no recovery.* — In an action on the case against a railway company, to recover damages for stock alleged to have been killed by the defendants' cars, the proof showed that a part of the injury complained of, and for which the plaintiff recovered, was not sustained until after the commencement of the suit: *Held*, that as to the stock killed after suit brought, a recovery could not be had. *Toledo, Peoria and Warsaw Railway Company* v. *Arnold.*

2. *What will be considered sufficient proof that the injury was done by the defendants' trains.* — And in such case, where there is no positive proof that the defendants operated the railway, which it is claimed committed the injury, but such fact is inferentially shown by the fact, the defendant was incorporated by the name it bears, at a session of the legislature next previous to the injury complained of,—under such circumstances, the inference is, that such injury was done by the defendants' road, there being no proof that any other road was operated in that portion of the county where the damage was done. *Ib.*

CHATTEL MORTGAGE.

1. *Irregularity in the foreclosing proceedings: does not invalidate the mortgage.* — The validity of a chattel mortgage is not affected by reason of an irregularity in the proceedings to foreclose it. *Hanford v. Obrecht.*

2. *Instruments offered in evidence in the courts of this State: require no stamps.* — Instruments are not required to be stamped to be evidence in the courts of this State. And no unfavorable inference can be drawn against the party offering such unstamped instrument, by reason of the want of a stamp. *Ib.*

3. *Possession by mortgagor after default.* — The principle is well settled, that where a mortgagor of chattels retains the possession of the mortgaged property, by or through the act of the mortgagee, after default made, such retention is fraudulent *per se.* *Ib.*

4. But where, after the default of the mortgagor, a sale of the property under the mortgage is had, and purchased by a third party, in good faith and for a valuable consideration, who leaves it in the possession of the mortgagor, then possession so acquired by the mortgagor would be lawful. *Ib.*

5. *Parol agreement to extend the time of payment: founded on a valuable consideration: binding on the parties.* — H. and wife executed to P. a chattel mortgage upon four horses, two sets of harness and a wagon, to secure a note for $300, given by H. to P. Before the mortage matured, the mortgagor let P. have one pair of the horses to apply thereon at $280, the price being $300, a deduction of $20 from the price being made in consideration of an agreement by P. to extend the time of the payment of the balance of the debt from two to three months. Before the expiration of two months after the the maturity of the mortgage, P. took possession of the other span of horses, harness and a wagon, and thereupon, the wife of H. tendered to P. the balance due upon the debt, and demanded a return of the property, which was refused. *Held*, in an action of trover, brought by the wife against P., that the agreement to extend the time of payment of the mortgage, was for a valuable consideration, and was binding upon the parties. *Pierce* v. *Hasbrouck.*

DAMAGES.

1. *What will not be considered excessive.* — In an action of trespass for false imprisonment and for assault and battery, the jury assessed the plaintiff's damages at $1,700, upon which judgment was rendered: *Held*, that such damages could not be considered excessive, the proof showing, that the defendant, influenced solely by a willful and malicious nature, procured the arrest and prosecution of the plaintiff upon a charge of larceny, without the slightest grounds upon which to base a justification of, or even to instigate, his conduct. *Reno* v. *Wilson.*

2. *Where a charge is made for probable cause.* — But, where a person in good faith, and for probable cause, makes a criminal charge against another, the party so charged cannot, in the event of his discharge, recover heavy damages in an action for trespass against such person. *Ib.*

3. *Excessive damages.* — And in such case, a new trial will not be awarded, on the ground alone that the damages were excessive, even though this court would have been better satisfied with a verdict for a less amount, the jury having the right to give punitive or exemplary damages, and their verdict being warranted by the facts in the case. *Ib.*

4. *Instructions.* — And in such case it is not error for the court to refuse to instruct the jury to the effect, that if they believe that the defendant ordered the arrest of the plaintiff, and at the same time, stated the facts of the case to the officer making the arrest, the defendant is not liable for the arrest, if plaintiff was committing an act which made him liable to arrest, and they should find for the defendant. It was not for the jury to determine what acts made the plaintiff liable to an arrest, and there was no proof that plaintiff was doing an unlawful act. *Ib.*

5. Nor was it error for the court to refuse an instruction which directed the jury, that unless the defendant *made the charge* against the plaintiff, he was not liable, when, under counts which charged an arrest and imprisonment, the plaintiff would have been entitled to recover, without reference as to who made the false charge. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. *Duties of: with respect to assets.* — It is the duty of executors and administrators, enjoined by law, to reduce the assets of the estate to money, and report the same to the court, to be paid upon debts and distributed among the parties entitled to receive it. *Johnston* v. *Maples et al.*

2. *Cannot loan the money of the estate without legal authority.* — And if an executor loans the money of the estate, unless authorized or required so to do, by the will, he does it in his own wrong, and it operates as a *devastavit*, and creditors, legatees or distributees, may sue and recover on his bond. *Ib.*

3. *A reasonable compensation will be allowed: for necessaries furnished minor heirs having no guardian.* — And when an executor furnishes the necessary food and clothing for the support of minor heirs, having no guardian, he should be allowed to charge a reasonable compensation therefor. *Ib.*

4. *Burden of proof: in suit on an executor's bond.* In a suit in chancery on an executor's bond, by the devisees, for an alleged misappropriation of the moneys belonging to the estate, where the defendant claims that such moneys were paid over by the executor to complainants, it is incumbent on him to satisfactorily establish such fact, the money having been in the hands of the executor, as proved by his report to the court. *Ib.*

FRAUD.

1. *How shown.* — It is not the rule that fraud must be shown by affirmative testimony. Proof of such fact may be shown by circumstances, from the existence of which the inference of fraud is natural and irresistible. *Bullock* v. *Narrott.*

2. *Presumptive evidence of.* — Where a party executed and delivered to another a chattel mortgage upon certain property, which was duly recorded, and shortly after died, and in an action of replevin for the mortgaged property, which had been taken upon execution, subsequently brought by the mortgagee, it was shown that, at the time of the mortgagor's death, he had in his possession the note for which the mortgage was given as security; *held*, that this fact was a strong circumstance against the *bona fides* and honesty of the mortgage transaction, the presumption being, either that the note had never been delivered, or had been paid and taken up; and this, no matter how honest the transaction may have been. *Ib.*

IMPLIED WARRANTY OF TITLE.

Where the owner of a lumber yard adjacent to a railroad, in making sale of the lumber yard, professes to sell the superstructure of a side railway, laid upon the street, there is an implied warranty of title as to such side railway. *Woodruff et al.* v. *Thorne et al.*

INFANTS.

1. *Contracts by: for improvement of their property: not binding.* — Where work is done, or materials furnished, under a contract made with a minor, for the improvement of his property, such contract is not binding, and the contractor can claim no lien therefor against the property. *McCarty* v. *Carter.*

2. *Receipt of rents by: after majority: does not amount to a ratification of a contract.* — And where improvements are made under such a contract, the receipt of rents, after he becomes of age, from the property so improved, does not amount to a ratification, so as to operate as a lien against his property. *Ib.*

3. *Mechanics and material men: must know with whom they are contracting.* — A party performing work, or furnishing materials for the improvement of property, must ascertain whether the party with whom he is contracting is a minor or not, and if such contract is with one who has not attained his majority, it is not obligatory upon him, and the lien of the contractor fails. *Ib.*

4. *Persons having a less estate than the fee considered as owners to the extent of their interests.* — Where a person holds a less estate than the fee, he is considered, under the statute, as the owner *only* to the extent of his interest or estate, and cannot by his contract, create a lien against the property to any greater extent than his right and interest therein. *Ib.*

5. *Estate acquired by marriage subject to the lien.* — And the estate of a husband, acquired by marriage, may, by his contract, be subjected to the lien. *Ib.*

6. *Acts which will not amount to a ratification of a contract made by a person unauthorized to contract.* — And where a contract is made by a person to erect a building upon premises which belong to another, and such contract is made without the knowledge or authority of the owner, the fact that such owner, after its completion, receives the rents and profits therefor, does not amount to a ratification of such contract, so as to create a lien upon the premises. *Ib.*

INSURANCE.

1. *Against accidents.* — In an action on a policy of insurance, against death by accidents, the court refused to permit the defendant to give in evidence the application of the assured, showing, that at the time of the insurance, his occupation was that of a "switchman," and to prove in connection therewith, that the assured was killed while in the performance of the duties of a "brakeman." *Held*, that this evidence was immaterial. That the mere representation by the assured, that he was a "switchman," did not amount to a contract that he would do no act connected with such occupation, or that he would not engage in any different one. *The Provident Life Insurance Co. of Chicago* v. *Fennell.*

2. *Policy must provide for the cases in which protection from liability is sought.* — In such case the defendant cannot prohibit itself from liability, inasmuch as the policy was not against accidents occurring in the occupation of the assured, but against accidents generally, and enumerated the particular cases in which the company could not be held liable, but did not provide that it would not be liable for death occurring from a cause not connected with the occupation of the assured, or that he should not change his occupation. *Ib.*

3. *Acknowledgment in policy of the receipt of the premium: cannot be controverted.* — Where a policy of insurance, acknowledges the receipt of the premium, proof that it had not been paid will not be permitted. *Ib.*

4. *Of the policy: rule of construction.* — The rules by which a policy of insurance is to be construed, and the principles by which it is to be governed, do not differ from other mercantile contracts. But conditions and provisions in a policy of insurance are to be construed strictly against the underwriters. Where a policy of insurance contained the following clause: "It is expressly agreed that the assured is to keep eight buckets filled with water, on the first floor where the machinery is run, and four in the basement by the reservoir, ready for use at all times in case of fire": *Held*, that this could not be considered either as a condition or proviso in the policy, but was an express agreement on the part of the assured, and which must be construed like other agreements. The rule for the construction of such an agreement is, that while the assured will not be held to a literal compliance with the warranty, as for instance, in keeping the buckets filled with water during the winter season, when no fires were allowed in the building, which might be impossible, and could not have been contemplated by the parties, yet it is, under such agreement, incumbent on the assured to keep the required number of buckets in good and serviceable condition, at the places designated, ready for instant use, a failure to do which, should a fire occur, would prevent a recovery upon the policy. *The Aurora Fire Insurance Company* v. *Eddy.*

JUDGMENT.

Power of court after the term. — The power of the court over its judgments, except to amend them in matters of form, or to correct clerical errors, is gone when the term at which they were rendered has expired. After that time a court cannot, on motion, set aside a judgment. *The State Savings Institution* v. *Nelson.*

LEASE.

1. *Forfeiture: at common law: for non-payment of rent.* — The right of forfeiture for non-payment of rent, being a harsh remedy, has never been favored by the law, and where a lease provides for such forfeiture, the landlord is required, at common law, before he can declare a forfeiture, to make a demand for the rent on the day it falls due, for the precise amount, and at a convenient hour before sunset, at the place specified in the lease, or on the premises if no place is named. Such demand must be

made in fact, although no person be present. *Chapman* v. *Kirby*.

2. *What will not be deemed a valid declaration of a forfeiture: so as to terminate a lease.*—P. leased to K. a portion of certain premises, together with a specified quantity of steam power, at a stipulated rent, payable on the first day of each month, from May 1st, 1864, to January 1st, 1869. The steam power thereby leased was to be communicated from lessor's engine, through a shaft, to K.'s machinery. The lease provided for a forfeiture for non-payment of rent. K. failed to pay the rent due on the 1st day of May, 1867, and the lessor, on the 7th day of that month, caused to be served upon K. a written notice, notifying him that, by reason of such default, he had elected to terminate the lease at the expiration of ten days thereafter. The person serving such notice was instructed, by the lessor, not to receive the rent if K. should offer to pay it, which he did offer to do within the ten days after the service of the notice, and it was refused. On the first of June following, the lessor severed the connecting shaft, whereby K. was supplied with the steam power, and his machinery stopped. In an action by K. against the lessor, to recover the damages sustained by reason of such act: *Held*, that there was no valid declaration of a forfeiture by the landlord, so as to terminate the lease and authorize a re-entry; that K.'s offer to pay the rent within ten days, and the lessor's refusal to receive it, were tantamount to payment, and saved the lease from a forfeiture. *Ib.*

3. *Payment of rent made within the ten days after notice: lease saved from forfeiture.*—In giving construction to the act of 1865, this court has said, that if the tenant pays the rent in arrears within the ten days after service of the notice, a forfeiture of the lease is thereby prevented. (*Chadwick* v. *Parker*, 44 Ill. 328.) *Ib.*

4. *Mere non-payment of rent: will not authorize the landlord to enter and forcibly expel the tenant or remove tenements or appurtenances.*—Under such lease K. acquired the same right to the use of the steam power that he did to occupy the premises, and his failure to pay the rent no more authorized the landlord to cut off such power than it did to enter upon the premises, and forcibly disposses the tenant thereof. Mere non-payment of rent does not authorize the landlord to enter upon and forcibly expel the tenant, or to remove the tenements or their appurtenances, or any part of them. *Ib.*

5. *Measure of damages: for destruction of business: in consequence of cutting off the steam power.*—And in such case, where the evidence showed that in consequence of the act of the landlord, in cutting off the steam power, the lease was rendered valueless, and the stock in trade and machinery of the tenant became depreciated, and his business destroyed,—*Held*, that these were all proper elements for the consideration of the jury in ascertaining the measure of damages. *Ib.*

6. *Concerning the profits.*—And in estimating the losses sustained, by reason of the destruction of plaintiff's business, it is proper for the jury to take into consideration the extent of plaintiff's business, and his profits for a reasonable period next preceding the time when the injury was inflicted, leaving the defendant to show that, by depression in trade, or from other causes, the profits would have been less. *Ib.*

7. *In trespass.*—In all actions of tort, the measure of damages is not less than the amount of injury sustained, and in case, all of the consequential damages sustained, connected with, or flowing from the act complained of. *Ib.*

8. *Must be real.*—But the damages must be the necessary and natural result of the act, and must be real, and not speculative or probable. *Ib.*

MARRIED WOMEN.

1. *Rights of, under the act of* 1861.—Where parties residing in England were married there, and the wife, at the time of such marriage, was the owner of certain personal property, such marriage operated as an absolute gift of it to the husband, and the subsequent removal by the parties to this State, after the passage of the act of 1861, worked no change in the title to such property, which by the marriage had vested in the husband. *Dubois* v. *Jackson*.

2. The statute was never designed to take from the husband rights which had vested in him prior to its passage, or to take from him such as had been acquired in another State, subsequent to its passage. *Ib.*

MEASURE OF DAMAGES.

In action on covenant of warranty.—L., a grantee, holding a covenant of warranty, was sued in ejectment by C., and a recovery had. C. conveyed the premises to W., from whom L. purchased: *Held*, in an action of covenant by L. against his original grantors, that L., by the deed from W., obtained only the naked legal title, as the conveyance by C. to W. did not pass C.'s claim to *mesne profits;* and L., never having paid *mesne profits*, nor been damnified by the assertion of a claim to them, and C.'s right to recover them having been cut off by the statute, prior to the trial of L.'s suit, the defendants could only be charged with interest from the date of C.'s deed to W., the possession and profits having been enjoyed by L. up to that time, under defendant's deed to him, and his purchase from W. only covering the *mesne* profits back to the time when W.'s title accrued. *Wead et al.* v. *Larkin et al.*

NEW TRIAL.

Verdict against the evidence.—Where the verdict is not clearly against the weight of evidence, the judgment will not be disturbed. *Lalor* v. *Scanlon*.

PARTNERSHIP.

1. *Interpretation of particular agreement between partners.*—I. and F. entered into a written agreement, whereby F. advanced to I. $10,000, to be used by him at his saw-mill in Wisconsin, and I. agreed to consign to F., at Chicago, all the lumber manufactured by him during a certain period, and which F. was to sell, retaining his advances out of the proceeds. F. had the option of either selling the lumber by the cargo, or of yarding it, and if he sold in the former mode, he was to have a certain per cent as his commissions, and if in the latter, one-half of the profits over and above all cost, I. agreeing that the cost should not be above a fixed sum. Afterward, and before any lumber was received under this agreement, a second one was entered into, by the terms of which the former one was continued in force, but as amended by the second, and which created a partnership between them, under the name of I. and F., "for the sale of the product of the aforesaid saw-mill," and also for the purchase and sale of lumber at Chicago. This agreement provided, that the product of I.'s mill should be charged to the yard of I. & F., at $1.00 per thousand less than the market rates at the time of the arrival of each cargo at Chicago, or should be invoiced to the yard at the net cost of manufacture. The option between these two modes was left to F., who was to make his election and signify it to I. within a certain time, and which he did, and elected to take by the former mode: *Held*, that these agreements did not create a partnership in the profits of the lumber manufactured by I., at his mill; that F., by his election, became the mere purchaser of the lumber at a fixed price with reference to the market rates, taking no interest in either the losses or gains that may have attended its manufacture. *Freese* v. *Ideson, Administrator, etc.*

2. *Power of partner.*—A partner cannot sell partnership property in payment of his individual debt, without the assent of his partner; to do so is a perversion of the firm property, and operates as a fraud upon the other partner. And for the same reason, one partner cannot mortgage the chattels of the firm to secure his individual debt, without the assent of his partner, so as to prevent the latter from having such property applied to the payment of the firm indebtedness. *Smith* v. *Andrews et al.*

3. Where a partner makes such a mortgage to secure such a debt, it does not operate as a mortgage on the interest of the maker in the property, as on its foreclosure the property would be diverted from the use of the firm, and would create a tenancy in common between his partner and the purchaser or holder under the mortgage. But it may be that if, on the payment of the firm debts and a division of the assets of the firm, such property fell to the mortgagor, the mortgage would become operative and could be enforced. Such is the effect of a sale on execution of a partner's interest in the firm property. *Ib.*

PRINCIPAL AND AGENT.

Ratification.—Where a person in possession of the property of another, without the knowledge and consent of the owner, exchanges the same for other property and gives his individual note for the difference, and without disclosing the fact of ownership in another at the time of

making the exchange, and afterward the owner receives the property so taken in exchange, thereby ratifying the act of such person as his agent; and the payee of the note, after learning the fact that such person acted as agent in the transaction, fails to notify the principal that he should look to him for the payment of the note, until after the principal has settled with the agent, and in such settlement had paid the agent the amount which he had given his individual obligation to pay: *Held*, that the principal was thereby discharged from any liability to the payer of the note. *Fowler* v. *Pearce.*

RAILROAD COMPANIES.

1. *Required to deliver the goods to the consignee: at his place of business: when on the line of its track.* — Under section 22 of the act of February, 1867, entitled "Warehousemen," railroad companies are positively inhibited from making delivery of any grain which they have received for transportation, into any warehouse other than that into which it is consigned, without the consent of the owner or consignee thereof. And independent of the statute, the duty to make a personal delivery to the consignee, in cases where such delivery is practicable, is required by the common law. And the common law rule, requiring common carriers by land to make personal delivery to the consignee, has been so far relaxed as regards railways, *from necessity*, as in most cases to substitute in place of personal delivery, a delivery at the warehouse of the company. But this is upon the ground that a railway has no means of delivery beyond its own lines. And in cases where a shipment of grain is made to a party having his warehouse on the line of the road by which the grain is transported, and such consignee is ready to receive it, it is the duty of the carrier to make a personal delivery to him, at the warehouse to which it is consigned. *Vincent et al.* v. *Chicago and Alton Railroad Company.*

2. *What points are to be considered as on the line of a railway for the purposes of personal delivery.* — Where the owner of adjacent property to a railway company had, with the consent of the company, for a valid consideration, been permitted to lay down a side track, connecting with the track of the company, for the purpose of transporting to such property articles of freight, and such owner has erected thereon a warehouse, which is in readiness for the receipt of such freight, such side track is to be considered as a part of the line of the company, for the purpose of delivery under this statute. *Ib.*

3. *In what cases only: the company will be excused from delivery.* — In such cases a personal delivery must be made at a warehouse on the line of such side track, the same as if the warehouse stood upon a side track owned by the company, and the company have the right to send its cars over such track for the purpose of delivery, until forbidden by the owner, when it will be excused from delivery. And in such case, where the carrier refuses to make a personal delivery to the consignee, the party injured is not confined to the statutory redress; the right created not being a new one, nor the remedy provided adequate, he may resort to the restraining powers of a court of chancery, to prevent an injury to his business which might ensue, and which could not be compensated for at law. *Ib.*

4. *As to discriminating charges.* — A railroad company, although permitted to establish its rates of transportation, must do so without injurious discrimination as to individuals. *Ib.*

5. And when it has fixed its rates for the transportation of grain, from any given station, on the line of its road, to Chicago, it will not be permitted, on the grain being taken there, to charge one rate for delivery at the warehouse of one person and a different rate for delivery at that of another, both warehouses being upon its line or side tracks. *Ib.*

6. *Delivery must be made to the warehouse to which the freight has been consigned.* — And where the company takes grain consigned to Chicago, its duty is to deliver it in Chicago at any warehouse upon its lines, or side tracks, to which it has been consigned. *Ib.*

STATUTE OF FRAUDS.

Parol promise to give or lease lands for the life of another: not binding. — A parol promise, founded upon no consideration, made by the owner of lands, to give or lease the same to another for life, is void, being within the statute of frauds. *Holmes et ux.* v. *Holmes.*

SURFACE WATERS.

Easement and servitude in respect thereof. — The plaintiff was the owner of a tract of land less elevated than the land in the neighborhood, from which all the water that fell upon it, from rains or otherwise, flowed on to the land of the plaintiff, and which, by means of a depression in his land, ran off his land to adjoining land and thence into a natural lake. The defendant, a railroad company, made a large embankment on the line of plaintiff's land, entirely filling up this channel, thereby throwing the water back on plaintiff's land. Negligence in so doing, without leaving an opening in the embankment for the water to flow on and escape, was alleged in the declaration. On demurrer to the declaration, it was *held*, it stated a good cause of action. The owner of a servient heritage has no right, by embankments, or other artificial means, to stop the natural flow of the surface water from the dominant heritage, and thus throw it back upon the latter. *Githam* v. *Madison County Railway Co.*

TRUSTS AND TRUSTEES.

Property conveyed to a person to pay debts. — G conveyed to B certain lands, with the power to sell them and apply the proceeds in the payment of G's debts. B sold the lands, and, to the extent of the proceeds received, applied them in payment of G's debts: *Held*, in an action against B, by a creditor of G, whose claim had not been paid, that B could not be held liable for a misapplication of the funds, there being no proof that B, on receiving the deed, had agreed with G to pay this claim as a preferred debt. *Becker* v. *Williams.*

TENANTS IN COMMON.

1. *Incumbrance removed from the common estate by one: other tenant must contribute to extent of his interest: of the lien for such contribution.* — A and B were owners, as tenants in common, of a certain tract of land incumbered by a mortgage, which was foreclosed and the premises purchased by one C, who assigned the certificate to A. D, the mother of B, having a right of dower in an undivided half of the premises, and being also guardian of B, redeemed the same, by paying over to the master the full amount of the purchase, which sum was paid to A. In a suit for partition, by A against B and D, *held*, that A must take her allotment, subject to D's lien for the payment of one-half of the redemption money. *Titsworth et al* v. *Stout.*

2. That D, having redeemed the premises from the master's sale, had a valid claim against A to the extent of one-half of the redemption money paid by her, and which constituted an equitable lien on the land while in the hands of A, which a court of equity would enforce. *Ib.*

3. Where one tenant in common removes an incumbrance from the common estate, the other tenants must contribute to the extent of their respective interests, and to secure such contribution, a court of equity will enforce upon such interests an equitable lien of the same character with that which has been removed by the redeeming tenant. *Ib.*

4. *Of the purchase of an outstanding title by one tenant: rights of his co-tenant.* — And where one tenant buys in an outstanding title, he cannot set it up as against his cotenant without giving him an opportunity to contribute, and thereby participate in the benefit of such purchase. *Ib.*

TRUSTS AND TRUSTEES.

1. *Relative to the enforcement of trusts by courts of equity.* — Where a policy of insurance on the life of the assignor was voluntarily assigned by him to a trustee, for the benefit of his three children, notice of which assignment and trust was given to the company, and also to such trustee, who sent to the assignor his written acceptance thereof, but the policy and assignment remained in the possession of the assignor, and was found after his decease among his other papers; *held*, in a suit by the trustee against the administrator of the assignor, to compel a surrender of the policy to him as such trustee, and that he be declared the owner thereof:

1st. That an actual delivery of the policy and assignment thereof to the trustee were not necessary in order to complete the trust created.

2d. That the acts of the parties — the one notifying the other of the assignment and trust, and his written acceptance thereof, constituted a sufficient delivery to complete the title of the trustee.

3d. That the object sought to be accomplished by the assignor in making the assignment, namely, to make provision for his orphan children, being fully established, equity will carry out such intention, though the transfer be voluntary and without consideration, he never having manifested any desire to retract the act. *Otis et al.* v. *Beckwith et al.*

2. *Sales: intention of parties: a controlling element.* — In such cases, equity will look to the substance of the act done, and the intention with which it was done, and, in the absence of fraud, carry out such intention, and give it full effect. *Ib.*

WILLS.

1. *Extent of widow's claim to the personalty of her husband who dies testate — leaving no lineal descendants — and she renounces the will.* — A husband died testate, leaving a widow but no children or lineal descendants, and provided, in his will, that the income of one-half of his personal estate should be paid to his widow during her life, and at her death should be distributed among his collateral kindred, and bequeathed the other half to various persons. The widow renounced the will, and set up claim to the entire personal estate. *Held*, that in such case the widow was only entitled to one-third of the personal property remaining, after the payment of debts, in addition to the award of specific property. *McMurphy* v. *Boyles and Coolbaugh, Executors.*

2. *Renunciation of: does not render the testator's property intestate.* — By the widow's renunciation of the will, the property of her husband is not thereby converted into an intestate estate. The will remains, notwithstanding she declines its provisions in her favor; and in such case the 46th section of the statute of wills, which applies only to intestate estates, has no application. *Ib.*

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AGREEMENTS TO PAY DEBTS IN GOLD OR SILVER COIN.*

When the case of *Rhodes* v. *Bronson* was decided by the New York Court of Appeals (34 N. Y. 649), I regarded the point in controversy as settled and correctly settled. Consequently, I was somewhat surprised on reading the opinion and decision of the Supreme Court of the United States (36 How. Prac. R. 365 and 444), reversing that decision. And now, upon a careful review of the case and of the prevailing opinions in both courts, I am led to pronounce in favor of the reasons assigned and the conclusions arrived at by the New York court.

The New York court appears to have been content with stating and deciding upon the agreement as made by the parties, whilst the United States court has taken the liberty of reforming an agreement to *pay a debt* into one for the delivery of specific articles of personal property, and then reasons out and decides a case of its own creation.

The facts in the case were briefly these: In 1851, Christian Metz *borrowed* of the defendant Bronson $1,400, and gave a bond and mortgage to secure its future payment with interest, stipulating in the mortgage that the debt should be paid "*in gold or silver coin, lawful money of the United States.*" The debtor sold the land to the plaintiff Rhodes, subject to the mortgage.

In 1865, when one dollar in gold was worth in market $2.25 in greenbacks, Rhodes tendered to the defendant the amount due on the mortgage in the United States legal-tender notes, and demanded satisfaction of the mortgage; but the defendant refused to accept the payment as offered, on the ground that the contract called for payment in gold or silver coin.

The plaintiff, having perfected his tender by making the required deposit of the greenbacks, brought this action, demanding judgment that the mortgage be adjudged satisfied. The general term in the Eighth district of New York ordered judgment, to the effect that the mortgage was satisfied by the tender and requiring the defendant to take the money and satisfy the mortgage of record.

This judgment was taken to the Court of Appeals of the State of New York, where it was affirmed, on the ground, as I understand the opinion, that the subject of the debtor's obligation was a *debt*, as distinguished from an agreement to deliver specific articles of personal property, and was within the scope of the act of Congress of 25th February, 1862, making certain treasury notes legal tender in the payment of debts; and consequently the formal tender of those notes was a full performance of the debtor's obligation.

The case was then taken by appeal to the Supreme Court of the United States, where the judgment of the New York court was reversed, on the ground that the debtor's obligation was, in effect, an agreement to deliver gold and silver dollars and fractions of dollars to the amount of the debt, and could not be satisfied by any other mode of payment — the act of Congress of the 25th February, 1862, to the contrary notwithstanding — and the impracticable doctrine laid down as the standard rule of practice in that court, that where contracts to pay debts made payable in coin are sued upon, judgment may be entered for coined dollars and parts of dollars.

I once heard of a justice of the peace, who, in his zeal for dispensing justice in strict accordance with the agreement of the parties, gave judgment against the defendant for seven dollars, payable half in rye and half in corn; but I never heard of that judgment being followed as a precedent.

The rule is well settled, that upon an agreement to deliver one hundred bushels of wheat, the judgment for non-delivery is the market value of the wheat and interest. And upon an agreement to pay a debt of one hundred dollars in wheat, the judgment is for the amount of the debt and no more. In the one case the obligation is to deliver the wheat, and in the other it is to pay the debt.

The learned Chief Justice's analysis of the coinage acts is well executed, and the information thus simplified and thrown out to the public is valuable; but it fails to show that those acts have imparted any new life, or any wonder-working properties to the inert metal. It is gold, after all, and nothing more. If parties choose to make it an article of merchandise, as these parties did, or as the brokers have of late, there does not appear to be any thing in the coinage acts forbidding them to do so. For aught that appears, we are just as much at liberty to buy and sell gold dollars at a price agreed upon as gold spoons. It is all very true that we now have two kinds of money which are lawful tender in payment of debts, but the only effect of this is to allow the debtor to take his choice; and, of course, he will select that which is the cheapest or most easily obtained. No debtor will procure and tender gold when greenbacks are cheaper or more easily obtained; and this practical fact has led to the withdrawal of the gold from general circulation, except where some statute requires it to be used, and converted it into a mere article of commerce; so that now, it can hardly be said that gold constitutes any portion of our circulating medium.

At the time this contract was made the insertion of the clause payable in "gold or silver coin, lawful money of the United States," was utterly nugatory, for without that clause the creditor had the right to demand lawful money, and that was gold and silver coin; nothing else was then lawful money. Hence the natural inference is that the intention of the parties was nothing more than that the payment should be in lawful money, and if the addition of the words "law-

*This article was written before the recent decision of the United States Court in the Hepburn case, and is limited entirely to a consideration of the reasoning of the court in the case of *Rhodes* v. *Bronson*. We might regard the question as finally settled, and any further discussion profitless, were it not that the probabilities are very strong, that should the question ever come before the court again, a decision will be rendered entirely adverse to those above referred to. On this question the court now stands four to three, and two additional judges are shortly to be appointed. That the Senate will confirm only those whose opinions are in harmony with the present minority of the court is conceded. While we fully coincide with the judgment of the court in *Rhodes* v. *Bronson*, we believe that that judgment was founded on a line of argument unnecessary and fallacious.—Ed. L. J.

ful money of the United States," means any thing, it is simply, that the debt should be paid in lawful money, as distinguished from State bank bills. But the idea that this or any other "contract to pay *a debt* in gold or silver coin is, in legal import, * * an agreement to deliver a certain weight of standard gold," smells a little too strong of the schools for practical life. An agreement to deliver a certain weight of bullion of a certain fineness is clearly an agreement to deliver a specific article of personal property; but that is not this case. Very true, "the currency acts themselves provided for payments in coin;" and that is the reason why the revenue, the interest on the public debt, and the like, must be paid in coin. The obligation to pay in coin rests on the statute, not on the agreement of the parties. True, also, "the merchant who is to pay duties must contract for the coin;" that is, he makes a specific contract for the delivery to him of so much coin; so "the bank which receives coin on deposit," agrees to return the same number of coined dollars on demand; so the "messenger who is sent to the bank or the custom house" agrees to deliver so many coined dollars. These are all contracts, not "*to pay*" a debt, but *to deliver* so many coined dollars. They are not debts but obligations or undertakings to deliver so many coined dollars. So, if "the government, needing more coin than can be collected from duties, contracts * * for the needed amount," it is an agreement for the delivery of the specified number of coined dollars, and may be enforced as such. So of "depositors of bullion at the mint," the government agrees to return to them a coined dollar, half eagle or eagle for every so many grains of the bullion at the standard fineness. This, also, is an agreement to deliver coined gold. And these instances certainly "are *not debts*," but agreements to deliver specific articles.

The error of the United States Court consists:

1st. In treating this mortgage as evidence of "an agreement to deliver a certain weight of standard gold," etc., when the whole circumstances and surroundings of the case and of the parties clearly show that nothing was more foreign to the minds of the parties than a sale or purchase of gold; the debtor borrowed the money and gave this mortgage to secure its payment, and the creditor loaned the money and took the mortgage to secure its payment; the insertion of the gold clause was merely declaratory of the law which authorized the creditor to demand lawful money; and the presumption that the "intent was that the debtor should deliver * * * a certain weight of gold," etc., is, to say the least of it, without any foundation in the transaction. Treated as a contract for the sale and purchase of gold, it would be void for uncertainty. It was simply a loan of money; nothing more. And in this, its natural and true light, the act of Congress of 1862 allows its payment in legal tender notes.

2d. In announcing or undertaking to establish the doctrine or rule of practice, that in a common law action, upon a contract to deliver coin, the judgment may be entered for coined dollars and parts of dollars. Such a judgment can be entered only in an equity action for a specific performance.

It is to be hoped this decision will be reviewed and overruled, or at least never followed as a precedent, and the sound, practicable and heretofore well-established doctrine of the New York court reaffirmed.

LAW AND LAWYERS IN LITERATURE.*

VII.

ARISTOPHANES.

In the "Wasps" we have a most vivid picture and admirable satire of the administration of law in ancient Athens. The state treasury was replenished by fines imposed by the courts upon delinquents, and of the money thus extorted a great part was bestowed on public feasts and amusements. Under such circumstances, a rich defendant stood but a slender chance of escape, and the six thousand dicasts, or jurymen, of Athens, acquired a passionate fondness for attending the courts. In the comedy, "Philŏcleon," an old dicast has become nearly insane in his eagerness to discharge his official duties. "He cannot sleep for thinking of the bench, and prefers to his comfortable bed at home a shake-down at the door of the court, that he may secure a good seat in the front row when the business commences. There, with his staff in his hand, and his judicial cloak on his shoulders, his delight is to sit all day earning his three *oboli*, and having his ears tickled with the gross flattery by which litigant parties at Athens sought to conciliate the favor of the judges." His son is much disgusted at his father's mania, and determines to prevent his going abroad: and so guards the outer door, and stretches a net over the court-yard. The old dicast tries to escape by way of the chimney; but, in spite of his assertion that he is smoke, is dislodged. Next he pretends to be anxious to go out to sell an ass; but the son offers to do it for him, and bringing out the animal, discovers that the old man had strapped himself under its belly. Another attempt to escape by creeping along the roof tiles is baffled. Just then a chorus of his fellow dicasts, dressed and painted to resemble wasps, call on their way to court to inquire why their brother does not accompany them. The wasps and the father rail against the son, who, in defense, asserts that his father has been cheated, and that the career of the dicast is a state of abject servitude. The old man insists that he has by virtue of his office an almost despotic power. The chorus is appointed to determine the justice of the dispute, and the argument commences. In Philocleon's account of the delights of his office, the poet lashes the abuses of the system with an unsparing hand. The result of the argument is that the chorus entreat the old man to submit to his son's wishes. But as the passion is still strong on him, the son suggests that he shall institute a domestic court and try causes at home. Opportunely, a dog, Cleon, appears, and complains that another dog, Labes, has carried off and eaten a Sicilian cheese. The old man insists on trying this cause immediately. So the indictment is framed:

> "The dog of Cydathenus doth present
> Dog Labes, of Æxone, for that he—
> Singly, alone—did swallow and devour
> One whole Sicilian cheese, against the peace."

The trial goes on, speeches are made pro and con, and the old dicast votes an acquittal for the first time

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

in his life, asking pardon of the gods for such an unprecedented act. The son promises to take care of the old man, and the play ends.

RACINE.

Closely modelled, in several scenes, upon "The Wasps" of Aristophanes, but of more intelligible, because of more modern interest, is "Les Plaideurs" of Racine. The absence of any translation of this exquisite comedy, either in prose or verse, so far as I can learn, is my excuse for offering translations by myself of some passages. We have, as *dramatis personæ*, Daudin, a judge, fond of exercising his powers; his son, Leandre, a gay youth, to whom the study of the law, for which his father designs him, is irksome; L'Intime, the judge's secretary; Petit Jean, the house porter, illiterate; and the Prompter, who helps the advocate, Petit Jean, in the trial scene; also Chicaneau, a citizen, and La Comtesse, both litigious. Leandre and Daudin make their first appearance in a dialogue, in which the old man expostulates with his son on account of his dissolute course, and reproaches him for despising the law. The hereditary pride of the old French judge is strikingly illustrated:

"Money is not earned so fast in my dominion.
Each one of thy fine ribbons cost me 'n opinion.
My gown makes you ashamed! And you the son of a judge!
Should'st act the gentleman? Oh, Daudin, that's all fudge!
Consider, in my wardrobe and in my sleeping-room,
The portraits of the Daudins; all these have worn the gown.
It is a good profession. Compare, too, price for price,
The New Year's gifts of a good judge, and those of a marquis:
Remark what we shall be at th' end of next December:—
What 's then your gentleman? A post in th' ante-chamber."

The son tries to convince the father that his health demands repose and retirement, and to induce him to stay at home and temporarily give up business. The old gentleman being indisposed to accede, the son threatens restraint. The judge says that life to him, without the exercise of his official duties, is a punishment. The son tells him he can set up a domestic court. At that moment the porter opportunely rushes in, announcing that the house-dog, Citron, has carried off and devoured a capon. The judge seizes on the idea, orders the arraignment of the offender, and assigns the porter to the prosecution, and the secretary to the defense. The trial then goes on, with the aid of the Prompter, the advocates having first been crammed for their respective parts. I give below a translation in full of this admirable scene, in which the tedious prolixity and irrelevancy of the advocates and their oratorical affectations, with the *ad captandum* argument of presenting the prisoner's family in court, which even now-a-days is so effective when the action is against a railroad and the relatives are women in weeds, are drawn in such a masterly manner:

Daudin:
Come, who are you down there?
Leandrê:
These are the advocates?
Daudin (to the Prompter):
And you?
Prompter:
I come to help their halting memory.
Daudin:
I understand. And you?
Leandrê:
I'm the auditory.
Daudin:
Commence then.
Prompter:
Gentlemen—
Petit Jean:
Oh, take a lower key,
For if you prompt so loud they never can hear me,
My lord—
Daudin:
Put on your hat.*
Petit Jean:
Oh, sir—
Daudin:
I say, put on your hat.
Petit Jean:
Oh, sir,
I think I understand good breeding better'n that.
Daudin:
Be covered, I repeat.
Petit Jean (putting on his hat, to Prompter):
Well, Prompter, now be dumb;
That which I know the best is my exordium.
Your honors, when I consider with exactitude
The world's inconstancy, full of vicissitude;
When I behold so many races different,
So many wandering stars, not one star permanent;
When I view Cæsar and his fortune;
When I behold the sun, when I behold the moon;
When I behold the state of the Babylonians,
Transferred from Persia to the Macedonians;
When I behold the Lorraines, at first despotic,
Pass to a monarchy, and then grow democratic;
When I behold Japan—
L'Intimê:
When will he stop beholding?
Petit Jean:
Oh dear! why will he interrupt me with his scolding?
I cannot speak a word.
Daudin:
Restive attorney,
Why don't you let him finish up his journey?
When I'm a-sweat to learn if he'n Japan discover
A harbor for his capon, and thus his wandering's over,
You've interrupted him with your discourse absurd,
Now, advocate, proceed.
Petit Jean:
I can't. I've lost the word.
Leandrê:
Out with it, Little John. Your *dêbut* none derides.
But why d'ye keep your arms stuck close against your sides?
And stand upon your feet like a statue perpendicular?
Come, brighten up, don't be afraid, we're not particular.
Petit Jean (moving his arms):
When—I behold—when—I behold—
Leandrê:
Well, what? you dunce!
Petit Jean:
Why, how can one expect to course two hares at once?
Prompter:
'Tis said—
Petit Jean:
'Tis said—
Prompter:
In the—
Petit Jean:
In the—
Prompter:
Metamorphosis—
Petit Jean:
What say?
Prompter:
That the metem—
Petit Jean:
That the metem—
Prompter:
Sychosis—
Petit Jean:
Sychosis—
Prompter:
Oh dear! The horse—
Petit Jean:
The horse—
Prompter:
Again said!

*The French lawyers were privileged to plead covered.

Petit Jean:

Again—

Prompter:

The dog.

Petit Jean:

The dog—

Prompter:

Oh blockhead!

Petit Jean:

The blockhead—

Prompter:

Plague take this advocate!

Petit Jean:

The plague on you be cast!
See t' other fellow, too, with's face like Lenten fast!
Go to the devil, all!

Daudin:

Come, on to business push.

Petit Jean:

Oh dear me! what's the use of beating round the bush?
They teach me to speak words in length a fathom each,
Big sounding words, that would from here to Poutoise reach,
Now, I don't see the sense of all this hurly-burly;
In short, to find a fowl I came this morning early;
There's naught your dog won't steal, if it but take the shape on
Of fowl, and now he's gone and gobbled up our capon—
A capon from the Maine; here's nothing to decide;
The first time that I find him, I'll soundly tan his hide.

Leandrè:

A very neat conclusion, worthy your setting out!

Petit Jean:

Oh, carp who will. One knows my meaning without doubt.

Daudin:

Produce your witnesses.

Leandrè:

Well said, if he's got any.
They don't come for the wish; they cost a deal of money.

Petit Jean:

We have a plenty, though, and they're beyond reproach.

Daudin:

Let them present themselves.

Petit Jean:

I have them in my pouch.
Behold them! here they are—the capon's legs and head!
Examine them and judge.

L'Intimé:

I object to them.

Daudin:

Well said!
But why object?

L'Intimé:

They're from the Maine;* their trade's to cozen.

Daudin.

True, these Maine witnesses crowd in here by the dozen.

L'Intimé:

Your honor—

Daudin:

Tell me, sir, shall you be expeditious?

L'Intimé:

I cannot answer anything.

Daudin:

Why, that 's judicious.

L'Intimé (in a tone ending in a squeal):

My lords, all that can astound the culpable,
All that which mortals hold the most redoubtable,
Against us here assembled, seems to be in league;
In short, I mean to say, eloquence and intrigue.
The fame of the deceased on one hand stands t' admonish,
On t' other, eloquence doth equally astonish,—
The shining eloquence of master Little John.

Daudin:

Say, can't you soften down the shrillness of your tone?

L'Intimé (in his ordinary voice):

Oh, yes, I've many of them. (In a pompous tone:) Whatever diffidence
May justly be aroused by said fame and eloquence,
We rest upon your truth, as Hope leans on the anchor,
And trust your sense of right to mitigate all rancor.
Before the great Daudin innocence is power;
Yes, before the Cato of Normandy, the lower,
That sun of equity whose beams have never languished;
Vict'ry delights the gods; but Cato 's for the vanquished.

Daudin:

Now truly he pleads well.

L'Intimé:

To make no further pause,
I take my cue, and go to the merits of my cause.
Aristotle wisely says, in his Politikon,—

Daudin:

Why, advocate, the point is now about a capon,
And not of Aristotle and his politics.

L'Intimé:

But the authority of the Peripatetics
Has proved that good and evil—

Daudin:

In courts of equity
Your Aristotle hasn't the least authority.
Come, to the point.

L'Intime:

Pausanias, in his Corinthiacs,—

Daudin:

To the point.

L'Intimé:

Rebuffe—

Daudin:

To the point, I tell you.

L'Intimé:

The great Jacques—

Daudin:

The point, the point, the point!

L'Intimé:

Harmenopul, in fact,—

Daudin:

I'll enter your default.

L'Intimé:

Oh dear, how rash you act.
Then have the facts. (*Quickly.*) This dog to the kitchen drawing nigh,
A capon plump and sweet within he did espy:
Now he for whom I speak with hunger there was hasting;
He against whom I speak was nicely plucked and basting;
Then he for whom I speak, seized on, took off, secreted
Him against whom I speak. The larder thus depleted,
He's taken on a writ. Counsel plead pro and con;
A day's fixed. I'm to speak, I speak, and now I've done.

Daudin:

Tut, tut, tut, tut! Learn better how to try your case.
Th' irrelevant you give at a deliberate pace,
Th' important you run over at a gallop strong.

L'Intimé:

The former, may it please you, sir, is fine.

Daudin:

It's wrong.
Were causes ever known to be in this way pleaded?
What say th' assembly?

Leandrè:

This style is now most heeded.

L'Intime (in a vehement tone):

Where were we, gentlemen? They come. And how come?
They chase my client, and they force a mansion.
What mansion? Why, the mansion of our own judge.
They force the cellar which serves us for refuge.
Of brigandage they then accuse us, and of theft,
We're then dragged headlong forth, and to our accusers left,
To master Little John, your honor—I attest.
Who does not know the law. If any Dog (Digest *De vi*, and see the paragraph *Caponibus*),
Is manifestly contrary to such abuse?
And when it turned out true that my poor client Citron
Had eaten all or most of the aforesaid capon,
Against this trifling deed you will not hesitate
To weigh our former actions, and let them mitigate.
When has my client ever been reprimanded?
By whom has this your house always been defended?
When have we failed to bark at robbers in our town?
Witness three low attorneys, from whom we've torn the gown.
They show you certain fragments to accuse us by;
Receive these other fragments to help us justify.

Petit Jean:

But Adam—

L'Intimé:

You keep still.

Petit Jean:

L'Intimé—

L'Intimé:

You're too rude.

Petit Jean:

He's hoarse!

L'Intimé:

Shut up!

Daudin:

Repose a moment, then conclude.

*I infer that the inhabitants of Maine were notorious "experts."

L'Intime (in a wheezing voice):

Since, then, a moment's rest to catch our breath 's permitted,
And formal peroration 's not t' be intermitted,
I come, without omission or prevarication,
Compendiously t' enunciate an explication,
And hold up to your eyes a general exposition
Of all my cause, and all my client's imposition.

Daudin:

T' repeat the same thing twenty times, he prefers by far,
Than once t' abridge. Oh, man, or whatever else you are,
Devil, conclude; or heaven seize thee with damnation!

L'Intime:

I finish.

Daudin:

Oh!

L'Intimé:

Before the world's creation—

Daudin:

Oh, skip over to the flood!

L'Intimé:

Well, then, before the birth
Of time, of the material system, and of the earth,—
The world, the universe, and nature universal,
Lay buried in the bosom of the material.
The elements—the fire, the air, the earth, the water,—
Piled up or buried, are nought but a heap of matter,
A dire confusion, a mass of matter formless,
Chaos, disorder, and brooding rout enormous.
As Ovid sings, there was, on all the face of nature,—
Called chaos by the Greeks—one rude indefinite feature.

(Daudin, being sleepy, nods, and falls heavily.)

Leandrè:

My father, what a tumble!

Petit Jean:

See how he drops his head!

Leandrè:

Come, father, rouse yourself!

Petit Jean:

Your honor, are you dead?

Leandrè:

Father! I say.

Daudin:

Well, well? what? who? a man, it seems.
Truly, I've been asleep, and had most awful dreams.

Leandrè:

Come, sir, decide.

Daudin:

To the galleys!

Leandrè:

You hardly can, sir,
Commit a dog that way.

Daudin:

No more—you have my answer.
What with the world and chaos, I've such a muddled pate!
Wind up this cause.

L'Intime (presenting the puppies to him):

Come hither, you family desolate;
Come, little ones, whom he would orphans render,
Give utterance to your understandings tender.
Yes, gentlemen, you here behold our misery;
Restore a father to his orphaned family;
Our father dear, by whom we were engendered—
Our father dear—

Daudin:

This issue can't be tendered.

L'Intimé:

Our father, gentlemen—

Daudin:

Don't such a noise be keeping.
They're making a great muss there—

L'Intime:

That's our way of weeping!

Daudin:

Why, now, I seem to be quite taken with compassion,
And this which I behold is fit to touch that passion!
I am quite bothered here. The fact alleged so presses;
A crime's averred; th' accused himself confesses.
But if he is condemned, equal's th' embarrassment.
For then these pretty children must be to th' asylum sent.
But I am occupied. I cannot see a person.

In the last scene, our author depicts the indifference with which courts had grown to regard the torture of litigants upon the rack, or "putting the question," as it was termed:

Daudin:

Have you, then, never seen a party put to torture?

Isabelle:

No, and believe I never would for my salvation.

Daudin:

I wish you'd gratify for this your inclination.

Isabelle:

Oh, when th' unhappy suffer, can any one stand by?

Daudin:

Why, to fill an hour or two, it answers passably.

This, from a magistrate who was so overcome at the sight of the prisoner's orphaned family, is pretty strong satire, but not extravagant, as observation shows. In a dialogue between Chicaneau and La Comtesse, the former gives the following account of his experience in litigation:

Attend. For fifteen years or twenty past, an ass
Over my meadow had accustomed been to pass
And there disport himself, by which much waste he made,
For which before the village judge my plaint I laid.
The ass I attach. An appraiser's nominated,
At trusses two of hay the waste is estimated.
In short, with this award, after a year, they fling
Me empty out of court. And then an appeal I bring.
Now while th' appeal in court was sleeping at its ease,—
Remark particularly, madame, if you please,—
My lawyer, Drolichon—no fool—on my petition,
Obtained by bribery a premature decision,
And thus I gain my cause. On that, what next is done?
My opponent tricky resists the execution.
But while procedure on procedure thickens,
My adversary lets in my field his chickens.
To ascertain, unto the court it then seemed meet,
How much of grass one chicken in one day can eat.
Issue at last is joined. In fine, when everything
In that condition stands, the cause they say they'll bring
To 'n end, April fifteenth or sixteenth, 'fifty-six.
I write fresh score. I put in evidence, and mix
Plaints, pleas and inquests, inspections compulsory,
Appraisals, transfers, three interlocutory
Orders, and grievances, fresh acts, reports, *res gestæ;*
I forge my name in letters issued by Majesty:
Fourteen appointments, twenty writs, six allegations,
Productions six and twenty, twenty just'fications,
Judgment in short. My cause is swallowed in expense
Amounting to about five or six thousand francs.
Call you this doing right? Is this the way they adjudge?
After fifteen or twenty years! There's no refuge
For me left open but petition civil.

The Countess is also an old hand. She has been in law thirty years or more. Chicaneau says that's not much, and asks how old she is. Sixty, she replies. But most of her suits are finished. She has on hand only four or five little affairs—one against her husband, and others against her father and her children. She has endeavored to live honestly, but to live without litigation cannot content her. She is no compromiser; she will have all or nothing, and will sell her chemise if necessary.

LAW OF ARREST WITHOUT WARRANT.

III.

The right of an officer to arrest without warrant, while the individual is in the act of committing the offense, was discussed in the preceding article. We now proceed to a discussion of the right of an officer to arrest *after the offense is committed.*

The common experience of mankind is that when heinous crimes, as felonies, are committed, there is a much stronger motive for the offender to escape the consequences of his crime than there is when only mere misdemeanors are perpetrated; and, therefore, the law has clothed the peace officer with greater power to arrest without warrant for such offenses. A prompt arrest and punishment should be rendered tolerably certain, and in order to protect the rights of society and insure public safety, the officer should be untrammeled in immediate pursuit of the felon, and,

if necessary, proceed without the delay of obtaining a warrant in such cases. The law has therefore given an officer much more authority to make such arrests than it has a private individual. An officer may arrest any person, if he has reasonable ground to suspect he has committed a felony, whether any felony has been committed or not by the party suspected or arrested, or by any person.

In 1 Lead. Cr. Cases, p. 197, note, Mr. Bennett says: "The first enunciation of this doctrine is in the Year Books, 7 Hen. IV; Hilary Term, pl. 35. Again, in *Ward's Case*, in 1636 (Clayton's Reports, 44), we find another recognition of the right of an officer to act upon the charge or accusation of a third person; but *Samuel* v. *Payne* (1 Doug. 359, 1780) was the first distinct adjudication upon this important question of law. *Ledwith* v. *Catchpole* (Caldecott's Cases, 291, 1783) is another important case. The main distinction between *Samuel* v. *Payne* and *Ledwith* v. *Catchpole* is, that, in the former, the party arrested was, by a third person, reported to the officer as guily of a felony, and the officer proceeded upon that charge alone, while in the latter there was no charge against the suspected person in particular, but the officer acted upon his own suspicion that he was the true offender. But it is clear that, in either case, if the officer acts *bona fide*, and upon reasonable grounds, he is not guilty of a trespass. See *Cowles* v. *Dunbar*, 2 Carr. & Payne, 565.

Every American case on this question, which we have examined, refers to *Samuel* v. *Payne* as authority. It was decided by the celebrated Lord Mansfield. *Ledwith* v. *Catchpole* was decided by the same distinguished jurist, who, on a motion for a new trial, said: "The first question is, whether a felony has been committed or not; and then the fundamental distinction is, that if a felony has actually been committed, a private person may, as well as a peace officer, arrest; if not, the question always turns upon this: Was the arrest *bona fide;* was the act done fairly and in pursuit of an offender, or by design or malice and ill-will? It would be a terrible thing, if, under probable cause, an arrest could not be made. Many an innocent man has and may be taken up upon such suspicion; but the mischief and inconvenience to the public, in this point of view, is comparatively nothing. It is of great consequence to the police of the country."

It was attempted by the plaintiff, in *Beckwith* v. *Philby* (6 Barn. & Cress., 635), to make an essential distinction between the rights of an officer whether he acts upon his own suspicion or upon the charge and accusation of another. It was admitted that, in the latter case, it is his duty to make the arrest, and it is not incumbent on him to prove the actual commission of a felony, But it was claimed, that, if he assumed to act upon his own suspicion, he then placed himself in the situation of any private citizen, and could justify himself only on proof that a felony had been in fact committed. But any such distinction was entirely negatived by the court, and it was there broadly laid down, that a constable, having reasonable cause to suspect that a felony has been committed, has authority to arrest the party suspected, although it afterward appear that no felony has been committed." Mr. Bennett (1 Lead. Cr. Cases, p. 200, note) has the following: "The attempt has sometimes been made to engraft a limitation to the power of an officer to arrest as before stated, and to allow him to arrest only when there is reason to suspect that the party accused would otherwise escape." This position was first advanced by Sergeant Russell, in *Davis* v. *Russell* (5 Bingham, 359). It would be of serious consequence, said he, to the liberty of the subject and the peace and comfort of society, if a constable is to be empowered to arrest on his own suspicions and judgment, where he has no reason to fear an escape, and may with propriety lay the case first before a magistrate.

If such a proceeding were allowable, the most respectable individuals, even judges themselves, might, upon the unfounded assertions of any unprincipled persons, be dragged from their beds to a prison. But this limitation was not sanctioned by the court. The same effort was made in this country in *Rohan* v. *Sawin* (5 Cushing, 281), but with the like want of success. The judge below sanctioned this doctrine, and ruled in accordance with it, but this was reversed on exceptions. "We do not find," said the court, "any authority for thus restricting a constable in the exercise of his authority to arrest for a felony without a warrant. The probability of an escape or not, if the party is not forthwith arrested, ought to have its proper effect upon the mind of the officer, in deciding whether he will arrest without a warrant; but it is not a matter upon which a jury is to pass in deciding upon the right of the officer to arrest. The question of immediate necessity for an immediate arrest, in order to prevent the escape of the party charged with felony, is one the officer must act upon under his official responsibility, and not a question to be reviewed elsewhere."

The great principle that underlies all authorities upon the foregoing questions seems to be, that although many innocent persons may be arrested from an abuse of such authority by imprudent and careless officers, when exercising their own judgment as to a proper cause to arrest without warrant, yet it does not overbalance the good which results to society by the exercise of such authority as will insure the prompt arrest of felonious offenders.

But in misdemeanors, after being committed, there is not the same motive to avoid arrest, as the punishment is much less. And, therefore, little is lost by the delay in obtaining a warrant in such cases, and the liability to arrest innocent persons on suspicion greatly diminished. Besides, it might be better that many of this class of small offenders escape, than sanction the above principle of the law of arrest in the apprehension upon suspicion for mere misdemeanors; for, at best, it is an arbitrary rule, and can only be justified by the stern necessities of society in the arrest of felons.

The following are elementary treatises and reported cases, where the foregoing questions are discussed to some extent, viz.: In England, *Lawrence* v. *Hedger* (3 Taunt. 14); *Nicholson* v. *Hardwick* (5 C. & P. 495); *Hobbs* v. *Branscomb* (3 Camp. 420; 1 East. P. C. 301; 2 Hale, P. C. 83, 84, 89; Roscoe's Cr. Ev. 242; 4 Black. Com. 290; 1 Chit. Cr. Law, 22). In America, *Rohan* v. *Sawin* (5 Cush. 281); *Eanes* v. *The State* (6 Humphreys, 53); *Wakely* v. *Hart* (6 Binney, 316); *Holley*

v. *Mix* (3 Wendell, 350); *Brockway* v. *Crawford* (3 Jones N. C. 433); *Long* v. *State* (12 Geo. 293); *Burns* v. *Erben* (40 N. Y. 463).

Whether an officer is warranted in arresting a person after the affray has been committed, is a point which has occasioned some doubt. (Ros. Cr. Ev. 242.) There are, indeed, some authorities to the effect that the officer may arrest the party on the charge of another, though the affray is over, for the purpose of bringing him before a justice to find security for his appearance (2 Hale P. C. 90); and the same rule has been laid down at *Nisi Prius* by Lord Mansfield, in a case cited in 2 East. 306; *Handcock* v. *Sandham*, *Williams* v. *Dempsey* (1 East. P. C. 306, note). But the better opinion was always said to be the other way (1 East. P. C. 305; Hawk. b. 2, c. 12, s. 20; 1 Russ. on Cr. 601. See *Timothy* v. *Simpson*, 1 C. M. and R. 757); and it was so expressly decided in *R.* v. *Walker* (1 Dear. C. C. R. 358). There the prisoner had assaulted a police constable who went away and after two hours' time returned and took him into custody; the court held that this was an unlawful apprehension.

This case seems to have been decided against the officer on the ground that the assault, for which the prisoner might have been arrested, was committed some time before, and there was no continued pursuit. In *R.* v. *Light* (Dears. and B. C. C. 332), the defendant was arrested twenty minutes after the assault was committed, and the arrest was justified on the ground that the officer had reason to believe that he was about to commit another similar act. See also *Baynes* v. *Brewster* (11 L. J. M. C. 5), which is in accordance with this view. In *Cook* v. *Nethercote* (6 C. and P. 741), Alderson, B., said to the jury: "The questions for your consideration in this case are whether the defendant was engaged in the affray; whether the officer had view of the affray while he was so engaged in it; and whether the affray was continuing at the time."

There seems to be no well considered modern case which justifies an arrest, without warrant, for a past affray or breach of the peace after the disturbance has entirely ceased, unless there is reason to believe a renewal of the disturbance will take place, or in fresh pursuit by an officer who witnesses the affray.

In 1 Russ. on Crimes, 295, it is laid down as *settled law* "that an officer has no power to arrest a man for an affray done out of his own view without a warrant from a justice." *Pow* v. *Beckner* (3 Indiana, 479) is to the same effect.

In *Derecourt* v. *Corbishley* (5 Queen's Bench, 188; 32 Eng. L. and Eq. R.), the plaintiff was arrested immediately after he had committed an assault, by an officer who witnessed it. It does not appear but that the arrest was made as soon as it was possible to make it after the offense was committed, and might be considered as an arrest made in fresh pursuit by an officer in whose view it occurred, and therefore justifiable.

In the case of *Taylor* v. *Strong* (3 Wend. 384) the officer (Strong) made a complaint, on oath, before a justice, for an assault on him by the plaintiff just before; and, while the justice was making out the warrant, Strong went to a store where Taylor was and asked him to drink with him, which he refused, left the store and went to a tavern. About ten or fifteen minutes afterward Strong arrested Taylor without warrant. Marcy, J., said: "there is room for doubt, in this case, whether the constable had not delayed too long, but that the arrest being made by the constable after having made complaint, on oath, before a justice, we cannot say he was not justified."

It is difficult to perceive how the fact that a complaint had just been made by the officer should give him the right to arrest, without warrant, for an affray after it was all over. And, in this case, the circumstances were such as to afford no reasonable apprehension of a renewal of the disturbance. In no legal sense was the arrest made in fresh pursuit. If the arrest, without warrant, was justified fifteen minutes after the affray had entirely ceased, why would it not have been equally justifiable the next day or the next week. This case is in conflict with *Cook* v. *Nethercote* (6 C. and P. 741); *R.* v. *Walker* (*supra*), and *Coupey* v. *Hanley* (2 Esp. 539).

We think, therefore, that no arrest should be made without warrant, for an affray after it is all over, and peace restored, whether the affray was in view of the officer or not.

THE BREACH OF PRIVILEGE CASE—VINDICATION OF MR. JUSTICE POTTER.

MR. SPEAKER: I appear in obedience to the resolution and order of this honorable body, to give such explanations as I am permitted, in relation to what is assumed to be a high breach of privilege in causing the arrest of an honorable member of this house.

In thus appearing, sir, I do not acknowledge the power of this house—I do not acknowledge the authority of this house—to call me to any account whatever; and coming here by courtesy and out of respect to this house, I proceed to make such statements as I am permitted to make by this honorable house, without waiving the objection, which, by counsel, I am advised I might make, and decline to appear here at all by any authority that this house may have over me.

And while I stand here, thus giving all respect to this high department of the State government, I also stand here to protest against the legal right and legal authority of this body, to call in question my judicial acts, performed within the sphere of the judicial department of this same government in which I have the honor to hold a place.

I claim, sir, that the judicial department of this government is intrusted with an equal portion of the sovereign power of the State, that it is possessed of equal dignity; a department whose powers are co-ordinate and co-extensive with, and entirely independent of, the legislative power. That to be sovereign and independent, when acting within its proper sphere, there must exist no other or higher tribunal to call them to account for their independent action. I protest and claim, sir, that there is no way known to the Constitution or laws by which a judge can be called to account, be tried, degraded, or the dignity of his judicial office impaired, except by the only method known to the Constitution, by way of impeachment for corruption in office. Of this there is no pretence here.

I am not called here, sir, as an individual, to answer for an individual offense. No, sir; this case assumes vastly greater proportions and magnitude than that. Sir, I come as a Justice of the Supreme Court of New York, as one representing the judicial department of the State, to defend my judicial action. In speaking in their defense, common propriety demands that I should speak with all respect to this honorable body; duty to my department equally demands that I, as their representative, should speak with boldness of defense as if that whole body were here speaking to an equal. Sir, with all respect, I deny the power — I deny the legal, the constitutional power—of this house to call my judicial acts in question.

I protest in the name, and as the representative, of the judicial department, to the exercise or to the attempted exercise of such a power by this house. I protest in the name of the sovereign people of this State; I protest in behalf of the constitutional independence of the judicial department against the power of this house to punish, by censure or otherwise, the individual, for acts performed while exercising the functions of a magistrate of the highest court of original jurisdiction of this State.

Sir, I should be a traitor to the interests, to the dignity, to the sacred character of the judicial department, to its independence, to the right to protection, if by any act of mine, or by passive submission, I should consent to the aggressive assumption of power which proposes to strike so deadly a blow to their independence; nay, if I did not with boldness, with fearlessness of consequences to myself, protest, solemnly, earnestly protest, against a proceeding so calculated in its effect to overawe them in the exercise of their duties, and thus to destroy their independence.

Sir, if this measure shall be carried out upon the assumed powers of this house, what is left of character or of independence to the judicial department? If one department of this government possess the power to command obedience of another of co-extensive and equal power; if the legislative can usurp the authority, to hold in awe or punish the judicial, then indeed have we a despotism, and not a government of freedom. If for an official judicial act of a judge, this house possess the power to punish, even for mistaken judgment, where is the boasted protection to an independent judiciary? Where will there be found a spirit craven enough to accept a place on the judicial bench?

Sir, allow me to say that, in my opinion, it will be a sad day for this republic, a sad day for the liberties of this people, when such a doctrine shall be established.

With what offense, then, am I charged? Not with having acted corruptly; but that, as a judge, acting officially, acting in the discharge of a high and solemn duty imposed by the Constitution and laws of this State, which I have sworn to support and obey, I had the independence, nay, if you please, the daring, to pronounce the law as I understood it then, and as I understand it now; yea, more, I feel bound to say here, before this high tribunal, now, in full view of all the terrors of its power, which it may deem in its pleasure to exert, that as I *still* understand the law of privilege in this State, were I called upon to-morrow to act again as I acted in this case, as I feel responsible to God only for its conscientious performance, I should feel bound to repeat the act for which I am now called upon to explain.

My offense, then, is, that in so pronouncing the law I have differed in opinion with the honorable committee, perhaps with the whole house. But, sir, I have committed no contempt; no contempt has been committed. As a judicial officer, in so acting, I could commit no contempt for which I could be held responsible. It is not the individual who is before you, whose acts you propose to punish by censure or otherwise, that has committed any act whatever. It is a high court of this State that performed the act; and the theory of this proceeding is, that the individual, who at the time was clothed by the Constitution and laws with the power to execute the sovereign will; he who was the mere minister of justice, acting according to his solemn convictions, executing not his own but the people's will, that is to be humiliated for daring to do his constitutional duty.

Sir, a case like this is unheard of. It is an anomaly in this, it is an anomaly in any and every civilized government upon the earth. It is an anomaly in every step of its progress. First, the judge was subpœnaed to appear before an honorable committee of this house to give evidence of the fact upon which one of its honorable members had been arrested. To this step no possible objection could be urged. He appeared in obedience to that summons. Knowing his legal protection, little did he imagine that he was called there to be made informer against himself for an offense, to be used as his own accuser.

A becoming respect to, and confidence in the body before whom he appeared, forbade such an idea. He was not summoned there for trial. Had he been, he would have put himself there, as he does here, upon his defense. He relied upon a reciprocal confidence, upon comity, upon the magnanimity of an honorable committee that no such object was in view as a trial. The legitimate duty of that committee, as he supposed, was to inquire as to facts, and by what law an honorable member had been arrested; whether there had been a breach of privilege; whether the law was sufficiently protective, and if not, to recommend one that should be. He knew that he had acted in the conscientious convictions of duty, and that he was not amenable; that if he had acted corruptly, then only could he be dealt with. He supposed, too, that if any doubt existed as to his rightful exercise of power, that some committee, like that of the judiciary, would be selected, and who would place their legal opinion, for which they would be held responsible before the legal world, upon the records of the legislative department, that before such a committee (not now intending disrespect to this) an opportunity would be given to discuss so grave a question.

But, sir, without a trial, I am charged by that honorable committee, that, as a judge of the Supreme Court, I have committed a high breach of privilege of this house; that, as such judge, I have struck a blow at the independence of this co-ordinate branch of the government; and the theory of your honorable committee, that this house possess the power to pun-

ish by censure, or otherwise, without a trial, not the body who committed the act, but the minister of that department who executed its power. This is an assumption of the pre-eminence of power of this house, authority over the judicial department, which has no foundation in this government. It is an assumption that the legislative power, or that one branch of its body, is superior in authority to the judicial department. This is an assumption that no lawyer dare assert, and one that this house will not stultify its understanding by asserting. If this proposition is untrue, how can they exercise the power of punishment? How then is it proposed to heal this wound to their dignity of privilege? They cannot punish the court. How then can they punish its minister? It is proposed to heal this wound by the *lex talionis*, the law of retaliation, of inflicting a like injury upon a co-ordinate department, to commit a breach of privilege upon the judicial department. Sir, I stand here protesting against the right to commit such a breach. I stand here claiming the privilege of the judicial department. I assert that you have no right to bring these two departments into conflict; that you would thereby endanger the stability, the perpetuity, the independence of the government, whose trusts you have taken in charge.

Believe not, sir, that I say these things through any fear of consequences personal to myself; that as you cannot punish the court with material or physical punishment; that you cannot punish its members without a trial; that you cannot try its judges but by impeachment; that you cannot impeach but for corruption, and that in the constitutional form. True, you can resolve; you can send forth your resolve in the language of degradation, but it will not degrade; that is, it will not degrade him against whom it is issued. It is not such degradation that I fear; if issued, it will fall harmless upon him against whom it is issued. Nay, sir, were I ambitious, I might invite it; I might court its favor. But, sir, I have no such ambition; no ambition, but in the sight of that God, in whom I trust, to do my judicial duty fearlessly to the best of my ability, unawed, unterrified, uninfluenced by caprice or favor, and the will of assumed rulers, or the more fearful influence of popular applause, or popular excitement and prejudice.

But, before I proceed further upon this view of the case, I propose candidly, for a moment, to look at the law of privilege to members of the Legislature of this State, and, with all intended respect to the argument of your honorable committee, I deny, I solemnly deny, that the law of privilege of the British Parliament, as claimed by them, is the law of privilege of the State of New York, and I shall show it to be otherwise. I deny that the privilege of the houses of Congress is the law of privilege of the State of New York; and while I accord to that committee credit for much research into the law of privilege of Great Britain, I shall show that they did not search far enough; and I find the report entirely deficient in the examination of the law of privilege of this State. The law of privilege of members of Congress is not the same law as that of the British Parliament, but is secured to them in the Constitution of the United States, which limits and restricts the common law of England, as cited in that report. The laws of the several States differ from each other and differ from that of Congress. The law of privilege of the State of New York is peculiar to itself. It is not, as is that of Congress, in the Constitution, but is regulated by a statute. It is so brief in its provisions that I shall be excused for repeating it. It is all embraced in two lines, to wit: "Every member of the Legislature shall be privileged from arrest on civil process." No lawyer of any standing or credit will deny the rule of construction to be given to this language by a maxim as old as the common law, which, applied to this case, is, "the expression of one privilege is the exclusion of every other." Members of the Legislature of this State, by this rule, are *only* privileged from arrest on *civil process*.

Would any honorable member of this House, would any free citizen of this government, like to have the Legislature possess the uncontrollable power of the British Parliament, as cited by your committee? Blackstone says that Parliament possesses sovereign and uncontrollable authority. The whole sovereign power of the kingdom is vested in it — legislative and judicial. The English writers say, "that with Parliament the sovereign power is despotic; it runs without limit and rises above all control." It is the law of privilege of such a government that seems to have charmed your honorable committee. It is the privilege of the law of Great Britain which your honorable committee claims to be in force in this State. Sir, with all due respect to that honorable committee, I deny it, and shall show it otherwise. It is the law of privilege of the State of New York only which this house can assert.

I shall be able to demonstrate that, by that law, no breach of privilege has been committed. It is only from civil process that there is privilege.

The honorable member has not been arrested on civil process. It is impossible in the nature of things that he should have been. The process in question was issued out of the Court of Oyer and Terminer. That court is a criminal court only. It has no jurisdiction in civil cases. It cannot issue civil processes. That court possesses the power, like other courts, to compel obedience to its process. All the forms of law were complied with. Disobedience to its process was proved by proper form of evidence. The court, composed of three persons, not of one individual, solemnly adjudged that there had been a contempt of its authority. It issued its process to arrest for this contempt. This is the high breach of privilege complained of.

Was this civil process? Without intending disrespect to any member of this body, I assert it to be little less than an absurdity so to claim. The judiciary of this State, I apprehend, would be startled at this novel assertion, that this was civil process. The elementary books of authority which influence courts in their opinions say otherwise. They define "attachment" to be a process in the nature of a criminal proceeding, issuing out of a Court of Record against a person who has committed some contempt of court, enumerating, among other things, "the disregarding of its process," or "omitting to do anything that shows his disregard of the authority of the court." Burrill's Dictionary, title "Attachment." 4 Black. Com. 284; 4 Stephens' Com. 19; *People* v. *Nevins*, 1 Hill, 154;

BAILEY, J. in *King* v. *Clement*, 4 Barn. and Ald. 231; Jac. Law Dict. Attachment.

So, too, in like authority, is found the definition of criminal proceedings, as follows: "Civil proceedings are distinguished from criminal in this—the former are for a civil injury, or for a right due from one citizen to another; the latter is for a breach or violation of some public duty in which the State or community, in its aggregate capacity, are interested." In this State criminal proceedings are cases in behalf of the public. In the highest court of this State, in the case of *Spalding* v. *The People*, 7 Hill, 303, the character of this process, upon which the honorable member was arrested, was expressly passed upon by the Court. Chief Justice Nelson, delivering the opinion, and which case was afterward affirmed by the Supreme Court of the United States, says: "It was said, among other things, that *criminal contempt* was where one unlawfully interfered with the process or proceedings in an action, or by the refusal of a witness to attend or be sworn," etc. "All these," says the learned judge, "are strictly cases of criminal contempts, which have nothing to do with the collection of debts *or the enforcement of civil remedies.*" Enough perhaps upon this head of *civil process*, except to concur in the opinion of the Court of Errors of this State, and this learned committee must excuse me when I am compelled to say that, as a judge, I shall act upon that opinion in preference to theirs, at page nine of their report, in which they hold the contrary rule.

They must further excuse me for differing with them in the opinion that a member of the Legislature is privileged from the service of a summons or subpœna to give evidence before a grand jury, or that the service of such subpœna or summons is void. In the recent case of *Wooley and others* v. *Benjamin F. Butler*, decided in the State of Maryland, the defendant was a member of Congress; in passing through that State he was served with process, commencing a civil action against him. He applied to the court to set it aside on the ground of privilege. The court held the service of process, which did not arrest the defendant, to be good and not void. Either that court was in error, or this honorable committee must be; and, if between such conflicting opinions, a judge should happen to be mistaken in his selection of authority, is he to be punished for contempt?

Sir, your honorable committee, by their report, in which they have regarded me as an offender, but with which they did not favor me with a copy (but for the favor of which I am indebted to the honorable representative of my own county), have stated supposed cases of almost infinite mischief, if the privilege of members is not made as absolute as they claim. I am not here to discuss such a question. I, too, can suppose cases of monstrous public injustice, if their claimed law of privilege was the law of the land. If a case of murder or felony is committed in the presence or within the knowledge of a member of the Legislature; and if, without his testimony before a grand jury, or a court, the felon shall escape public justice, should there be no power in this government to compel his attendance to testify? Is the dignity of a member of the Legislature paramount to the public security? Do not felons and outlaws now sufficiently abound in community? Shall new devices be presented beyond the present intricacies of law, by which their escape from punishment shall be secured? But, sir, my duty was to inquire what is the law; not what is policy.

It is my duty to say, however, in regard to the particular case before us, in justice to the case of the honorable member whose arrest is complained of here, I neither knew his name, the name of the accused, nor the crime with which he was charged. All I now know about it is, upon the statement of the public prosecutor, that upon the testimony alone of that honorable member before the grand jury, the accused was indicted and is now held for trial. That the accused had been perpetrating enormous frauds upon that community, claiming that he was acting as the agent of that honorable member. It appears to me that it should have been the pleasure of that honorable member to do cheerfully what he did of compulsion, to give the lie to the foul charge, and bring the culprit, who was assailing his fame, to justice. It is justice to him for me to say, that I do not believe that his refusal to appear and testify was any indisposition to have crime punished; but based solely on a mistaken opinion of his privilege as a member.

I do not further propose to discuss the questions of policy presented in the report of your honorable body; nor would it become a judge to discuss with that committee the policy of a law. Judges, when acting as such, must decide what the law is; not what it should be, nor what policy dictates. If the law is wrong, it is the province of the legislature, not of the judge, to alter it. If the law is obscure, or doubtful, it is equally the duty of the legislature to declare it and make it plain. If its obscurity or uncertainty, is such as to make the judiciary doubt, still, they must act upon their best and most conscientious convictions; and, if they mistake in this—if, in the view taken by this honorable house, which is but another and only an equal department of the government, that an error has been committed, is the latter clothed with power to punish for a mistake of judgment? Even if the decision of the judge happens to be upon the question of privilege, must he not still decide upon that question also when it comes before him? No civilized government on earth, and, above all, no free government, ever placed their judiciary in circumstances so hazardous, so despotic as this theory proposes, subject not only to accusation, but subject to have their accusers the judges who shall try them for the offense of a mistaken opinion, "and those judges, too, a body easily moved to anger by any thing that looks like an indignity offered to their own order."

Mr. Speaker, I crave the privilege of a single word upon the accusation made in the report by your honorable committee. It is not of material facts omitted in their report, which would give a more favorable view of the facts of the case, that I complain, although I might complain of them, but for the great injustice (unintentional no doubt) of the statement in one short paragraph of the report, not of the evidence, but of the conclusions of the committee, as follows. They say:

"His Honor, Judge Potter, before the committee,

in the first place attempted to extenuate or excuse his conduct by a statement that the attachment was issued inadvertently, and that his attention was not called to the fact that Mr. Ray was a member of the Assembly, although it subsequently appeared, by the statements of Judge Potter, of the district attorney, and of Mr. Waldron, the surrogate of Saratoga county, that, prior to the issuing of the attachment, the fact that Mr. Ray was a member of the Assembly was brought to the knowledge of the judge. It will thus appear that the subpœna was issued to Mr. Ray, and the attachment issued upon return of the service of said subpœna notwithstanding such knowledge."

This statement in its effect is not only calculated to create prejudice against me before this House, by whom it is claimed I am to be tried, but to degrade me in public estimation. I did not attempt to extenuate or excuse my conduct; but on the contrary justified the act then, as I do now; nor was the act done by inadvertence. That honorable committee will now do me the justice to remember, that though I did state the fact that, at the time I signed the attachment, I did not know that Mr. Ray, against whom it was moved, was a member of Assembly; that I signed many on that day and this among the number, it was not stated at the time in my hearing, that Mr. Ray was a member of the Legislature, This I state as fact; but I did declare to that committee, that I had previously given the public prosecutor, and also to the surrogate whom he sent, the opinion, that a member was not privileged, but I also declared to that committee that had I known at the time that Mr. Ray was a member, I should have deemed it wrong, but have issued the attachment all the same. I declared it then; I declare it now to this House, and the world. Such was, indeed, my opinion. I stated the fact that I did not know of his being a representative at the time the process was issued. I stated this *as a fact*, because it was true; and because the honorable Chairman called upon me first to state the facts. But, sir, I deny that I claimed to be excused, or attempted to extenuate my conduct, for that reason, further than the fact itself should have that effect. Sir, the conclusion that I attempted to excuse or extenuate is inconsistent with avowals before that committee; or that I previously advised the public prosecutor of my opinion of the law, on being asked, is inconsistent with my avowal that had I known the fact of membership at the time, with my opinions of duty, I should have issued it all the same. The honorable Mr. Littlejohn will remember that he replied to me that, with my opinion of the law, he did not see how I could do otherwise. In this, sir, that honorable committee unintentionally, no doubt, has done me great injustice. I thrust back such a charge, as against all my convictions. I stand here to defend myself upon the broad ground of duty conscientiously performed, admitting that I had given the opinion stated, but still repeating the fact, that, when I signed the process, I did not know the name of Henry Ray was that of a member.

Mr. Speaker, the fear of being tedious compels me to omit the discussion of many points vital to the subject now pending before the honorable body — more vital, perhaps, than a mere superficial view would suggest. A conflict between two equal departments of the same government, possessing co-extensive powers, each being sovereign within its own sphere, is fraught with dangers too serious for contemplation — too serious to be disposed of under an excitement of the moment by the complaining party, who are to sit also in judgment upon their own supposed grievances. For one department by their action, to attempt to reduce another to a state of servile obedience, or to destroy their independence, to bring the judiciary into a state of servile dependence upon the legislative will would leave the former at the mercy of the latter, and the institution of an independent judiciary would perish by its own imbecility or want of power.

Permit me to say, Mr. Speaker, in all kindness of feeling, it is my deliberate conviction, that your honorable committee, unintentionally, and without the reflection that their resolutions were to involve the consideration of such fearful precedent, would now prefer either to withdraw them for further consideration or refer them to the judiciary committee, or to the Attorney-General of the State, for a legal responsible opinion upon the great questions of the conflict of power which I have discussed, and which that committee have not at all considered.

Thus far, Mr. Speaker, I have argued this solemn question upon my individual views; perhaps the argument would carry more profound respect, should I cite to its support the opinions of some of the sages of the law, who, with prophetic vision, did consider this very case.

I have thus far intended to utter no word of disrespect to this honorable body, and I shall hope to receive from them in return that respect to my department, which the theory of our government has established as its right. In this defense, I intend to utter no language of my own, equal in its severity to that of the profoundest expounders of the rights of the judiciary, under our constitutional system.

Mr. Justice Story, that distinguished jurist and expounder of the Constitution, whom all so much respect, said: "Every government must, in its essence, be unsafe and unfit for a free people, where such a department as the judiciary does not exist with powers coextensive with those of the *legislative* department. Where there is no *judicial* department to interpret, pronounce and execute the law, to decide controversies and to enforce rights, the government must either perish by its own imbecility, or the other departments of government must usurp powers for the purpose of commanding obedience, to the destruction of liberty. The will of those who govern will become, under such circumstances, absolute and despotic; and it is wholly immaterial whether power is vested in a single tyrant or in *an assembly of tyrants*. He cites the remarks of Montesquieu with approbation, "that it is found in human experience that there is no liberty if the judiciary power be not separated from the legislative and executive;" and he adds that "it is no less true that personal security and private property rest entirely upon the wisdom, the stability, and the integrity of the courts of justice." "That government can be truly said to be despotic and intolerable, and will be rendered more oppressive and more mischievous, when the actual administration of justice is dependent upon caprice or favor, upon the will of

rulers or the influence of popularity. When power becomes right, it is of little consequence whether decisions rest upon corruption or weakness, upon the accident of chance or upon deliberate wrong."

In every well organized government, therefore, with reference to the security both of public rights and private rights, it is indispensable that there should be a judicial department to ascertain and decide rights, *to punish crimes*, to administer justice, and to protect the innocent from injury and usurpation. But, perhaps, this honorable body would better like an opinion still nearer home. That distinguished jurist, whose name every citizen of New York repeats with veneration, Chancellor Kent, said: "In monarchical governments the independence of the judiciary is essential to guard the rights of the subject from injustice of the crown; but in republics, it is equally salutary in protecting the Constitution and laws from the encroachments and the tyranny of faction. Laws, however wholesome or necessary, are frequently the object of temporary aversion, and sometimes of popular resistance. It is requisite that courts of justice should be able at all times to present a determined countenance against all licentious acts, and to deal impartially and truly according to law, between suitors of every description, or whether the cause, the question or the party, be popular or unpopular. To give the courage and the firmness to do it, the judges ought to be confident of the security of their station. Nor is an independent judiciary less useful, *as a check upon the legislative power*, which is sometimes disposed, *from the force of party*, or the temptations of interest, to make a sacrifice of constitutional rights."

But Judge Story was so imbued with the fear of legislative encroachments upon the judicial, that in another place, section 1585, he says, "that there is a great absurdity in subjecting the decisions of men, selected for the knowledge of the laws, acquired by long and laborious study, to the revision and control of men, who for want of the same advantage, cannot but be deficient in that knowledge. The members of the Legislature will rarely be chosen with a view to those qualifications which fit men for the stations of judges, and on this account there will be great reason to apprehend all the ill consequences of defective information; so on account of the natural propensity of such bodies to party divisions, there will be no less reason to fear that the pestilential breaths of faction may poison the fountains of justice." "These considerations," he says, "teach us to applaud the wisdom of those States who have committed the judicial power, not to a part of the Legislature, but to distinct and independent bodies of men."

This may, perhaps, suffice upon this point. But I approach another point, which is, to ask what is the duty of a judge, even if the question of privilege is before him for decision. This is, perhaps, one of the most important points in the case. Perhaps the opinion of Chief Justice Marshall might not be inappropriate to cite on this question. Surely no intelligent lawyer, no patriotic legislator, would hesitate to look up to such a source for advice.

In looking back upon my conduct as a judge in this matter, it is a source of sincere pride that I may call him, this profoundest of American jurists and noble patriot, to my aid. In *Cohen* v. *Virginia*, reported in 4 Wheaton, 404, that illustrious jurist said, "The judiciary cannot, as the legislature may, avoid a measure because it approaches to the confines of the Constitution. *We cannot* pass by it because it is doubtful. With whatever doubt, with whatever difficulties, a case may be attended, *we must decide it if it be brought before us.* We have no more right to decline the exercise of deciding, than we have to usurp a power that is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is to exercise our best judgment, *and conscientiously to perform our duty.*"

In another case this great judge said, "the legislative, executive and judicial powers of every well constructed government (9 Wheat. 818) are co-extensive with each other." If this is sound, where is the power of the one to call the other to account? In still another case (1 Peters, 814), Justice Johnson said, "in conflicts of power and opinion, inseparable from our very peculiar relations, cases may occur in which the maintenance of principle and the administration of justice may require different courses; and when such cases do come our courts *must do their duty.*"

Mr. Speaker, I do not stand here to deny the power and authority of this house to punish, as for contempt, one who commits an act amounting to a breach of privilege of one of its members; but to deny that as an individual I have committed any such act, or intended to commit any. The act was that of a court, of which I was but one of its ministers, and that as such minister, I am protected by the sanctity of the position — by the fact that it was judicial action, that my decision was one in which duty called upon me to act, and I was bound to render such a judgment in the matter, as a conscientious conviction of duty demanded. It is human to err. If I have mistaken the law, it is such an error as every other judge who has ever sat upon a bench has committed; and this is the first instance in the history of American jurisprudence in which a judge has been arraigned for having mistaken the law.

But, sir, have I even made a mistake? No court has ever adjudged it to be such. I trust none ever will. Suppose that in the opinion of your honorable committee it is a mistake, yet my convictions are otherwise, and since the passage of your resolutions I have the voluntarily offered opinions of distinguished jurists and lawyers, more in number than compose that honorable committee, who assure me I am right. The question, then, still remains undecided, which is right, with no high judicial court to pass upon it. Suppose I am right, after all, and this honorable house shall decide that I am wrong? It will not, therefore, be wrong. My opinion here may be disregarded. I cannot vote here on the question, or if I could, for aught I know, one hundred and twenty-eight, or a majority of that number, men, perhaps, my superiors in legal knowledge, can outvote me. I have said this was an anomalous proceeding. It is so. My accusers are to be my judges. Under such circumstances, I have been told, there is no hope of the act being justified. It may be so. It would be so, it is true, if only the party feeling the spirit of wounded

dignity is to control—feeling that the exercise of their power is beyond control—with no power of appeal. But, sir, if you shall believe I am conservative, it would be magnanimity, it would be the spirit of patriotism, nay, it would be elevating, to divest the case of feeling and prejudice, and to look upon the case as a high court of law, uninfluenced by personal considerations, would look upon it. Sir, this spirit of magnanimity gives me hope.

I have already said there are high governmental reasons why the precedent now to be established should be a good one. That if the law is in doubt, you have the power to remove that doubt by legislation. The courts have no power to do so, because it has not been before them. If the theory of your honorable committee is right, conscientious judges who differ from them will repeat the error; thus they will stand, with the terror of legislative precedent suspended over them upon the one side, but with a more awful terror of Almighty vengeance, if they violate their consciences, upon the other. Can this be called, then, an independent judiciary when placed in that position?

One word more, Mr. Speaker. Your committee inform you that they have based their resolutions upon Parliamentary law, and have given you its antiquity and its evidence of wisdom. They have assumed that this law of privilege is uniform. I have demonstrated by the statutes and constitutions that it is not, and that their conclusions in this particular were in error. I have shown that the National Legislature have their privileges secured by the National Constitution—that some of the independent States have their law of privilege secured by constitutions, and some by statutes, that the law of privilege of this State is qualified, and limited by the statute, and differs from that of the nation, of other States, and of Great Britain. If this honorable committee, as I insist, have been led into unintentional error in this, if they are equally in error as to the law of privilege in Great Britain, may not the resolutions based upon such opinions be also error?

Sir, I have read the cases referred to in that report upon the English law of privilege, and what will be found as most remarkable is, that not one of those cases were determined within the last century, nor since the year 1700. If that learned committee had extended their research to that year, which was the thirteenth year of the reign of William III, they would have found one English statute, *limiting* the privileges of members of Parliament, which is entitled "An act for preventing any inconveniences that may happen by privilege of Parliament." In that act, sir, the privilege was so limited that members of Parliament, including peers of the realm, were made liable to the service of any *civil* process which did not arrest their persons; and service of such process upon them was not void, as your honorable committee say of the subpœna, and as has lately been held in the case cited in the State of Maryland.

If that learned committee had extended their research still further down to the year 1770, just one hundred years ago, to the thirteenth year of the reign of George III, they would have found another statute, still further abridging the privileges of members of Parliament; setting forth in its preamble, that it was to obviate the inconvenience and delay, by reason of *privilege*, to the king and his subjects, in prosecuting their suits, etc. What suits had the king, but suits in his name, which in this country are suits in behalf of the people?

In fact, sir, for the *last one hundred years*, the privilege of Parliament has not been such as your honorable committee report it to be, but has been, as it has been here, limited and restricted by statute, and confined to arrest *in civil cases;* and the English law of privilege now is not materially different from that of the State of New York.

When this last bill to limit privilege was before Parliament, that great light of English jurisprudence, Lord Mansfield, advocated its passage, and I quote the following most significant remarks from his speech, which may be regarded as judicial construction of that law. He says: "It may not be popular to take away any of the privileges of Parliament, for I very well remember, and many of your lordships may remember, that not long ago the popular cry was for an extension of privileges, and so far did they carry it at that time, that it was said that privilege protected members from *criminal actions*, and such was the power of popular prejudice *over weak minds*, that the very decisions of some of the courts were tinctured with that doctrine. * * * It was undoubtedly an abominable doctrine. The laws of this country allow no *place* or *employment* as a sanctuary for crime, *and where I have the honor to sit as judge, neither royal favor nor popular applause shall ever protect the guilty.*" * * * Noble patriot! In another part of his speech he said, "that members of both Houses should be free in their persons, *in cases of civil suits*, for there may come a time when the safety and welfare of this whole Empire may depend upon their attendance in Parliament. God forbid that I should advise any measure that would in future endanger the State. But this bill has no such tendency. It expressly secures the persons of members from arrest *in all civil suits*. I am sure were the noble lords as well acquainted as I am with but half the difficulties and delays that are every day occasioned in the courts of justice under pretense of privilege, they would not, they could not, oppose this bill." The bill passed, and for one hundred years that is the law of privilege.

No case can be found like those cited by your honorable committee since the passage of that bill, even in the English courts. The cases cited are before that time, and, as that noble man declared, they contained a tincture of that abominable doctrine.

Mr. Speaker, have I not shown errors enough in the basis upon which your honorable committee have proposed action, to show that the law of privilege is not, in this State, what is claimed for it? There is not now even an approach to it, as laid down by your committee, in England. Why, sir, ten years before the passage of this last English statute, Lord Preston, a Peer of the realm, was committed by an inferior court for refusing to give evidence before a grand jury on an indictment for high treason. He obtained a *habeas corpus* before a higher court—the King's Bench. When Holt, Lord Chief Justice, said: "He had committed a great contempt, and had I been there

I would have fined him, and committed him till he paid the fine."

But, sir, I have done with English authority.

Now, sir, it only remains to give construction to the words *civil process* in our statute. If an attachment, issuing out of a criminal court, is *civil process*, then have I been misled by books of authority, then have I mistakenly erred in deciding the law. If it is not *civil process*, then my decision is law, and must stand approved, whatever this house may do. Oh! the peril to an independent judiciary! Would to God that a Marshall, or a Kent, or a Mansfield, had the decision of this great question! But, sir, I am not called upon to establish that the subpœna issued by the district attorney was *criminal process*, that burden is not put on me. No lawyer will say it was civil process. I did not issue that — the statute makes it the duty of the district attorney to do that—and yet, in theory, it issues out of the Court of Terminer; and disobedience to its commands is regarded as contempt of that court.

But the question is not that. If regularly issued, its service was good, and not void. It was in the eye of the law a contempt to disobey it. And all the question that remains is, was the process issued upon that contempt a *civil process?* This honorable body is called upon to vote distinctly upon the meaning of those words. I am not unwilling to see that record of names. If with the light of intelligence of this day — if with that love for judicial independence — if with a patriotic desire to avoid conflicts between the co-ordinate and co-extensive departments of the sovereign power — if you shall act with freedom from all spirit of wounded dignity — if with jealous care you feel that you are sitting both as accusers and judges; if you shall place yourselves upon that lofty plane of devotion to the Constitution and the best interests of this noble State; if it shall be your just pride to guard and protect the rights of an independent judiciary from the terrors of aggression of a co-ordinate power; then, sir, I have no fears of the result. Invoking these noble, these elevating considerations to your honorable body, I leave the case in your hands.

I invoke these noble and elevating considerations to your honorable body. But, Mr. Speaker, I desire to say that my appearing here to-day is out of respect to this high department of the government — not waiving my right to protest against being brought here at all. Nay, sir, by the advice of my counsel I should not have appeared here at all, and have put in defiance the power of this body, and should have allowed your officer to execute the process of this house upon my person and held you responsible for the act. But my own judgment has dictated to me to come here out of courtesy, and without waiving my right of protest or acknowledging myself in your custody. Although I have appeared here and offered this defense, I do not say that I submit this case to you, though probably that will be the effect of your action; but, sir, I stand here protesting, earnestly protesting, that I am not here in obedience to your power, but here out of courtesy to an independent department of this government.

There are forty-four Common Pleas Judges in Ohio.

CURRENT TOPICS.

The argument of Mr. Justice Potter, before the Assembly, on the breach of privilege question, is worthy of a more permanent place than in the recollections of those who heard it, and we therefore give it entire in this issue of the LAW JOURNAL. Though necessarily prepared in haste, it exhibits a vast amount of research and learning, and will prove of value should the same or a like question ever arise again in this or the other States. No one can fail to admire the firm and manly way in which he asserts the dignity of the Supreme Court, and the co-ordinate and independent position of the judicial branch of the government.

Mayor Hall, of New York, recently sent a communication to the Legislature, complaining of the difficulty experienced in getting intelligent respectable men to serve on juries, and asking for the passage of a law increasing the penalties for disobeying a summons to do jury duty. The evil, no doubt, needs remedying, but not in the manner proposed. The simplest and surest way to accomplish the result desired is to increase the pay of jurors so that men can *afford* to serve. The judges and other officers of the court are fairly remunerated for their services, and jurors should form no exception. The man who can make five dollars per day in his ordinary business will not be likely to exhibit much anxiety to serve on juries at the miserable pittance now allowed.

Our neighbors in Canada have introduced an experiment in the reform of legal procedure which is worthy of attention. An act was passed last year which dispenses with juries, in criminal cases, on request of the prisoner. The courts to which the act relates are given jurisdiction in nearly every case, except felonies punishable with death, and sit as occasion requires. The procedure is as follows: Within twenty-four hours after a prisoner is committed for trial, the sheriff notifies the fact to the judge, and so soon as the local prosecutor is ready to proceed with the case, the prisoner is brought up in open court under a judge's order, when the charge is read over to him. He is then offered the option of being tried by the judge forthwith, or by a jury, in the usual way, at the next sessions or assizes. If he accepts the former alternative, he is called upon to plead at once to the charge, and the trial then proceeds before the judge alone, but is conducted in all other respects in the ordinary way. So far, this method has been found to work well, and is highly approved by all engaged in the administration of justice. In addition to expediting the trial of persons charged with crime—a very important consideration both to the accused and the people—a tribunal is thus constituted whose findings of fact may be reviewed on appeal.

Drunkenness has never been a favorite defense to actions on contract in this State; but in some of the other States it has been frequently set up. A case of this character has recently been decided in Connecti-

cut, as will be observed by turning to the Digest of Recent American Decisions, on another page. The action was brought by an indorser against the maker of a negotiable promissory note, and the latter set up the defense that he was intoxicated when he signed the note. The court held that nothing short of complete drunkenness, where the party is utterly deprived of the use of his reason and understanding, is available against a bona fide holder, but intimated that a less degree of intoxication would be a sufficient defense as against the payee. As long ago as Lord Ellenborough's time, that Judge held in *Pitt* v. *Smith* (3 Camp. 33) that an agreement signed by an intoxicated man is void on the ground that such a person "has no agreeing mind." Numerous cases sustaining this doctrine, more or less, are cited in 1 Parsons on Contracts, 384; also, in 1 Story's Eq. Jur. §§ 231-3. It is a defense which ought to be received with the utmost caution, and never unless it clearly appears that the drunkenness was known to the payee or other contracting party, and taken advantage of by him; or that it was complete, and suspended all use of the mind at the time.

The Judiciary Committee of the Senate have reported a bill establishing the nine circuits of the Supreme Court of the United States as follows: 1, The New England States; 2, New York; 3, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia; 4, Mississippi, Louisiana, Texas, and Arkansas; 5, North and South Carolina, Georgia, Florida, Alabama, and Tennessee; 6, Ohio, Michigan, Kentucky, and West Virginia; 7, Illinois, Indiana, Wisconsin; 8, Minnesota, Iowa, Nebraska, Kansas, and Missouri; 9, California, Oregon, and Nevada. It also provides that the Justices of the Supreme Court shall be residents of their respective circuits, and vacancies now or hereafter existing in said court shall, in every case, be filled by a resident of the circuit. The latter part of the bill should be stricken out. Impartiality next to integrity is requisite to the judicial office, and this will be more likely to be secured in a stranger than in a resident. The Chinese, from whom we might learn many things of advantage in the administration of public affairs, will not permit their judicial officers to either reside, marry, or acquire property in the district over which they have jurisdiction, and never appoint them to a district within which they were born or received any part of their education. A similar regulation in force here would, we do not doubt, be of benefit, and afford some protection against the dangers which now threaten the independence of the judiciary.

The Pall Mall *Gazette*, in speaking of the "law's delays," finds some consolation in the fact that Englishmen are better off than their brethren in foreign lands, and cites several instances of Dutch colonial justice to illustrate. The first is this: In 1864 two men were committed in Java for manslaughter. After nineteen months incarceration they were tried, found guilty and sentenced to four and six years penal servitude respectively, wholly exclusive of their term of previous imprisonment. These men, however, were guilty, and do not deserve much sympathy; but that fact cannot be urged in mitigation of the cruelty of another case. In May, 1868, a father and son were committed in the same Dutch colony on the charge of purchasing a gun knowing it to have been stolen. Although the preliminary inquiry, which the Dutch system involves, was concluded in the following August, the accused did not receive the official notification of the charge on which they would be tried until April, 1869, and the actual trial did not take place till last September. No knowledge that the gun was stolen could be proved against the prisoners, and they were acquitted after an imprisonment of fifteen months — a period probably double that of the sentence they would have received had they been found guilty. Hard as the case is, it is further aggravated by the fact that the verdict of the inferior court requires confirmation by the Supreme Court of Java, and the two men are in prison at this moment awaiting the pleasure of the latter tribunal. Lamentable as are these examples we doubt not their parallel could be found in many counties in the State of New York. We have ourselves known of prisoners lying in jail for twelve or eighteen months before a trial was had. However, in such instances, the prisoner is usually the one who seeks delay.

OBITER DICTA.

During a divorce case in one of the Bloomington (Ill.) courts recently, the plaintiff interrupted her counsel's eloquent plea for provision for her child, with the remark addressed to the court, that "it was not provision she wanted, but would take whatever the court in its benevolence might allow her in money, be that much or little."

We are pleased to learn that Mr. Edmund H. Bennett, of Boston, is engaged upon a new edition of "Story on Bailments." Mr. Bennett is already well and favorably known as one of the authors of "Leading Criminal Cases," and also of the "Massachusetts Digest." He will bring to his work an extensive knowledge of the law, and great powers of analysis and discrimination.

Tilton, of the *Independent*, is altogether out-Heroded by the *Nation*. In that lively sheet we find the following intimation of the "Golden days of the American Bar" that are crowding in upon us: "We look forward to see the day when the tedium of every trial will be lightened by instrumental music, an occasional song or anecdote from the bench, and perhaps readings or recitations from female members of the bar, and the introduction of a baby or two to be passed round toward lunch time." The unfortunate collocation of "baby" and "lunch time" leads one to recall involuntarily the King of the Cannibal Islands.

Judges, as a class, are not wont to indulge in the classical, poetical, and metaphorical, but occasionally a refreshing exception is to be found. At a court of sessions recently held in one of the counties of this State, the presiding judge, in charging the jury on the trial of an indictment for arson in the third degree, elucidated one point in the following language: "Persons engaged in the perpetration of crime do not, Diogenes like, sally forth in the light of day, with lantern in hand, in search of honest men or women as witnesses of their nefarious performances, but rather like him who draws the curtain from pale Priam's couch, and would have told him half his Troy was burned, with stealthy pace and Tarquin strides, patrols the streets toward their design, at dead of night,

when over half the world Nature seems dead, and busy dreams disturb the curtained sleeper." It is needless to add that a verdict of "guilty" was found.

A lawyer sends us the following waif, and says: "I enclose a copy of some verses, cut from a newspaper, which smack so smartly of legal flavor, that I trust they find their way into your entertaining journal, where they will meet the eyes of those who will appreciate them." The said verses, though by no means new, are nevertheless good:

A LAWYER'S ODE TO SPRING.

"Whereas on certain boughs and sprays
Now divers birds are heard to sing,
And certain flowers their heads up raise,
Hail to the coming on of spring.

"The song of those said birds arouse
The memory of our youthful hours—
As green as those said sprays and boughs,
As fresh and sweet as those said flowers.

"The birds aforesaid—happy pairs—
Love 'mid the aforesaid boughs enshrines
In freehold nest, themselves, their heirs,
Administrators, and assigns.

"Oh, busiest term of Cupid's court,
Where tender plaintiff's action bring—
Season of frolic and of sport—
Hail, as aforesaid, coming spring!"

LEGAL NEWS.

Chief-Justice Hinman, of the Supreme Court of Connecticut, died on the 22d inst., at his residence in Cheshire.

The Hon. Wm. Willis, a well-known and highly respected lawyer, of Portland, died in that city last week.

At a recent session of the Criminal Court in Nuoro, Sardinia, some malicious person set fire to the Judge's wig and robe.

A Georgia Justice has sent an entire Grand Jury to jail for contempt of court in censuring him for bailing a murderer.

A bill has been introduced in the Georgia Senate providing that the Senate shall pay counsel for accused persons in capital cases.

In Virginia there are over one hundred and twenty-five judges to be elected by the Legislature, and the candidates are multitudinous.

The Pennsylvania Senate has passed over the Governor's veto the bill allowing writs of error to the Supreme Court in criminal cases.

Gen. Stringfellow, of Atchison, has sued the Missouri Pacific Railroad Company for $10,000 for services in procuring legislation from the Missouri legislature.

Henry Black, son of Hon. Jeremiah S. Black, has commenced the practice of the law in Mercersburg, Penn., a country village about four miles from Stone Batter, the birth-place of the late ex-Pres. Buchanan.

It is now authoritively stated that Lieutenant Governor Cumback has declined the appointment of Minister to Portugal. The Indianapolis *Journal* says his law practice promises to be more remunerative than the mission would be.

The Maine Supreme Judicial Court has just tried a suit on a promissory note. The plaintiff claimed that the indorsement of the note was: "I back this note holden for debt and costs." The defendant claimed that the indorsement was: "I back this *not* holden for debt and costs," and that the letter "c" had been added. Verdict was rendered for the defendant.

The Chicago city attorney has brought suit against 21 foreign insurance companies doing business in that city. Under the laws of Illinois every foreign insurance company doing business there through agents is required to pay two per cent of their gross earnings into the city treasury. The agents of the companies prosecuted have neglected or refused to comply with the law. The first suit commenced is against the Astor Insurance Company of New York.

An interesting insurance case has just been decided by the law courts of Maine. The plaintiffs were H. W. Lancey & Co., of Portland, whose store was insured by the Phœnix Insurance Company of New York for $3,000. The store was burned in the great fire of 1866. The company refused payment on the ground that the store was situated on leased land and the agent of the company had omitted to state the fact in the policy. The court decided in favor of the plaintiffs, awarding the full amount of the insurance, with interest from 1866, with costs.

Considerable interest is manifested in the disposition by the United States Supreme Court of the case of the Lieutenant Governor of Florida, which comes up on a motion to dismiss an appeal from the decision of the State Supreme Court debarring him from holding the office because he had not been a resident of the State for three years, as required by the Constitution. It is held that the United States Supreme Court has no jurisdiction, as the right to the office existed under State and not Federal law; and also because the decision below does not violate the Constitution or any United States law or treaty.

BOOK NOTICES.

A Digest of New York Statutes and Reports, from January, 1867, to November, 1869. By Benjamin Vaughan Abbott and Austin Abbott. Comprising the Adjudications of all the Courts of the State, presented in Abbott's Practice Reports (new series), vols. 2-6; Barbour's Supreme Court Reports, vols. 46-53; Edmonds' Select Cases, vol. 1; Howard's Practice Reports, vols. 32-37; Keyes' Reports, vols. 1-4; New York (Court of Appeals) Reports, 34-39; Parker's Criminal Reports, vol. 6; Robertson's New York Superior Court Reports, vols. 1-5; Transcript Appeals, vols. 1-7; together with the Statutes, of general application, contained in the Laws of 1867, 1868 and 1869, being the Third Supplement to Abbotts' New York Digest. New York: Baker, Voorhis & Co. 1870.

This, the third supplement to Abbotts' New York Digest, brings the cases down to January, 1870, and embraces the decisions in forty-three volumes of reports. The plan and arrangement is the same as that of the previous volumes, with the addition to each title of an index to all the cases in that title or subject in the previous seven volumes. The mechanical execution of the work is a credit to the publishers—the type is clear, the paper of an excellent quality, and the binding unusually good. Indeed it is not too much to say that it is one of the handsomest books ever published in this country. Of the merits of the work it is hardly necessary for us to say more than that it is fully equal to its predecessors. Whatever the Messrs. Abbott do in the way of book making they do thoroughly and well; but we have ever regarded this digest as their masterpiece; and had they written nothing else they would justly have stood acquitted of that debt to the profession which Lord Bacon spoke of, and would besides have earned the thanks of those who were profited by the results of their labor. Their work is pre-eminently distinguished for comprehensiveness, arrangement and accuracy—the three cardinal virtues in every digest. In this volume the inconvenience of using a work having several supplements has been admirably overcome by the index at the head of each subject. The work is one that no lawyer can afford to be without.

TERMS OF THE SUPREME COURT FOR FEBRUARY.

Last Monday, Circuit and Oyer and Terminer, Tioga, Parker.

Last Monday, Circuit and Oyer and Terminer, Chemung, Murray.

Last Monday, Special Term, Monroe, J. C. Smith.

COURT OF APPEALS ABSTRACT.

Horton v. *Cook.*

In an action to enforce a lien for materials furnished and work performed under chapter 402 of the Laws of 1854. *Held*, that the notice filed in the town clerk's office was insufficient, on the ground that the name of the owner was not sufficiently stated therein; that it is not sufficient, under the requirements of that act, to state facts from which the ownership of the property can be ascertained, but his *full name* is to be specified. Merely stating the surname is insufficient.

Nathaniel A. Cowdrey, App't, v. *Jacob Carpenter, Resp't.*

Where a contract is capable of two constructions, one of which will render it illegal and void, and the other legal and valid. The latter construction will prevail, and the contract upheld and enforced, if the end to be accomplished thereby is lawful and proper.

Ludlow v. *Knox.*

An order made in proceedings instituted to redress an injury sustained by the violation of an order made in an action requiring a party to produce his books, etc., before a referee, comes within subdivision 3 of section 2 of the Code, and is appealable to the Court of Appeals as a final order made in a special proceeding affecting a substantial right. The fine to be imposed in such proceedings under sec. 21, of 2 R. S. 534, must be such only as will indemnify the injured party for his costs and expenses, and such costs and expenses must be ascertained by competent proof before the amount of the fine can be fixed. It is not a matter that rests in the discretion of the judge.

Hiron W. Allen and another, Executors of John Shepard, Appellants, v. *William S. Shepard, William A. Allen and J. F. Malcom, Respondents.*

The Surrogate of the city of New York admitted the will of John Shepard to probate. William S. Shepard appealed from his decree to the Supreme Court. That court reversed the decree of the Surrogate, with costs of the appeal; ordered that issues as to the competency of the testator be tried by a jury, and that upon the trial thereof the contestants should have the affirmative, with the right to open and close. The Supreme Court also ordered that there be paid to J. F. Malcom, attorney for William S. Shepard, a counsel fee of $1,000, and to William A. Allen, guardian for infant, a like counsel fee of $750, to be paid out of the funds of the estate.

The executors appealed to this court from the entire order of the Supreme Court.

At the January Term, 1869, the respondents moved to dismiss the appeal, when this court held:

1. That so much of the order of the Supreme Court as directed issues to be tried at the circuit, the evidence before the Surrogate being conflicting, was not appealable to this court, because it was a matter of discretion with that court, and the order, in that respect, was not final. (The court did not pass upon the question whether an appeal would lie from such an order in a case where there was no evidence whatever on which to base a reversal.)

2. That the portions of the order directing counsel fees to be paid to the attorneys for the parties, not executors, and which awarded costs to the contestants, were final in their nature, designed to be carried into immediate execution, and were appealable.

3. That Malcom and Allen, the attorneys to whom the allowances were made, were proper parties to the appeal. The motion to dismiss the appeal was denied with $10 costs.

The cause was argued upon the merits and decided at the March Term, 1869, opinions being delivered by WOODRUFF and JAMES, JJ.

The court held:

1. That the Supreme Court had no right or authority to make an allowance to a party, not an executor, or his attorney, beyond the statutory costs.

2. That inasmuch as the Supreme Court directed issues to be tried by a jury, its order was not final, and it should not have awarded costs of the appeal to the appellants from the surrogate's decree, as if they failed to succeed on the trial of the issues, they would not be entitled to charge the estate with costs of an appeal not ultimately successful.

The above portions were reversed with costs against the respondents, and the residue of the appeal dismissed without costs.

Held per JAMES, J. That so much of the order as gave the contestants the affirmative was erroneous, but the court held that that portion of the order was not appealable; that if the Supreme Court *on the trial* should refuse the executors the affirmative they could appeal from the *judgment*, when the order could be reviewed, as an intermediate order, and that and the decision on the trial, if erroneous, reversed.

GENERAL TERM ABSTRACT.

SIXTH DISTRICT — JANUARY TERM.*

BANKING.

Liability of associates as partners for deposits: interest on deposits. — The defendant, by filing his certificate under chapter 242, Laws of 1854, became a partner of the individual banker and his cashier in the legitimate conduct of the banking business, under the name of the Unadilla Bank, and became liable for the debts of said bank.

The death of one of the other partners, after filing such certificate, did not work a dissolution of such partnership, but the survivors remained partners as to each other and the public.

The receiving of deposits by a bank and the agreement to pay interest thereon, is not unlawful, and does not invalidate the rights of the depositor.

The banker and cashier, in payment of their own debt, had credited plaintiff's testatrix with $6,000 upon the books of the bank, and given her a pass-book showing such credit upon interest at 7 per cent. Upon such credit, the said testatrix gave her receipt in full for her debt against the banker and cashier. In fact, only $950 was ever deposited to the credit of testatrix in the bank. Afterward the banker and cashier, from time to time, paid testatrix about $2,200, which was charged to her on the books of the bank and on her pass-book. Upon action brought to recover the balance due, it was held that the defendant was only liable for so much money as the bank actually received for plaintiff's testatrix, he having no knowledge of the transactions and having taken no part therein; that the payments of $2,200 made should be applied to that portion of the debt not deposited with the bank, and therefore least secured. The testatrix had the right to make such application of the payments made as she pleased, but as she had no knowledge of the actual facts, and no application of the payments was made by the debtors, the law will apply the same upon the most precarious security of equal degree as justice and equity require. The decision of the court below was therefore affirmed. *Frederick Juliand, Exr., etc.* v. *William Watson, impleaded, etc.* Opinion by BOARDMAN, J.

CONTRACT.

During rebellion. — During the late rebellion, a refugee from the enemy's lines, who has not aided or assisted the rebellion, may, within the Union lines, though in a rebel State, make valid contracts with citizens of the State of New York for the purchase and sale on joint account of cotton to be procured within such rebellious State, and within territory occupied and controlled by the Union forces.

* Owing to the absence from home of Judge PARKER, we have been unable to procure his opinions in time for this number.

The rebel government, being only *de facto*, has no existence or power beyond the territory actually occupied and controlled by its forces.

A state of war dissolves a partnership existing prior thereto between citizens of the hostile countries. And where such partners are joined as plaintiffs, and before trial the alien enemy dies, and his name is thereupon stricken from the case, with directions that the case proceed in the name of the surviving plaintiff alone, no objection to the misjoinder will be available on the trial. *John W. Leftwick* v. *William M. Clarter, impleaded.* Opinion by BOARDMAN, J.

Consideration: statute of frauds. — Plaintiff bought six steers of defendant, and paid him for them. At the same time, and as part of the same transaction, it was agreed verbally that defendant should come in one year from that date and buy said steers back at $58 per head. Before the expiration of the year, defendant gave plaintiff notice that he (defendant) should not take the steers, and that plaintiff might sell them. Plaintiff sold them for $50 per head. On action brought, plaintiff recovered $48 in Justice's Court, and the judgment rendered thereon was affirmed in the County Court.

On appeal, it is held that the execution of the contract of sale by defendant to plaintiff furnished no consideration for the executory verbal agreement to re-purchase said steers to take the case out of the Statute of Frauds. See *Hager* v. *King*, 38 Barb. 200.

The judgments were therefore reversed. *Luther Paige* v. *Francis Clough.* Opinion by BOARDMAN, J.

INSURANCE.

Reforming policy: proofs of loss: chattel mortgage on insured property. — By the policy plaintiff was insured on his stock in trade consisting of bread, etc., also "his cracker machine, cutter, and other tools used in his business as a baker and confectioner, contained" in the same building with said stock. Such machine, etc., were in fact in another building than that mentioned in the policy. This court sustained the decision of the Special Term in reforming the policy in accordance with the facts. Having acquired jurisdiction for that purpose, a court of equity properly grants the full relief to which plaintiff is entitled.

Proofs of loss having been served without objection being made to their form or sufficiency, all technical objections are thereby waived.

The giving of a chattel mortgage upon insured property, without parting with the possession, does not avoid the policy. The title must be divested absolutely before it constitutes an act of sale, alienation or transfer. *Cyrus Strong* v. *The North American Fire Insurance Company.* Opinion by BOARDMAN, J.

PRACTICE.

Pleadings: evidence: commission: referee's report. — Upon an action to recover amount advanced by a commission merchant upon propery received by him of defendant, beyond the proceeds of the property sold under the circumstances of this case, it was not necessary to allege notice of the balance and demand of payment. If otherwise, an amendment should be allowed at any time in furtherance of justice.

When it appears, by the return of a commissioner, that a witness was "duly sworn" or "sworn," it will be presumed that he was legally sworn. It is not necessary that the witness should sign the evidence on the direct and cross interrogatories severally.

The original commission *must* be used when the cause is tried in the county to which it is returned. But when the trial is in another county, either the original, duly proved, or an authenticated copy may be used.

The referee's report need show no other facts than are necessary to sustain the judgment to be entered thereupon. *Charles J. Bishop* v. *John Ferguson.* Opinion by BOARDMAN, J.

SLANDER.

Evidence: charge. — The rank, condition and occupation in life of the plaintiff may be given in evidence for the consideration of the jury in an action of slander, charging plaintiff with want of chastity. It was proper, therefore, for plaintiff to show that she was working out for her support, and had been for several years.

The declarations of a third person to plaintiff accompanying the breaking off of a marriage contract are admissible in evidence to characterize the motive, reason and object of the act.

If defendant has knowledge whether the words spoken by him are or are not true, he will not be permitted to testify that he had no intent to injure the plaintiff. If the words spoken were in fact false, the intent becomes immaterial except in mitigation or aggravation of damages.

Specific acts of lewdness, not pleaded, cannot be proved by the defendant to affect plaintiff's character.

Words charging a venereal disease must import a continuance of the disease at the time they were spoken, or else special damage must be shown. When some of the evidence might be construed as importing a continuance of the disease, the judge properly submitted the question upon the whole evidence to be passed upon by the jury. *Harriet E. Smith, by her Guardian,* v. *Alfred G. Cook.* Opinion by BOARDMAN, J.

TAXES.

Void assessment. — In ejectment, the plaintiff showed title to the land in dispute, under a patent dated February 24, 1770, issued to John Kortright, and by virtue of a perpetual lease, executed by said Kortright, in which rent was reserved. She was the owner, as heir at law of said Kortright, of one undivided sixth interest in the lease and land. The defendant was in possession originally as assignee under the lessee, but claimed that the plaintiff's title, as one of the heirs at law of John Kortright, deceased, had been extinguished by a sale of the land for taxes to a third person. The land was part of the Kortright patent, and the rents in the lease of the land in question, and in the leases of the other lands in the patent, were assessed in 1864 as follows: "The Kortright patent — John Kortright and others, legal heirs of John Kortright, late of the city of New York, deceased, *or* their heirs *or* assigns, for rents reserved in the town of Kortright, in the county of Delaware, subject to taxation, estimated at a principal sum, which, at a legal rate of interest (seven per cent), will produce an income equal in amount to such rents. [Personal, $26,195.]" John Kortright died in 1859, and all of his children, but two, were dead in 1864. *Held*, that the assessment of the rents reserved in the leases was void: 1. Because all the rents in the leases of all the lands in the town were assessed together. 2. Because the assessment was to a dead person, and others not named, *or* their heirs *or* assigns, and *each* rent assessed was not specified in the assessment roll. 3. That an assessment against A. or B. is not valid against either. 4. That the assessment in *Wheeler* v. *Armstrong* (10 Wend. 346) differed from that in this case, because it was to "the widow *and* heirs of Zopher S. Wheeler, deceased," when the widow and all the heirs were living on the land and each had an interest in the same. Also *held*, that a sale for the non-payment of a tax levied under and by virtue of such assessment was void; and that the plaintiff was entitled to recover one undivided sixth part of the land in dispute. *Cruger* v. *Dougherty.* Opinion by BALCOM, J.

WILL.

Construction of. — The fifth clause in the will of Noah Dimmick, deceased, was as follows: "Fifth. I give and devise to my son, Noah, the Kittle farm, *as it is now occupied by him*, to be held and enjoyed by my said son, Noah, during the term of his natural life, for the support and maintenance of himself and family, and after the death of my said son, Noah, I give and devise the said Kittle

farm to his children, their heirs and assigns forever." At the date of the will, and at the death of the testator, only about half of the Kittle farm was in the possession of the devisee. *Held*, that the *whole of the Kittle farm* was devised to the testator's son, Noah, for life, and after his death to his children, their heirs and assigns. *Sharp & Dimmick, Executors and Trustees*, v. *Noah Dimmick*. Opinion by BALCOM, J.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CONNECTICUT.*

ACTION.

In personam. — A judgment rendered in an action in which the property of the defendant has been attached, but in which no service was made on him personally, is not a judgment *in personam*, and cannot be made the basis of an action of debt. The effect of the proceeding is limited to an appropriation under the process of the court of the property attached to the payment of the debt. *Easterly* v. *Goodwin*.

AGREEMENT.

In court. — Where an agreement is made between counsel as to a case in court, which is not in writing and not made in the presence of the court, the court as a general rule will not, in case of a disagreement as to its terms, inquire into it and enforce it. But where such agreement was so made, and the counsel were both agreed as to the fact of its being made and as to its terms, and the only question was as to its construction and effect, it was held that the court could properly consider it. *Woodruff* v. *Fellowes*.

BOUNDARIES.

Committee to establish. — Under the statute (Gen. Statutes, title 37, § 33), which authorizes proceedings in the Superior Court for the establishment, by a committee appointed by the court, of boundaries that have become lost or uncertain, it is not necessary for the court, by a preliminary hearing, to determine whether there is in fact a lost or uncertain boundary, but this question may properly be referred to the committee with the rest. The object of the statute was not, by this summary proceeding, to determine the title to land, or settle disputed or uncertain lines between adjoining proprietors, but to restore the marks of dividing lines that have once existed and have been displaced or destroyed or have become obscure. The action of the court in establishing such lost bounds does not affect the question of title between the parties. *West Hartford Eccl. Soc.* v. *First Baptist Church in West Hartford*.

CONTRACT.

Parol for sale of land. — A parol contract for the sale of lands will be enforced in equity, where possession has been delivered and held, and especially if the vendee has paid a part or all of the purchase money and has made improvements upon the estate. In 1842 P. agreed by parol to sell a piece of land to F., who entered into possession and made improvements, and from time to time made small payments toward the price. In 1848 P. conveyed the land to G., for the unpaid balance due from F., he agreeing to carry out the arrangement with F., and it being understood that F. would labor for G. from time to time on account of the debt. F. continued to occupy the land and make valuable improvements upon it down to 1864, having labored frequently for G., but it not appearing whether any of his earnings had been applied on the price of the land. In 1864 he offered to pay G. whatever balance was due, and demanded a deed of the land, which G. refused to give. *Held*, on a proceeding in equity to compel G. to convey, that F. had not lost his right to the aid of chancery by his delay. *Green* v. *Finin*.

COURT OF PROBATE.

1. *Practice.* — A court of probate has power, in its final decree settling an administration account, to correct any errors made in any former and partial settlement of the account. On an appeal from a decree of a probate court settling an administration account, but refusing to allow a correction of an error in a former settlement, the appellees offered proof of a different item with which the administrator ought, as they claimed, to be charged. Held to be inadmissible. *Mix's Appeal from Probate*.

2. *Power of.* — Where a third person claims property in the hands of an administrator, the court of probate has no power to try the question of title, and to make an order that the administrator deliver the property to the claimant. *Homer's Appeal from Probate*.

DIVORCE.

1. *Proceedings in actions for.* — There is no proceeding known to our common law, or to our system of equity, by which the marriage relation can be dissolved. Divorce is the special creature of statute. *Steele* v. *Steele*.

2. The manner in which the Superior Court shall proceed, and the rules by which it shall be governed in acting upon applications for divorce, are not prescribed by the statute giving it jurisdiction of the subject, and both are therefore left to its discretion. *Ib*.

3. Where, therefore, while a petition for a divorce was pending, which had been brought before the petitioner had resided three years in the State, as required by the statute, a supplemental bill was allowed to be filed after she had resided three years in the State, it was held that the proceeding was not void, though such a practice was not to be sanctioned. *Ib*.

4. Where the respondent, who had already appeared to defend against the original petition, continued his appearance, and made defense upon a trial of the case, without objecting to the supplemental bill, it was held that he had waived all objection to its irregularity. *Ib*.

5. Where the respondent, in a proceeding in error to set aside the decree of divorce, claimed that he did not know of the supplemental bill until after the trial, but it appeared that it was regularly filed with the clerk, and there was nothing in the record to show that her counsel did not know of it, and the allowance of it was not assigned as error, it was held that the claim could not be regarded. *Ib*.

DOMICIL.

Of wife. — The act of 1854 (Gen. Statutes, p. 618, sec. 5) provides that where a woman having a settlement in this State marries a man who has none, she shall retain and the minor children shall take her place of settlement, until her husband acquires one in his own right. In a case where a wife and children had such a settlement and the husband none, supplies were furnished to the entire family. *Held*, that they were not to be regarded as furnished wholly to the husband, but that the town where the wife and children were settled was liable for the supplies furnished the wife and children. *Town of Goshen* v. *Town of Canaan*.

EQUITY.

1. *Specific performance.* — An application to a court of equity to decree the specific performance of a contract to convey real estate, is addressed to the discretion of the court, and will not be granted unless the contract is made according to the requirements of the law, and is equitable, reasonable, certain, mutual, on good consideration, consistent with policy, and free from fraud, surprise, or mistake. *Patterson* v. *Bloomer*.

2. Where a contract was made for the sale of a quarry in this State, and of personal property of the value of $25,000 connected with it — the whole for $55,000, of which $5,000 was to be paid down, and the balance to be secured by a mortgage back, and the vendor, residing in the State of New York, made the agreement under the mistaken belief that a chattel mortgage would be a valid security here without a retention of possession by him, and the purchaser was insolvent, it was held that the vendor was justified in refusing to convey, and that a court of equity, in the exercise of its discretion, ought not to compel him to convey. *Ib*.

* From J. Hooker, State Reporter, and to appear in vol. 35 Connecticut Reports.

EVIDENCE.

1. *In murder trial.* — On the trial of a prisoner for the murder of a woman to whom he had been married and with whom he was living as his wife, the State was allowed to prove that he had a former wife still living; that he had married the deceased under a different name from that which he had before borne; that he had imposed upon her by false letters and papers, and that he married another woman five weeks after the death of the deceased. *Held*, on a motion for a new trial, that the evidence was admissible to repel the presumption of conjugal affection on the part of the prisoner. *State* v. *Green.*

2. Where the motion did not show that the judge restricted the application of the evidence to this object, it was held that it would be presumed that the judge did his duty, and that as the motion did not show for what object the evidence was offered, nor on what ground it was objected to, it would be considered as properly admitted if admissible for any purpose. *Ib.*

3. Much of the foregoing evidence was allowed to be drawn from the prisoner on cross-examination, he having offered himself as a witness in his own behalf, and the objection taken being only to the pertinency of the evidence. *Held* to be no error. *Ib.*

4. *Parol bounty.* — Parol evidence that a soldier deserted from his regiment, given by private soldiers in the same company with him, is not admissible. Nor is a letter written by him at the time admitting his desertion. Such desertion can be proved only by the official record. *Terrell* v. *Town of Colebrook.*

5. A town voted $100 to each person from the town who should "voluntarily enter and be accepted in the United States service." *Held*, that the right to the bounty was complete when the volunteer had entered the service and been accepted, and was not affected by his subsequent desertion. *Ib.*

6. *Stamped instruments.* — The act of Congress which provides that no document required to be stamped shall be admitted in evidence or used in any court until stamped according to law, is to be regarded as intended to apply only to the federal courts. *Griffin* v. *Ranney.*

7. Whether it is in the power of Congress to make laws affecting the competency of evidence in the State courts: *Qnære. Ib.*

FIXTURES.

1. *Annexation to freehold.* — To constitute a fixture, it is necessary that it should appear, from all the circumstances, that a permanent annexation of the article to the freehold was intended. *Capen* v. *Peckham.*

2. The character of the annexation is of great importance as showing the intent with which it was made. *Ib.*

3. A windlass used in a slaughter-house, which passed through and turned in timbers firmly secured to the building, held to be a part of the realty. *Ib.*

FORECLOSURE.

Equitable relief. — A foreclosure was to take effect August 5th. The debt was $3,723, and the property, which was nearly all the mortgagor had, was worth between $8,000 and $9,000. An uncle of the mortgagor, who had ample means, had promised the mortgagor to furnish the money on the 3d of August, and the latter had relied on receiving it, but, unexpectedly to the mortgagor, he failed to furnish it. On the evening of the 5th, the mortgagor procured a person who had the necessary amount in United States bonds, but not in money, to go to the mortgagee and see if he would take them for the debt. This person called at the house of the mortgagee the same evening, and finding that he had gone to bed, sent him word by his wife that he had come to redeem the mortgaged property, to which she brought back a reply that he was sick, and nothing further was done. *Held*, on a petition brought by the mortgagor, to open the foreclosure and to be allowed to redeem, that the relief ought to be granted. *Bostwick* v. *Stiles.*

GARNISHMENT.

1. *Demand.* — A demand by an officer upon a garnishee, on an execution issued in a case of foreign attachment, for "*any estate* of the defendant in the hands of the garnishee," is not a sufficient demand of a *debt* owed by the garnishee to the defendant. *Mitchell* v. *Shelton.*

2. An allegation in a writ of *scire facias* that the garnishee was indebted to the original defendant is not equivalent to an allegation that he had his estate in his hands. *Ib.*

3. Whether an allegation that the officer made demand upon the garnishee "of the sums contained in said execution," would be held on general demurrer or after verdict to be a sufficient averment of a demand of a debt: *Quære. Ib.*

HIGHWAY.

1. *Committee to lay out, etc.* — On a petition for a highway the petitioners and the respondent town agreed on a committee, which was appointed by the court, a member of which was a landlord and tax payer of the town. By statute the committee was to be disinterested. Its duties were to hear the parties, lay out the road if found to be of common convenience and necessity, and assess damages to the land-owners, who were to be notified and had a right to be heard before them. The land-owners had also a right to a reassessment by a jury on appeal. The town and sundry land-owners, who had been ignorant of the disqualification of a member of the committee until after the hearing, remonstrated against the acceptance of the report. *Held*, 1. That the town, by assenting to the appointment, had waived all objection to the disqualification. 2. That the neglect of the agent of the town to inform himself was equivalent to knowledge. 3. That the land-owners, not having become parties to the suit till a later stage of the proceeding, had not waived the objection, and were not affected by the waiver of the town. 4. That the opportunity for a rehearing before a jury was no ground for denying them a disinterested tribunal in the first instance. *Pond* v. *Town of Milford.*

2. The committee, after the hearing as to the laying out of the proposed highway was closed, held an adjourned meeting, and, without notice to the parties, or any further hearing, procured a survey of another line at one end of the proposed highway not before examined or considered, and located the highway on the same. *Held*, that this was "irregular and improper conduct" within the meaning of the statute, and a ground for setting the report aside. *Ib.*

3. After the report of the committee had been returned into court, and at the next term, a majority of the committee by leave of the court amended the report, by altering the amount of damages assessed to a certain land-owner, deducting a certain sum from his damages, and assessing the sum so deducted to him and two others jointly. *Held*, that such an amendment could be made, if at all, only on notice to the party affected by it and after giving him an opportunity to be heard. *Ib.*

4. *Dedication: nuisance.* — A committee of the original proprietors of lands in the town of W., appointed to lay out and divide the lands owned in common, in the year 1752 surveyed and laid out a highway three rods wide, and the highway had ever since been used and repaired as a public highway. *Held*, that although the committee had no power to establish a legal highway, yet their act, accepted by the proprietors, was a dedication of the land to the public for a highway, and that their report and survey were admissible for the purpose of proving the existence and width of the highway. *State* v. *Merrill.*

5. To constitute a nuisance by an erection on a public highway, it is not necessary that it be across the traveled path. *Ib.*

6. Any erection which renders a highway less commodious is a nuisance at common law, and our statute on the subject was not intended to narrow the rule. *Ib.*

(*Continued next week.*)

The Albany Law Journal.

ALBANY, MARCH 5, 1870.

AN ADDRESS TO LAW STUDENTS.

In every age of civilized man, the lawyer has been an important instrument in the work of elevating and refining the race.

Unknown or unregarded, where mere force holds dominion—*silent leges inter arma*—he rises to consequence and dignity, in proportion as mankind advance in establishing the supremacy of mind over matter.

Engaged in the divine attribute of administering justice among men, he cannot fail to make his impress, for good or evil, upon the age in which he lives.

Intrusted with a guardian care over the dearest interests of his fellow-men, he cannot fail to become either a curse or a blessing.

Having necessarily great confidence reposed in him, he cannot fail to become eminently capable of working mischief or benefit to his age.

Silent and unobtrusive as are his pursuits, compared with those of the artist, the warrior, or the statesman, he lives not in history by the blaze of his personal renown, but rather in the advancement of his age, which he has ever been so capable of influencing and directing.

How important, then, is it, that he should understand his position and his power, that he may learn how, carefully to maintain the one and wisely to wield the other! How great the responsibility which devolves upon him! And how necessary that he should be fitly prepared for the great work in which he is to be engaged!

What is there, in our day, of life, liberty, reputation, or property that is not, in turn, confided to the lawyer's care? What is there of arts or sciences, that may not, in due season, come within the range of his action? What is there of domestic relations or of governmental power or duty that does not demand his attention? To borrow language, not yet so trite as to cease to be as beautiful as it isexpressive —"The seat of the Law is the bosom of God; her voice the harmony of the world; all things in heaven and earth do her homage; the very least as feeling her care, and the greatest as not exempt from her power."

And they, who are her ministers, treading her sacred fane and officiating at her altars, may well be reminded "that angels and men, creatures of every condition, though each in different sort and manner, yet all with uniform consent, admire her as the mother of their piece and joy."

Let it not, however, be understood that there is naught but praise to speak of our profession. Unhappily, in all ages of its existence, bad men have abused its power and perverted its privileges, yielding, in this respect, to the temptations which beset them, and to the influence of the age and the profession, like all other human institutions, becoming at once an effect as well as a cause, and acting alike and acted upon, by the spirit of the times.

Cicero speaks of the lawyer of his day as the *Cautus et acutus praeco actionem, cautor formularum. Auceps sylabarum.*

Bacon says of them, that they have a tendency to resist the progress of legal improvement, and are not the best improvers of the law.

Bolingbroke says: "A lawyer now is nothing more—I speak of ninety-nine in a hundred at least—to use some of Tully's words, *nisi legulius quidem cautus et acutus praeco actionem, etc.*" But there have been lawyers that were orators, philosophers, historians. There have been Bacons and Clarendons. There will be none such any more till in some betteo age, true ambition or the love of fame prevails over avarice, and till men find leisure and encouragement to prepare themselves for the exercise of this profession by climbing up to the vantage ground, as my Lord Bacon calls it, rf science, instead of groveling all their lives below, in a mean but gainful application to all the little arts of chicane. Till this happen, the profession of the law will scarce deserve to be ranked among the learned professions, and whenever it happens, one of the vantage grounds to which they must climb is metaphysical, and the other historical, knowledge. They must pry into the secret recesses of the human heart, and become well acquainted with the whole moral world, that they may discover the abstract reason of all laws, and must trace the laws of particular States, especially of their country, from the first rough sketches to the more perfect draughts—from the first causes or occasions that produced them through all the effects, good and bad, they have produced."

Gibbon speaks thus of the lawyers of the Roman Empire: "In the practice of the bar they considered reason as the instrument of dispute; they interpreted the laws according to the dictates of private interest; and the same pernicious habits might still adhere to their characters in the public administration of the State." * * * "The noble art, which had once been preserved as the sacred inheritance of the patricians, was fallen into the hands of freedmen and plebians, who, with cunning rather than with skill, exercised a sordid and pernicious trade. Some of them procured admittance into families for the purpose of fomenting differences, of encouraging suits, and of preparing a harvest of gain for themselves or their brethren. Others, recluse in their chambers, maintained the dignity of legal professors by furnishing a rich client with subtleties to confound the plainest truths, and with arguments to color the most unjustifiable pretensions. The splendid and popular class was composed of the advocates, who filled the forum with the sound of their turgid and loquacious rhetoric. Careless of fame and of justice, they are described, for the most part, as ignorant and rapacious guides, who conducted their clients through a maze of expense, of delay, and of disappointment, from whence, after a tedious series of years, they were at length dismissed, when their patience and fortune were alike exhausted."

And Hume, though he awards to the profession the merit of having, in the decline of Roman learning, when the philosophers were universally infected with superstition and sophistry, and the poets and historians with barbarism, preserved, through the dark ages, the good sense and purity of language of the palmier

days of the civil law, yet refuses to ascribe this merit to the love of science or of truth, but rather to a constant study and close imitation of precedents, and he cannot refrain from saying of lawyers that they are seldom models of science or politeness.

Such is the character of our profession in olden times. Need I pause here to comment upon its great advancement since those days, and to show that that which was then the exception is now the general characteristic, and that the keen and acute promoter of suits and cavillers on words of Cicero, is now indeed an exceptionable case with us?

It is enough, perhaps, to say, that our profession has kept pace with the age, and lags not behind its progress.

But it is capable of preceding, and adorning, and elevating it, and that which it is capable of it is its duty to perform.

The field of that duty is wide-spread before us, and nowhere so broadly as in this country, where freedom of thought and action is enjoyed to an extent never before known among men; where the sphere of the lawyer's usefulness has no limit, and where, in the work of elevating mankind, the lawyer has a great office to perform, for here his, more than any other calling, is identified with the science and practice of government.

Of fifteen occupants of the Presidential chair, thirteen have been lawyers.

The mind that first brought order out of the financial chaos of a new and an untried government, was that of one who was even as distinguished as a lawyer as he was as a statesman.

It was a lawyer who first infused into our political system the principle of diffusion instead of concentration of power, which has now, for three-quarters of a century, been the controlling impulse of our government.

The convention, whose office it was to frame the Constitution, which has been so eminently the instrument of our country's greatness, was composed chiefly of lawyers.

The conventions, who framed the three constitutions of our State, were mostly lawyers.

Our national cabinet, from the very foundation of our government, has been mostly lawyers.

And in every legislative body in the nation, for now nearly a century, the profession of the law has been more influentially represented than any other calling.

It may, then, well be said, that in the mighty work of completing our independence, as well as in the general advancement of our people, the lawyer in America has a high and holy office to perform.

The lawyer has ever been a cautious, if not a persistent, reformer. And the time having gone by when reforms were forced upon men at the drawn dagger's point or the cannon's mouth — the days of Tamerlane, of Mahomet, and of Napoleon, having floated down the stream of time, it is to be hoped, never to return, the hour of the lawyer's usefulness as a reformer has arrived. And devoutly is it to be hoped that this characteristic of cautiousness will not be abandoned; for solemn, indeed, is the duty which the emergency imposes upon him, and enduring may be the consequences for good or for ill.

Some of the reforms, which the lawyers have been instrumental in furthering, may be dwelt upon a moment as, at least, showing what they are capable of performing.

A strange anomaly in the system of law which has obtained in our country, and which came to us by inheritance, was the establishment of two distinct systems of common law and equity jurisprudence, administered by different tribunals, and governed by different principles, yet concentrated on appeal by a common tribunal of dernier resort.

As an original question, no enlightened lawgiver probably would ever have suggested the fabrication of such an anomaly. But flowing, as it did, from the necessity that was produced by the extreme severity in which the common law of England had become enveloped, there was great wisdom in the formation and gradual development of the English Court of Chancery; for thus was a remedy provided for many evils to which the practice and habitude of the common law courts forbade redress. But there was often involved the necessity of several actions when one ought to have been sufficient, and a great outlay of expense to which the parties ought not to have been subjected; and it often happened that, after long and expensive preparation, parties would be sent from one court to the other, backward and forward, for partial relief, when the same tribunal might readily have been rendered capable of performing the whole duty.

Long habit and custom had rendered this endurable in the mother country, and had transmitted it to some of the colonies. New York, New Jersey, and South Carolina, for instance, had, from an early period, distinct chancery organizations as England had. Some of the colonies (and States as they afterward became) early emancipated themselves from this evil; some of them organizing only one court, and that without any equity jurisdiction, as was the case with Massachusetts, and in Louisiana, where the distinction between Law and Equity is entirely unknown; some of them having only one court, with the union of law and equity powers, as in Maine, New Hampshire, etc., and the Federal Judiciary, being organized with only one tribunal possessing both powers, but kept entirely distinct in all the intermediate steps and final adjudication.

In this State, the distinction between the two systems, with their separate tribunals and principles of jurisprudence, as in England, was kept alive until the Constitution of 1846, which established only one tribunal, and until the Code of 1848, which completed the amalgamation and enacted the same system of practice and pleading in all cases, whether known as legal or equitable.

This is a reform in the administration of justice of very great importance, and its value is scarcely yet recognized among us. As time advances and brings with it the overthrow of attachments in the profession, which early study and long habit have engendered, its advantages will be more and more appreciated.

Even in England the same reform has been inaugurated, and you will now find in the modern common law reports cases of equitable claims and equitable defenses set up and adjudged in courts where

formerly they would not have been listened to, and where formerly the party would have been denied the relief to which he was manifestly entitled, merely because he had sought it in the wrong forum.

Another valuable reform introduced into our State was in the revision of our statutes in 1830 — an enduring monument of labor and wisdom, and whose improvements in our system of laws were too numerous to warrant enumeration on this occasion.

Another, and quite important as executing and completing the two former, is to be found in our Codification of the Practice.

And still another, which removed from our statute book a sad relic of inherited barbarism, is to be found in our abolition of imprisonment for debt.

All these important reforms in this State are the products of about a quarter of a century. They are steps in the march of our emancipation, and they sprang chiefly from lawyers themselves.

In the reception of them by the profession at large, in the first instance, Bacon's remark was justified, and there was displayed a "tendency to resist the progress of legal improvement." But this instinctive first impression was soon succeeded by a becoming magnanimity; and all these reforms find now their strongest supporters in the profession. Even the Code of Practice, with all the imperfections which too much haste necessarily engendered, and which have required so many emendations, and such an envelop of interpretation, is becoming domiciled among us, because of its really wise and commendable reforms, and has earned for itself the favor and adoption of other States. It has now become really one of our institutions, and when fairly wonted among us, the reform which it consummates will be a marvel among the old lawyers, while it will be sanctified by the adoption of the young.

The lawyer is, from necessity, a lover of freedom — rational freedom, as distinguished from unbridled license on the one hand, as it is from mental thralldom on the other; and that is so, because without freedom of thought and speech he cannot attain that perfection and eminence in his profession which is the aim of every generous mind.

And it is worthy of remark, that his advocacy of freedom has been none the less ardent because of the absence of the stimulant of a hope of glory, which so often rewards, if it does not prompt, others.

Thus, in the English Revolution, which ended in the expulsion of the Stuarts, in the constitution of a limited monarchy and the establishment of liberty on a broad basis, the first impetus was given by the lawyers in the House of Commons. Without any hope of that fame which surrounds the name of the successful warrior, they struggled for freedom, they warred upon prerogative, and they triumphed. But their names are almost forgotten, while Cromwell and Fairfax and Monk live in history and memory yet as the great defenders of constitutional liberty!

So in our own Revolution. While the names of Washington and Green and Gates, and a host of successful soldiers, live as familiar words in the memory even of our children; while even Arnold is embalmed in history's curse, and the spy Andre is remembered as a gallant soldier, how imperfect is our recollection of the lawyers, who, in the Continental Congress, pledged life, and fortune, and honor in the cause of freedom; who remained firm amid the darkest hours of the struggle; who successfully completed what the soldier began, and who thus toiled and thus triumphed, silently and obscurely, with every prospect of the traitor's halter, but with no hope of the chieftain's glory!

I would, young gentlemen, that you would trace for yourselves those struggles, with reference to the moving spirits in them, from the beginning to the end. In the one case, from the commencement of the reign of the eighth Henry to the flight of the second James, and the incoming of William and Mary, with the conditions attached to their advent; and in the other, from the landing of our fathers at Plymouth and at Jamestown to the final adoption of our Constitution.

You would find that it was the lawyers who sustained, if they did not originate, the struggles of at least a century's duration; who guided, if they did not direct, the movement, and who secured the ultimate triumph, even if they did not achieve it. Their names have almost passed from history's memory; but, in searching the musty records of those days, you will find that it was their quaint but burning eloquence which incited the masses to a fiery resistance to oppression; that it was their patient endurance which prolonged the struggle, through long years of doubt and discouragement; and their prudence and caution which finally secured the legitimate fruits of victory in the advancing emancipation of man.

And though you may not choose to incumber your memory with the forgotten names of William Ellery, Samuel Huntington, Richard Stockton, James Smith, George Ross, and others of the lawyers, who were firm and steadfast in the days of our Revolution, you may at least profit by their example, and learn to duly cherish the profession which prompts to such unobserved, but most invaluable efforts, for the whole family of man.

And believe me that it is not there alone, and amid the crowds of the profession there acting, that you will find the examples of such noble disinterestedness well worthy of your imitation. You will find them in individual instances, and most of all in him, who, living in that age, and making his mark upon it, has come down to our time as one of the most distinguished of the English bar, and as the most eminent of modern philosophers, rivaling as such even Greek and Roman fame. I need hardly say that I allude to Francis Bacon.

He served a master who was distinguished equally for his pedantry and his weakness, and who, when presented with his Chancellor's great work — his *Novum Organum* — which will live when James the First will be forgotten, even as an index to a period of time — was incapable of any further appreciation of it than to enable him to perpetrate the poor witticism, that it was "like the peace of God, past all understanding."

He served him with those who could not otherwise receive that work than with the remark, that "a fool could not write such a book, and a wise man would not."

Thus, unknown to those around him, he was yet

the master-spirit of the day, and offered himself up a willing sacrifice to save his infatuated master from the consequences, which yet, at a later period, visited his less erring but more unhappy son.

His name has come down to us, burdened with the epigramatic license of the poet, as

"The brightest, wisest, meanest of mankind;"

and even a distinguished legal writer of more modern date has loaded his memory with a fresh revival of the stigmas of the past.

But you, if you examine the history of the period to which I refer, will observe abundance to persuade you that he was indeed a voluntary sacrifice to ward off danger from a weak, and, therefore, ungrateful master; that the fault for which he fell was that of his age, and of long ages which had preceded him, and not of himself; and that the acts imputed to him were those which custom had sanctioned, and his monarch's prodigality had rendered necessary. You will marvel at the industry which enabled him to say, what no Lord Chancellor has been able to say since then, namely, that every cause in his court had been heard and determined. You will admire the capacity which enabled him to reduce to a system the hitherto chaotic elements of equity jurisprudence. You will revere the lofty and pure morality which ever flowed from his pen. You will marvel at the sagacity which pointed out to him thus early the coming storm which ere long overwhelmed the dynasty he was pledged to support. You will admire the mental power which enabled him to rise to the position of the first subject, the first lawyer, first statesman, and first philosopher of his day. You will revere the grasp of intellect which enabled him to overthrow the philosophy which had been hallowed by the adoption of more than a thousand years. And, above all, will your reverence and love for him be excited by the ease with which he surrendered his highest hopes and his lofty position to the dictates of gratitude. And you can well appreciate the feeling with which, as life was fading from him, he left his "name and memory to men's charitable speeches, to foreign nations, and the next ages."*

But to return to the legitimate topic of my paper:

It has of late become a common idea that it is easy to become a lawyer — in fact as well as in name — and that very little previous preparation is necessary to form a successful practitioner. Nothing can be wider from the truth, and it will grow wider, day by day, as the mass of the people increase in education and in wealth: for with such increase will grow a more anxious inquiry into the qualifications of those who are to be intrusted with important interests, and a greater capacity to judge of them.

Who are they who, even now, have confided to them the great constitutional and commercial questions which agitate our courts? Not the mere pretender, who has found it an easy matter to obtain a license, who has, according to the forms of the law, broken through the outer wall into the ranks of the profession, but who has not yet studied long enough to learn how little he knows. Not to him is confided the defense of life, liberty, and property. He may float successfully on the surface, and, perhaps, pursue a gainful course of practice, but to him is denied all participation in the graver questions which are mooted in our midst, because to him, the principles which are to determine such questions are a sealed book, and the world around him knows it.

It is a sad mistake for such persons to suppose that the preparatory course of studies which once was extended to seven years, was all that was demanded of the successful lawyer. That preparatory course but acquainted him with the names and uses of the tools of his trade. To attain eminence, his studies only began at the end of such probation. And there is this peculiarity in the profession. The merchant and the mechanic, as he advances in prosperity and wealth, may repose from personal toil, and, content merely to direct, may devolve on others the active duty of execution. So in other professions and the arts, the successful man may delegate to others the execution of his plans. But not so with the lawyer. With him there is no delegation of duty, for it is his personal knowledge that is invoked — it is his own peculiar judgment that is sought — it is the exercise of his own talents that is demanded. Hence it is that there is no more laborious man living than the successful lawyer in a large business. And, believe me, young gentlemen, when any of you shall attain that position, you will be, above all things, thankful, that the first ten years of your professional life were devoted to unintermitted study.

Let us see for a moment what are the elements which enter into the formation of an eminent lawyer, and ascertain whether my standard is too high.

You will remember the remark I have already quoted from Bolingbroke, that the lawyer, to be eminent, must occupy the very vantage ground of science. And he must so, for the whole range of science and the arts may come within the sphere of his action. And he has not always time to "cram for the occasion," as it is called at Cambridge. To-day he may be occupied with the construction of a ship, to-morrow with the anatomy of the human form; now with the mechanism of a steam-engine, and anon with the magnetic telegraph; at this moment with the laws of gravitation, and at the next with those of pneumatics or hydraulics, and so on with the whole circle of knowledge. I once found myself materially aided by a knowledge of algebra, a branch of study which, in my college days, I deemed never could be of use to the lawyer. And I have over and over again been

* I am aware that in the opinion which I have here expressed of the great Chancellor, I am departing from the commonly received opinion of him. "The Parliamentary History of Great Britain," "The English State Trials," Lord Campbell's "Lives of the Chancellors," and Macaulay's "Romance of History," all unite in conveying a different impression from that which has obtained with me. I can only say, that after examining those works, Bacon's own writings, and authentic histories of his life, I have arrived at the conclusion I have expressed, and, having arrived at it, I must give utterance to it.

I cannot, of course, in this connection, detail all the reasons drawn from those sources, which have contributed to my opinion, but must content myself to leave the topic for those who choose to search for the truth, to determine whether I am indeed right, or am wandering from the path of historical verity.

For my part, it seems to me that my conclusion must follow in every candid mind that will persistently investigate the subject for itself.

benefited by an acquaintance with arithmetic and book-keeping, though when I graduated I was scarcely capable of calculating the interest upon a bill of exchange.

I do not, of course, mean that the lawyer should be as familiar with these different topics as the professors of them are, but I do mean that it is important for him to be familiar with the principles of them — that he should have that familiarity with them at least, that is to be acquired at our higher seminaries of learning. And he who enters the profession without that familiarity will stumble wearily along the path which the better informed can so boldly tread.

So, too, classical knowledge is greatly advantageous, if not indispensable, to the lawyer. And this embraces an acquaintance with other languages, both ancient and modern, as well as his own.

Greek is valuable because so many of our words have a Greek origin, that it is only by an acquaintance with their root that we can learn the precise and accurate meaning of the language we use, and avoid a loose mode of speaking where precision is indispensable.

The Latin, however, is much more necessary, because so many phrases and axioms of the law are yet clothed in it, and because the treasures of the civil law, which we are daily more and more incorporating into our system, have that garb.

French and German, of modern languages, are necessary, because they have become so common among our people.

But beyond this acquaintance with language, a knowledge of classical learning, both modern and ancient, will be advantageous, because of the stores of wit and wisdom which may thus be opened, and be so often made available to us, and because of the elevation and refinement of intellect which must follow a familiarity with it. The idea is well expressed by Walter Scott, when he makes Counselor Pleycll, one of his very best drawn characters, say, when pointing to his library of well-selected classics: "There are my tools of trade. A lawyer without history or literature is a mechanic — a mere working mason: if he possesses some knowledge of these, he may venture to call himself an architect."

A pedantic use of such learning is, however, carefully to be avoided; for thus is shown rather a want of learning than the possession of it. The true use of classic lore is the incorporation of the beauties of its thought and diction into, and forming part of, ourselves, for thus are our mental efforts elevated and refined. But the too free use of quotations shows less of this incorporation than it does of the cultivation of mere memory. Let me not be understood as utterly condemning the use of quotations. I am aware, that in English forensic and parliamentary oratory, it is now considered quite *outre*, to indulge in this respect; but what could have been finer or more expressive than Webster's quotation in the celebrated debate with Haynes, of South Carolina, in the United States Senate? He was speaking of the recession of power from the Southern oligarchy, where it had so long reposed, and with a prophetic grasp of mind, he said:

"Upon my head they placed a fruitless crown,
And put a barren sceptre in my gripe,
Thence to be wrenched by an unlineal hand,
No son of mine succeeding."

Once in a while this will do, for at times it may be as effective as it is pleasing, but the habit indulged too freely will make the style turgid rather than interesting.

We have an example of this in some of the works to which we have daily reference. Thus, in Story's Commentaries on the Conflict of Laws, the reader is wearied with the eternal quotations from the Latin of the civil lawyers. One admires the writer's familiarity with the classic language of Rome, and so far his object has been attained, but the modern student cannot help wishing he had "done it into English for the benefit of country gentlemen." How unlike that is the plain simplicity and forcible Saxon of Kent's Commentaries, or Greenleaf's Treatise on Evidence. In spite of himself, in the one case, the student is reminded rather of the pedantry of Cambridge than of the polished refinement of Addison or Blackstone.

It is, therefore, the incorporation of classic learning into our own habits of thought that we are to aim at, and it is thus that we may aim at attaining the commanding power of a Burke, an Erskine, or a Brougham.

And thus is laid the foundation of that eloquence, which is so essential to the success of the modern lawyer, that without it, even the profoundest learning cannot achieve the summit of eminence.

It is said the poet is born, and the orator made. This sounds well and epigrammatic, but it may be doubted whether it is entirely true, at least to the extent to which the axiom has generally been received. For while it is true that the faculty of eloquence may be greatly cultivated, and be vastly improved by cultivation, yet there enters into its very constitution certain elements of the power of language, and the imagination, which are nature's gifts, but not to all. The most beautiful flower grows only in a fitting soil duly prepared for it.

In my early days I knew two men* who were rivals for professional eminence and political distinction. One of them arose to the highest position in our country, and the other for years was a leading spirit of his time. Neither of them had the advantages of early education. Of one, it was said that his honorary degree of Master of Arts remained by him untranslated, and of the other, that he could scarcely construe the most familiar legal maxim, and could not make an artistic draft of a bill in Chancery.

Yet both attained eminence in the profession, for both were natural orators. In the one, his language flowed smoothly and pleasantly along, and he carried his hearers with him by the graceful garb in which he clothed his depth of thought. The other was a foaming torrent that swept all before him by the rush of his wit, which never failed him, and the keenness of the invective before which the strongest would quail.

Both, however, possessed two qualities in common; one was untiring and enduring industry, and the other was a most profound, and perhaps, in some degree, an instinctive knowledge of human nature.

Side by side they arose, and for years they flourished as political and professional competitors, but their personal intercourse was never disturbed. To

* Elisha Williams and Martin Van Buren.

the end, they continued on terms of friendly relations with each other, and never annoyed themselves or others by those personal bickerings, which in every relation of life cause so much of the unhappiness that we behold.

And here I may stop a moment to consider one peculiarity of our profession which is worthy our attention. Although we are brought into daily collision with each other in the advocacy of our client's rights on opposite sides, and though there is often professional rivalry prevailing among us, we do not, except rarely, experience those personal animosities with which other callings are afflicted. Among physicians, divines, soldiers, artists, and mechanics, professional rivalry is apt to lead to personal animosities, but not so in the profession of the law. Those who come most frequently in conflict are generally the most friendly to each other, and it is among the most eminent of the profession that the most liberal and kindly feelings obtain.

This is owing partly to the fact, that thus each becomes better acquainted with the other's good qualities, and becomes fully aware of the forbearance he must display as well as demand, but it is mainly owing to the necessity of the case. No lawyer could endure his life, if he made all his clients' quarrels his own, or bore with him from the court-room the wrangling which his position demands from him within it, and it may be owing to the fact that a close connection with abstract principles is ever at variance with mere personal considerations.

Be the cause, however, what it may, the fact is no less certain, that there is more good and kindly feeling toward each other prevailing among lawyers than in any other calling.

Esto perpetua! Long may it be so, for our calling would be a curse alike to its professors and to others, if that enlarged and liberal feeling should ever be banished from among us.

I have spoken of the wit which the lawyer may gain from an acquaintance with the classics. I confess that I attach much importance to the cultivation of the faculty, for I have beheld many instances in which it has been a powerful weapon in his hands.

I do not refer to that play on words that is calculated to make the unskillful laugh, and sometimes the judicious grieve, but that more forcible and elevated kind which, by the union or opposition of two ideas, lends force to the expression, and at the same time gives pleasure to the hearers.

Erskine's description of insanity is an instance of it: "Not that Reason is hurled from her seat, but Distraction sits down beside her, holds her trembling in her place, and frightens her from her propriety." I once heard one of our profession defending a judge whose opinion he had cited, and of whom it had been said, that, deservedly great as was the reputation of that judge, he was not always equal to his fame, but would sometimes nod. The reply was, that it was not always easy to know the cause of the obscurity we complained of, whether it was owing to a spot on the sun or a cloud around the beholder.

The possession of this faculty was one great cause of the success of Elisha Williams, to whom I have already referred. Like the ancient poet,* he caught his illustrations from the common objects of life around him. I once heard him commenting on the undue influence of a second wife upon the testamentary disposition of her husband's estate. While speaking for the children of the first marriage, the second wife was sitting near him and before the jury, feeding her infant with an orange. He broke into one of his eloquent strains, which he closed by saying that "the stepmother so squeezes the orange of her affections upon her own offspring, that she has nothing but the sour rind to give to that of others."

(*To be continued.*)

* Homer.

JUDICIAL LEGISLATION.

III.

We propose in this article to inquire into some of the modes by which law is made and abrogated by the courts, and this will lead us first to glance at the character, extent and object of some of the changes in the law effected by them.

Law is the product of the policy, interest, necessities, habits and sentiments of a people. In fine, it is the reflection of their civilization.

It has been truly said that, were the whole history of a nation blotted out, and its laws remain, its progress in morality, philosophy, letters, arts, science, trade and commerce, could be pretty accurately ascertained from them; for all of these enter into and shape the laws. This will appear by comparing the jurisprudence of the two extremes of civilization. In the rude state the laws are simple, severe and arbitrary, respecting the habits and thoughts of that stage. On the other hand, in the enlightened stage the laws are complex and elaborate, consisting of infinite particulars to meet the vast and varied interests and exigencies of civilized life, and being, withal, grounded in reason and natural justice.

We obtain no very elevated notion of the refinement and moral sensibility of the Romans during that period of their history, when it was recorded in their twelve tables that a debtor, failing to fulfill his obligations, was liable to be cut into pieces and divided among his creditors. And we concede a marked advance, when the debtor could only, on failure to meet his obligations, be claimed as the slave of the creditor.

Nor is the famed Elizabethan age recalled without a shudder, when we remember that the rack and torture were applied under the personal supervision of the then attorney-general of England, afterward Lord Chancellor Bacon, to obtain testimony from unwilling witnesses.

It would doubtless be an interesting theme, and, did our limits permit, we would like to trace the progress of those two great nations in civilization and refinement, as exhibited in their laws; and more especially to note the influence of the courts in softening the rigor of their laws, and in modifying their rude institutions. But it will be sufficient to illustrate our theme to note, in a general way, some of the changes wrought by the courts in the English constitution to meet the change in the habits, interests and thoughts of that people, during certain periods of their history.

The feudal system came into England with the Conqueror. It was an inspiration of the genius of war. It contemplated a vast disciplined standing

army — an army embracing every able-bodied male in the realm — yet one that, instead of migrating from place to place and living by plunder, might permanently dwell in one territory, and occupy the intervals of peace in the pursuits of agriculture. To enforce this central idea grew up in time a vast and complex system of laws, harsh and severe as that military discipline on which it was founded. Its leading features were that all the lands belonged to the king, and that the subject held them by his favor and the performance of certain services; that they were not transferable except by the king's consent; that they descended to the eldest son, and that the peasant or serf descended or was transferred with the land upon which he was born. But when, in process of time, war ceased to be regarded as the normal condition of society, and when learning revived and the people began to turn their attention to trade, manufactures and commerce, it was found that their laws and institutions were entirely unsuited to this change in their affairs, and that new wants and new interests constantly developing required the abrogation of old and the creation of new laws to advance and protect this new manifestation of national habit and policy.

This was effected, in a large measure, by judicial legislation.

By the invention of fictions, as illustrated in the construction of the statute de donis and others, and by the introduction of uses and trusts, a branch of equity jurisprudence, borrowed from the civil law, the courts stripped real estate of its feudal burdens, and rendered it transferable to meet the exigencies of trade and commerce. By casting the burden of proof on the lord in cases involving freedom of the serf, and other devices, they abrogated serfdom, thus permitting the former serf to leave the soil and engage in other pursuits at his inclination.

They also closely inquired into the prerogatives of the Crown, and gave the sanction of law to those customs which weak or indulgent kings had allowed to grow up in derogation of their originally asserted rights. By applying the principles of natural justice to the adjustment of the multiform relations that sprang up with the general introduction of trade and commerce, they perfected a system of laws under the various titles of partnership, bills of exchange, bailments, fixtures, marine, fire, and life insurance, etc., until they caused them to assume the precision of regular branches of science, so that personal property, which is the especial product of peace and civil liberty, and which had been entirely neglected, during the military period, for real estate, obtained an equal if not a superior place to it in jurisprudence. Thus for centuries this work went on, until the law, conforming to the changed character of the nation, reflects the character of a great, free, commercial people. The particular modes by which these changes have been effected may be generally classified as two: 1. Indirectly or incidentally as by taking notice of customs and usages of trade, and thus giving them the sanction of law, not simply because they are customs, but because they are just and are adapted to meet the end in view; for the courts deny that a custom can be a law until it is recognized by them to possess certain qualities, and it is a maxim of the law that a custom not good must not be used "*malus usus abolendus.*" They only furnish materials from which the law may be made; or, 2. Directly, as when the courts lay down a general rule, or build up a branch or title, either by gradual accretion by the aid of natural law, or by incorporating into the law the perfected legislation of other nations.

Under the head of direct legislation may be classed the introduction of uses and fictions to which we have before referred, and, we may add, the introduction of vast portions of the civil law and the law merchant, which have no authority in our law, except as the courts have drawn them in and approved them.

Again also, by the adoption of certain abstract principles or maxims founded in natural justice, such as the safety of the people is the highest law; when the reason for a rule fails, the rule falls with it; that there is no wrong without an adequate remedy, etc.; or, in the construction of statutes, that the letter killeth but the spirit maketh alive,—this change in the law is constantly going on; every day adds a little to strengthen those rules or principles that experience proves correct, and every day weakens those that time and use show to be erroneous. Sometimes an adventurous judge, like Lord Mansfield, will, by one blow, overthrow the rules of a century's growth; but this is usually done by taking distinctions, by reducing the decision to its narrowest limits, and by placing one decision on a line slightly diverging, each succeeding court placing its decision a little in advance, until the old rule is left as an excrescence, and ceases to be quoted; and thus, by the application of natural justice and cultivated reason to the affairs of men, their institutions and laws are silently conformed to the nobler thoughts, customs and aims of successive times; as a consequence, the fabric of their jurisprudence must ever reflect the physical development of their country, and the habits and intellectual progress of the people.

The mode by which these vast changes in the laws and institutions of free governments are effected by the courts, may not inaptly be compared to the manner in which physical changes are wrought by the flow of a mighty river through the land, which is ever changing its bed—now wearing upon one bank and now upon the other, as the physical conformation of the country or the nature of the soil permits or compels, here cutting off an island from a sharp bend in the bank, there building up an island by slow accretions, and, finally, as the channel becomes narrow or crooked, striking out a new course to the sea and leaving the old channel as a waste.

We shall conclude what we have to say upon this subject in another article, which will be devoted to the comparative advantages of judicial legislation.

LAW AND LAWYERS IN LITERATURE.*

VIII.

SHERIDAN,

In "The School for Scandal," has a good idea of the responsibility of slanderers, when he makes Sir Peter Teazle say: "I would have law merchant for them, too; and in all cases of slander currency, whenever the drawer of the lie was not to be found, the injured

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

parties should have a right to come on any of the indorsers."

RICHARD DE BURY,

who was under Edward III Bishop of Durham and Lord Chancellor of England, has a chapter in his *Philobiblon*, a treatise on the love of books, entitled "Laws are, properly speaking, neither Sciences nor Books." He says: "Because the discipline of contraries is one and the same, and the reasoning power is available to opposites, and at the same time human feelings are most prone to mischief, it happens that the practitioners of this faculty indulge more in protracting litigation than in peace, and quote the law, not according to the intention of the legislator, but violently twist his words to the purpose of their own machinations." And further, that the books of civil law "are nevertheless useful things, like the scorpion in treacle," and that "the causes of laws are, for the most part, not to be discussed."

His translator, Inglis, says in a note on this chapter: "It may be said generally, that the church and the law were never on good terms, because lawyers were often obliged to defend themselves and others against the rapacity of the church; if they were also rapacious, the dislike between the parties would be the more confirmed. The lawyers were, perhaps, too prudent to write much against the church, but the church did not spare them, as may be seen in the legends and collections of miracles. 'A lawyer had often sold his tongue when living; when he opened his mouth to take his last gasp, it disappeared.' It is to be hoped he had redeemed the rest of his body. The following ditty was found in a breviary, apparently of the thirteenth century, set to music so as to resemble the hymns:

'Venditores labiorum
Fleant advocati,
Qui plus student premiorum,
Dande quantitati,
Quam causae qualitati;
Ad consulta prelatorum,
Multi sunt vocati,
Sed electi pauci quorum,
Adquiescat animorum,
Virtus equitati,
Parcunt veritati,
Stantes causis pro reorum,
Jus pervertunt decretorum,
Sanctas leges antiquorum;
Nummus obligati,
Duplices probati,
Mala fovent perversorum,
Scelus operati,
Quod attentat occultorum,
Judex Christe non eorum
Parcat falsitati.'"

Which I have endeavored to translate, or rather imitate,—

They shall weep, those labial vendors,
Lawyers, fraud enacting;
Striving more for what law renders
By the suits' protracting,
Than the right exacting.
So the church to consultation
Calls attorneys many,
For, despite this wide vocation,
Moved by equity's inspiration,
She finds hardly any.
Destitute of verity,
Counting lawsuits their subsistence:
Robbing laws of all consistence,—
Sacred laws of long existence;
Bound by a retaining fee,
Steeped in vile duplicity.
Deeds of wicked men fomenting;
Working deep iniquity
When they seem to right consenting
Christ, the Judge, of their repenting
Will not spare the falsity.

The translator's remark about the hatred of the church for lawyers, reminds me that St. Ives, the advocate of the poor, was maliciously said by the priests to be the *patron* but not the *pattern* of the lawyers. Bercheur, too, in the *Repertorium morale*, in speaking of the croaking of frogs, compares them to lawyers: "*Tales sunt causidici et advocati quod vero isti sunt clamosi, quia clamando litigant ad invicem.*" *Philobiblon* was edited and published in an elegant form a few years ago by the present learned and talented reporter of the Court of Appeals of this State, a gentleman whose position in the profession is so assured, that he can afford to be thought guilty of knowing something outside of law-calf.

CRABBE,

that amiable poet, whose verses have the double advantage of being just as good prose as poetry, has something to say of Law and Law Books, in his poem called The Library:

"On either side
The huge Abridgments of the Law abide;
Fruitful as vice the dread correctors stand,
And spread their guardian terrors round the land;
Yet as the best that human care can do,
Is mix'd with error, oft with evil too,
Skill'd in deceit, and practised to evade,
Knaves stand secure, for whom these laws were made,
And justice vainly each expedient tries,
While art eludes it, or while power defies."

Hereupon an interlocutor, in the shape of a "youthful poet," breaks out into song about those happy ages "when the free nations knew not laws," and "love was law," etc., but is rebuked and corrected by the older bard, who explains that the laws were made—

"Those to control and these to succor trade;
To curb the insolence of rude command,
To snatch the victim from the usurer's hand;
To awe the bold, to yield the wrong'd redress,
And feed the poor with Luxury's excess.
Like some vast flood, unbounded, fierce and strong,
His nature leads ungovern'd man along;
Like mighty bulwarks made to stem that tide,
The Laws are form'd, and plac'd on ev'ry side:
When'er it breaks the bounds by these decreed,
New statutes r'se, and stronger laws succeed;
More and more gentle grows the gentle stream,
More and more strong the rising bulwarks seem;
Till, like a miner working sure and slow,
Luxury creeps on, and ruins all below;
The basis sinks, the ample piles decay;
The stately fabric shakes, and falls away;
Primeval want and ignorance come on,
But Freedom, that exalts the savage state, is gone."

The editor of Crabbe's Poems has an interesting note, quoted from Sir D. Dalrymple (Lord Hailes), on Abridgments:

"Who are they, whose unadorned raiment bespeaks their inward simplicity? These are law-books, statutes, and commentaries on statutes—whom all men can obey, and yet few only can purchase. Like the Sphynx in antiquity, they speak in enigmas, and yet devour the unhappy wretches who comprehend them not. Behold, for our comfort, 'An Abridgment of Law and Equity!' It consists not of many volumes; it extends only to twenty-two folios; yet as a few thin cakes may contain the whole nutritive substance of a stalled ox, so may this compendium contain the essential gravy of many a report and adjudged case. The sages of the law recommend this Abridgment to our perusal. Let us, with all thankfulness of heart, receive their counsel. Much are we beholden to physicians, who only prescribe the bark of the quinquina, when they might oblige their patients to swallow the whole tree."

Crabbe does our profession the honor of devoting to us a letter in *The Borough*. He heads it "Professions —Law," and, as one would naturally expect, a letter on "Physic" succeeds; but one looks in vain for any epistle on "Divinity" from the reverend poet's pen. It seems, on perusing these letters, that the place of honor is given to the law, not on account of any especial partiality in the writer for our profession, but simply for the reason that one of two criminals is hanged first, or with the courtesy that Polyphemus extended to Ulysses, the privilege of being the last to be devoured. After the lawyers and doctors are executed, the clergy appear to receive a full pardon. The letter in question is so dull, that it is difficult to select any thing for quotation. The poet, in alluding to the increasing prosperity of attorneys, observes:

"One man of law in George the Second's reign
Was all our frugal fathers would maintain;
He, too, was kept for forms—a man of peace,—
To frame a contract, or to draw a lease.
He had a clerk, with whom he used to write
All the day long, with whom he drank at night,
Spare was his visage, moderate his bill,
And, he so kind, men doubted of his skill."

If our poet could see the bills of lawyers of this day, he would not pronounce modern attorneys of a "*spare*" habit.

After comparing lawyers to spiders, and their clients to flies, etc., after the time-honored vogue, he admits that there may now and then be an honest attorney; but

"These are the few—in this, in every place,
Fix the litigous, rupture-stirring race;
Who to contention as to trade are led,
To whom dispute and strife are bliss and bread."

In speaking of the ideas that the young imbibe of various occupations, he says:

"The youth has heard—in fact it is his creed—
Mankind dispute, that lawyers may be fee'd."

He makes the lawyer contend that only three of the ten commandments are obligatory, namely, those against stealing, murder and adultery:

"Break these decrees, for damage you must pay;
These you must reverence, and the rest—you may."

Really, if a clergyman *will* write such stuff as this, one might be excused from observing the third commandment, at least. He compares the law to a still; while the fire burns of itself, gains are quickly made; when it begins to fail, the lawyers blow the flame;—

"At length the process of itself will stop,
When they perceive they've drawn out every drop."

In all this chaff I find one grain of wit. Of an attorney who got clients by hospitality, he says:

"For this, he now began his friends to treat;
His way to starve them was to make them eat."

DE FOE,

in his Hymn to the Pillory, has the following fine passage on law:

"The first intent of laws,
Was to correct the effect, and check the cause:
And all the ends of punishment
Were only future mischiefs to prevent.
But justice is inverted when
Those engines of the law,
Instead of pinching vicious men,
Keep honest ones in awe."

And the following, not so fine, on lawyers:

"Next bring some lawyers to thy bar,
By inuendo they might all stand there;
There let them expiate that guilt,
And pay for all that blood their tongues have spilt.
These are the mountebanks of State,
Who, by the slight of tongues, can crimes create,
And dress up trifles in the robes of fate;
The mastiffs of a government,
To worry and run down the innocent."

The secret of De Foe's hostility to the lawyers is found in the fact that he had been put in the pillory for publishing a "scandalous and seditious pamphlet," entitled "The Shortest Way with the Dissenters." We can excuse his violence in consideration of the malice and bigotry of his accusers. He made money out of the hymn, however, just as our distinguished countryman, Mr. Train, finds it to his profit to go about rehearsing his incarceration in an Irish bastile, at the hands of the brutal British government, for his advocacy of the cause of that down-trodden race whom Ossian describes as "the bare-breeched Fenians."

ANONYMOUS.

This very prolific and talented author, in an obscure play, entitled "Sir Thomas More," found in the collection of the Shakspeare Society, and supposed to have been composed about the close of the sixteenth century, introduces us to a merry scene in court. *Lifter* is haled before the court on a charge of picking a pocket. *Smart*, the complainant, appears in person and by *Suresbie*, as his attorney. The attorney takes the novel ground that the complainant was to blame for carrying so much money as ten pounds, the sum he lost, about him:

"I promise ye, a man that goes abroade
With an intent of trueth, meeting such a bootie,
May be provokte to that he never meante.
What makes so many pilferers and fellons,
But such fond baites that foolish people lay
To tempt the needie, miserable wretche?"

While the jury are out, Sir Thomas More, then sheriff, offers the prisoner, if he will pick the attorney's pocket, to bring him safely off from this accusation. This is done, and the purse is handed to Sir Thomas. The jury find the prisoner guilty. He is sentenced to die, and, according to custom, a subscription is taken to buy him a burial place. When *Suresbie* looks for his purse, it is, of course, gone, and he makes great outcry, alleging it contained seven pounds. Thereupon Sir Thomas quotes to him his own views above given on carrying about so much money, *in hæc verba*. His purse is returned to him, and we conclude, although we have no account, that the prisoner is let off. This incident is founded on facts related in a Life of Sir Thomas.

Justice was more speedy in those days than now, if we may believe what the sheriff says of some criminals sentenced to execution:

"Bring them away to execution:
The writt is come aboove two houres since;
The cyttie will be fynde for this neglect."

After Sir Thomas is made Chancellor, expecting a visit of ceremony from the learned Erasmus, he dresses up his servant *Randall* in his robes of office, and passes him off on the scholar as the Chancellor. The cheat is discovered when Erasmus addresses the fictitious chancellor in Latin, and is answered in English, and rather common-place at that. On More's fall, he declares that

"halting souldiers and poore needie schollers
Have had my gettings in the Chancerie;"

and laughs to himself,

"To thinke but what a cheate the crowne shall have
By my attaindour!"

On the scaffold, to the executioner, who asks his forgiveness, he gives his purse, saying: "I had rather it were in thy power to forgive me, for thou hast the sharpest action against me; the law, my honest freend, lyes in thy hands now; here's thy fee; and, my good fellowe, let my suite be dispatchted presently; for 'tis all one payne, to dye a lingering death, and to live in the continual mill of a lawe suite."

MORE

himself, in his youth, wrote a poem entitled "A Merry Jest; how a Sergeant would learn to play the Friar." He sets out by inculcating the idea that it is unsafe for a man to go outside his peculiar vocation — "*ne sutor ultra crepidem*," and applies this to lawyers and merchants:

"A man of law
That never saw
The ways to buy and sell,
Weening to rise
By merchandise,
I pray God speed him well.
A merchant eke,
That will go seek,
By all the means he may,
To fall in suit
Till he dispute
His money clean away;
Pleading the law
For every straw,
Shall prove a thrifty man,
With 'bate and strife,
But by my life
I cannot tell you whan."

The story is long and dull. In a word, the Sergeant disguised himself as a friar, in order to procure access to a debtor in hiding, who feigned sickness, and drawing out his mace to enforce his process, was attacked by the debtor and his wife and maid servant and thrown down stairs.

More did not tolerate lawyers in his "Utopia." "They have no lawyers among them," he says, "for they consider them as a sort of people whose profession it is to disguise matters as well as to arest laws; and, therefore, they think it is much better that every man should plead his own cause and trust it to the judge, as well as in other places the client does it to a counsellor. By this means, they both cut off many delays and find out truth more certainly. For after the parties have laid open the merits of their cause, without those artifices which lawyers are apt to suggest, the judge examines the whole matter, and supports the simplicity of such well-meaning persons whom otherwise crafty man would be apt to run down. And thus they avoid those evils which appear very remarkably among all those nations that labor under a vast load of laws."

"UNION IS STRENGTH."

The following epigram was made at the expense of four lawyers who were in the habit of going together in one coach to Westminster Hall for a shilling the load:

"Causidici cum felices quatuor uno
Quoque die repetunt limina nota fori,
Quanta sodalitium prestabit commoda! cui non
Contingerint socii cogitur ire pedes."

Four merry lawyers in one carriage ride
To seek the threshold of the court each day.
Great comforts in such partnerships reside;—
Were they not cronies, each must foot his way.

ST. PETER *v.* A LAWYER.

The following lines are printed on a sheet of foolscap, and at the head is a cut representing St. Peter opening the gates of heaven to a lawyer demanding an entrance, but whom the saint, on recognizing his profession, refuses to admit. There is no date or author's name:

"Professions will abuse each other;
The priest won't call the lawyer brother;
While *Salkeld* still beknaves the parson,
And says he cants to keep the farce on.
Yet will I readily suppose
They are not truly bitter foes,
But only have their pleasant jokes,
And banter, just like other folks.
As thus, for so they quiz the Law,
Once on a time, the attorney, Flaw,
A man, to tell you as the fact is,
Of vast chicane, of course of practice
(But what profession can we trace
Where some will not the corps disgrace?
Seduc'd, perhaps, by roguish client,
Who tempts him to become more pliant),
A notice had to quit the world,
And from his desk at length was hurl'd.
Observe, I pray, the plain narration:
'Twas in a hot and long vacation,
When time he had, but no assistance,
Though great from courts of law the distance,
To reach the court of truth and justice
(Where, I confess, my only trust is),
Though here below the learned pleader
Shows talents worthy of a leader,
Yet his own fame he must support,
Be sometimes witty with the court,
Or work the passions of a jury
By tender strains, or, full of fury,
Mislead them all, tho' twelve apostles,
While with new law the judge he jostles,
And makes them all give up their pow'rs
To speeches of at least three hours.
But we have left our little man,
And wander'd from our purpos'd plan:
'Tis said (without ill-natured leaven),
If lawyers ever get to heaven,
It surely is by slow degrees
(Perhaps 'tis slow they take their fees).
The case, then, now I'll fairly state:
Flaw reach'd at last to heaven's high gate:
Quite spent, he rapp'd, none did it neater,
The gate was open'd by St. Peter,
Who look'd astonish'd when he saw
All black, the little man of law;
But Charity was Peter's guide,
For having once himself denied
His Master, he would not o'erpass
The penitent of any class;
Yet having never heard there enter'd
A lawyer, nay, nor one that ventur'd
Within the realms of peace and love,
He told him, mildly, to remove,
And would have clos'd the gate of day,
Had not old Flaw, in suppliant way,
Demurring to so hard a fate,
Begg'd but a look, tho' through the gate.
St. Peter, rather off his guard,
Unwilling to be thought too hard,
Opens the gate to let him peep in.
What did the lawyer? Did he creep in?
Or dash at once to take possession?
O, no; he knew his own profession;
He took his hat off with respect,
And would no gentle means neglect;
But finding it was all in vain
For him admittance to obtain,
Thought it were best, let come what will,
To gain an entry by his skill.
So while St. Peter stood aside
To let the door be open'd wide,
He skimm'd his hat with all his strength
Within the gates to no small length:
St. Peter star'd; the lawyer asked him,
'Only to fetch his hat,' and pass'd him,
But when he reach'd the jack he'd thrown,
Oh, then was all the lawyer shown;
He clapp'd it on, and arms a-kembo
(As if he'd been the gallant *Bembo*),
Cry'd out, 'What think you of my plan?
Eject me, Peter, if you can.'"

Governor Jewell, of Connecticut, has officially announced the death of Hon. Joel Hinman, Chief Justice of the Supreme Court of Errors of that State, saying that he was a judge of great judicial abilities and acquirements, and commanded the highest confidence of the bar and of the public as an honest man and impartial judge, and that his soundness of judgment, his integrity, his legal learning and his judicial experience were such that the public sustain a great loss in his death.

THE PENAL CODE OF NEW YORK.

In 1857 the legislature of this State appointed David Dudley Field, Wm. Curtis Noyes and Alexander W. Bradford commissioners to prepare three codes — the Political Code, the Civil Code and the Penal Code. The act provided that the Penal Code must define all the crimes for which persons can be punished, and the punishment for the same; and that neither of the codes should embrace any provisions concerning actions or special proceedings, civil or criminal, or the law of evidence. The act further directed that, whenever the commissioners should have prepared either Code, they should cause it to be distributed among judges and other competent persons for examination; after which the commissioners were to re-examine their work and consider such suggestions as had been made, and they were then to cause the Code, as finally agreed upon, to be reprinted and again distributed six months before being presented to the legislature. These several Codes, together with the Codes of Civil and Criminal Procedure, were intended to form a complete body of law. The commissioners at once began their work. After years of investigation, research and consultation they prepared a draft, and distributed it among the judges and others, as provided by the act. After that a thorough revision was had and the work was finally submitted to the legislature in 1865. Since then no action has been taken on either Code, but they sleep in the hands of the committee.

The Penal Code proper is divided into eighteen titles, which are again subdivided into chapters and sections — there being 786 brief sections in the entire work. The nineteenth and last title is not properly a part of the Code, as it treats of prison discipline in its application to our State prisons and county jails. The object of the Penal Code is to define every offense which is the subject of punishment, and to prescribe the punishment therefor; and its value depends mainly upon the completeness with which the commissioners have accomplished this object, and which can only be fully determined after the Code shall have been submitted to the test of actual use.

Inasmuch as a Code aspires to the dignity of a scientific production, it is of primary importance that its plan and arrangement should be philosophical. In this respect we believe the commissioners have been only moderately successful. They treat, first, of persons who are punishable, excusable or responsible for crimes or misdemeanors; and, second, the crimes and misdemeanors themselves and their punishments. The most natural and philosophical plan would have been to have separated entirely the punishment from the offense, and have made it a separate consideration. The arrangement would then have been, first, the persons punishable; second, the offense; third, the punishment. In order to have done this it would have been necessary to have established certain degrees of crimes — as, for instance, felony of the first, second and third degrees, and misdemeanors of the first, second and third degrees — and to have classed all offenses under one or other of these degrees, prescribing for all offenses of a certain degree a certain punishment. Such a plan is simple and logical, and likely to lead to a juster gradation of punishments than the one proposed.

It is a rather singular fact that the *Code Pénal* of France — the model on which nearly all the penal codes of Europe are founded — reverses the natural order of arrangement by treating of punishments and their consequences before defining crimes and misdemeanors. That Code is divided into four books. The first book treats of punishments and their consequences; the second, of persons who are punishable, excusable or responsible for crimes or misdemeanors; the third, of crimes and misdemeanors themselves and their punishment; and the fourth, of police infractions and their punishments.

The following is a summary of the contents of the Penal Code of New York, as submitted by the commissioners: It begins with an introduction of six pages, giving the title, effect and construction of the Code; defining "crime," "felony" and "misdemeanor," etc. Then follow titles, I, "of persons liable to punishment for crime;" II, "of parties to crimes;" III, "of crimes against religion and conscience;" IV, "of treason;" V, "of crimes against the elective franchise;" VI, "of crimes by and against the executive power of the State;" VII, "of crimes against the legislative power;" VIII, "of crimes against public justice;" IX, "of crimes against the person;" X, "of crimes against the person and against public decency and good morals;" XI, "of other injuries to persons;" XII, "of crimes against the public health and safety;" XIII, "of crimes against the public peace;" XIV, "of crimes against the revenue and property of the State;" XV, "of crimes against property;" XVI, "of malicious mischief;" XVII, "of miscellaneous crimes;" XVIII, "general provisions;" XIX, "of the government and discipline of State prisons and county jails, and of the conduct and treatment of prisoners therein."

This arrangement, while on the whole good, is exceedingly bungling in some respects; for instance, title IX treats "of crimes against the person," and should include all such crimes, but the very next title treats "of crimes against the person and against public decency and good morals." Under this latter title is included rape, abduction, etc., which clearly should have come under the previous title, leaving indecent exposure, obscene exhibitions, lotteries, gaming, etc., to stand in a title by themselves under the head of offense against public decency and good morals. Again, the subject of title XI, "of other injuries to persons," is exceedingly awkward, and its contents lead one to believe that the commissioners have attempted to make this a sort of *omnium gatherum* for whatever they did not know what else to do with; for instance, we here find "counterfeiting trade marks," which is clearly an offense against property, classified as a crime against the person. So of "keeping dies, etc., with intent to counterfeit trade mark;" "selling goods which bear counterfeit trade marks;" "colorable imitation of trade marks;" "refilling and selling mineral water bottles;" "defacing marks upon wrecked property;" "defacing marks upon logs or lumber," and a number of similar provisions which are contained in this title, and which it is difficult to discover by what system of classification, are placed under "injuries to persons."

Again, in title XII, under "Crimes against the

public health and safety," we find "frauds practised to affect the market price;" "publishing false statements in newspapers;" "eaves-dropping;" "omitting to mark name upon packages of hay;" etc., which have about the same relation to the subject of the title as they do to "Crimes against the elective franchise." So also, while "malicious injuries to freeholds," and to standing crops, are placed under the subject of "malicious mischief," the kindred matter of "malicious injuries to railroads, highways, bridges and telegraphs," is placed under "Crimes against property." There are a number of similar instances in the work, demonstrating its faulty arrangement and detracting from its value as a scientific compilation.

The objects had in view in the preparation of the work are thus stated by the Commissioners:

1. To bring within the compass of a single volume the whole body of the law of crimes and punishments in force within this State. The existing statute law of crimes, though comprehensive, does not abrogate rules of the common law making criminal many acts which are untouched by statute; nor does it, in respect to crimes for which punishment is expressly prescribed, altogether dispense with the necessity of reference to the common law to determine what are the elements which constitute the offense. As long as the criminality of acts is left to depend upon the uncertain definitions or conflicting authorities of the common law, uncertainty must pervade our criminal jurisprudence. The value of the Penal Code must ultimately depend, in great measure, upon its containing provisions which embrace every species of act or omission which is the subject of criminal punishment. That this has been fully accomplished, is scarcely to be expected. But it should be understood that this has been the endeavor of the Commissioners; and if any act or neglect of duty, which, upon a sound view of public policy ought to receive criminal punishment, is not made punishable by provisions of the Code, they hope the omission may be detected, and the necessary provision supplied, in the course of the deliberations of the Legislature.

2. To supply deficiencies and correct errors in existing definitions of crime. The statutory definitions of offenses, found in our existing law, are in many instances incomplete or inaccurate, and in some cases contradictory when compared with each other. These have been revised, and those which bear upon co-relative crimes have been collected, in the desire to render each definition, as far as possible, complete in itself and independent, consistent with all definitions of analogous crimes, and accurate in including every grade of the prohibited act which deserves punishment, and excluding every act which, though partaking of some element of the offense, is not seen to be innocent.

3. To harmonize the provisions of punishment. The system of punishments instituted by the Revised Statutes was carefully devised, and was harmonious and well proportioned, but later legislation has introduced many inequalities and disparities. In this Code these have been, to a considerable extent, corrected. In general, however, for the higher crimes, the punishments prescribed by the existing law have been retained, except where special reasons have called for a modification: while in respect to lesser crimes, the limit of power of the courts to impose fines for misdemeanors in general, has been somewhat increased, and many crimes of inferior grade have been left to be punished as misdemeanors, the particular measure of punishment imposed by the existing law being omitted.

4. To supply prohibitions of acts deserving of punishment, but not punishable by the present law. The progress of society creates new opportunities and temptations to crime, which require to be met by new provisions of law. The statutes of other jurisdictions have been extensively consulted for provisions which might meet by anticipation new developments of crime; and the effort has been to adapt the Code as fully as possible to the wants of the present time.

The commissioners add, that "if the views and purposes above mentioned had been followed without qualification and restriction in the compilation of the Code, the results would have been quite different from that which has been reached. The commissioners have, however, in a number of instances, felt restrained from framing provisions of the Code in the manner which has appeared absolutely best, by their sense of the dangers and evils attendant upon hasty innovations upon the existing law."

It is certainly to be regretted that the commissioners did not feel at liberty to follow their own judgment more fully. They were gentlemen thoroughly competent to devise a complete and harmonious system of penal law, and it would have been a matter of gratification if they had done so. Many of the laws upon our statute books, and which they have retained, have become practically obsolete, while others have more of the character of the old "Blue Laws" of Connecticut than of the progressive legislation of the nineteenth century. Among the provisions of the latter class may be mentioned the following:

"§ 43. All traveling on the first day of the week is prohibited, except such as is performed on foot, or in carrying or in a conveyance carrying the United States mail, or such as is done in cases of charity or necessity, or in going to or returning from some funeral, place of worship, or religious assembly within the distance of twenty miles, or in going for medical aid or for medicines and returning, or in going express by order of some public officer, or in removing one's family or household furniture, when such removal was commenced on some other day."

Admitting the impropriety, from a religious point of view, of traveling on the Sabbath day, the almost uniform practice of mankind demonstrates the folly of making it a penal offense. We also fail to discover by what system of reasoning the conclusion is arrived at that there is any more impropriety in traveling twenty-one or twenty-five miles to church on the Sabbath day than in traveling nineteen.

The whole thing is a relict of Puritanism, and would better have been discarded. Another provision of a somewhat similar character is the 65th section, which, in effect, makes the "treating" of electors, and even the carriage of voters to the polls, criminal offenses. So, too, the 187th section, which makes it a crime for any one to purchase property from one not in possession while such property is the subject of controversy, is a section which could have been dispensed with without any material detriment to the State. We may, however, pass these by as unimportant, since it is very certain they would remain a dead letter if adopted.

But there are some matters of more gravity wherein the Code is fairly open to criticism. The principal of these is the definition of murder, which is as follows:

"§ 241. Homicide is murder in the following cases:

"1. When perpetrated without authority of law, and with a premeditated design to effect the death of the person killed, or of any other human being.

"2. When perpetrated by an act imminently dangerous to others and evincing a depraved mind, regardless of human life, although without any premeditated design to effect the death of any particular individual.

"3. When perpetrated without any design to effect death, by a person engaged in the commission of any felony."

We cannot escape the conviction that this definition of murder is faulty. The first provision makes homi-

cide murder, "when perpetrated without authority of law and with a premeditated design," etc. Now, when a person kills one who is attempting to commit any felony upon him, he does so without "authority of law"—in the legal sense of that term—and with a premeditated design to effect death, which would bring the homicide within the definition of murder, as given by the commissioners,—and yet such a homicide is clearly justifiable. There is, of course, no doubt as to the *intent* of the provision; but a definition of murder in a Penal Code should be so clear and accurate as to leave nothing to be gathered by implication.

The definition includes all cases of homicide which would be murder at common law, and abrogates the degrees of murder as established by the acts of 1860 and 1862.

The commissioners explain their object in doing this, as follows:

"By recent statutes murder was divided into two degrees, the first degree only being punishable with death. The practical result of introducing such a distinction will be that jurors influenced by unwillingness to unite in a capital conviction, will always find the prisoner guilty of the second degree only. The commissioners are of opinion that the simplicity of the definition of murder in the Revised Statutes should be restored."

The common law definition of murder, which the commissioners seek to restore, was adopted at a time when laws were more severe and arbitrary and less equitable and just than at present — when to hang a criminal convicted of larceny was common, and to put a witness to the rack not unusual. The progress of civilization has tended to ameliorate the severity of punishments and to render laws more consonant to the spirit of justice and equity. The common conviction of mankind is that there are grades in the enormity of the crime of murder. It is uniformly agreed that he who administers—hour after hour or day after day—poison to another, and thereby effects death, or that he who crawls at dead of night into a dwelling house and deliberately puts to death the sleeping inmates, is guilty of a far more attrocious crime than he who on receiving a sudden and unexpected slap in the face draws a revolver and shoots his assailant. We say that it is the conviction and common sense of mankind that there is a wider difference in the degrees of enormity of these two homicides; and, as a very natural result, that there should be a wider difference in the degrees of punishment meted out for them. Yet the two offenses stand equal before the law, and are punishable in the same manner; and this the Code commissioners seek to perpetuate. It is because of the manifest inequity of this thing that so many offenders have gone unwhipped of justice—that so many men, clearly guilty of a modified degree of murder, have been acquitted. The commissioners claim to have done away with degrees of murder because juries are apt to find the prisoner guilty of the second only. It occurs to us that in case of guilt a conviction, even in the second degree, is preferable to an acquittal. Men are, and ought to be, very loth to find a verdict that is to deprive a man of his life, and which puts it beyond the range of human possibilities to remedy any subsequently discovered errors,—and a verdict of murder in the first degree is therefore usually found only when the evidence is so overpowering as to render it impossible to escape such a finding. When the law shall discriminate between the crime of a Cole who kills his wife's alleged seducer and that of a Traupmann who slays a whole family, then juries will find verdicts more nearly in accordance with the evidence, and convictions will not be the exception.

We have little doubt that it was the intention of the Legislature, in establishing the second degree of murder, that the jury might convict in that degree, when they found that the intent to effect death was less deliberate and atrocious than was requisite to justify a conviction in the first degree; but the courts have defeated this intention, and have practically annulled the distinction. What we need is to restore and clearly define the degrees of murder, classing only those under the first degree that are the result of *deliberate* premeditation; or, in other words, a provision whereby the jury in all cases of murder, where the degree of premeditation or the circumstances attending the homicide do not, in their opinion, justify punishment of death, may render a verdict of murder in a less degree to be punished by imprisonment for life, or for a term of years.

The inconsistency of the commissioners' classification is manifest from the great difference between the punishment prescribed for murder and that for the next less offense — manslaughter in the first degree. The one is death, and the other imprisonment for not less than four years. In this respect, the commissioners have failed to establish what they claim — "a more just gradation of crime and punishment than now exists."

The severity with which the law deals with the offense known as "the crime against nature," occurs to us to be a little singular. The provisions of law relating to it have been substantially retained in this Code. The crime, though intrinsically detestable and abominable, is fraught with no evils to others, and is seldom, if ever, committed by any one not an idiot or the subject for an insane asylum. Yet the offender may be imprisoned for the term of ten years. Whereas, a man may commit a rape upon a woman, outrage her person and feelings, and bring sorrow and shame upon herself and family for life, and escape with a punishment of five years' imprisoment.

We have only space to notice one other matter in which the commissioners could possibly have improved our existing laws, and that is in relation to seduction under promise of marriage. The punishment prescribed by them for that offense is imprisonment in a State prison not exceeding five years, or by imprisonment in a county jail not exceeding one year, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment. The necessity for, or utility of a provision of this character, is questionable. It will hardly be claimed that a really virtuous woman ever needs any safeguard of this kind, and it is hardly necessary to enact penal laws to protect the virtue of one not virtuous. The English have no provision of the kind in their penal laws. We believe that the experience of most lawyers and judges, who

have witnessed trials for this offense, is, that recourse is seldom had to the law, except by designing women of doubtful character. We are sorry to say that the known sympathy of jurors for "sorrowing maidens," and the difficulty of disproving a charge of the kind, have usually led to a conviction. If the law is to remain, a provision should be added providing that the contract of marriage should be in writing and under seal, and that such written contract should be the only evidence of the act.

While we regard the Penal Code as defective in many respects, yet, as a whole, it is a very able and valuable compilation, superior in most points to any of those in use in Europe. The penal laws of this State, as they now exist, are many of them crude, ill-considered and uncertain, without any well defined plan or system, and are, moreover, scattered through almost numberless statutes, or involved in the rules of the common law. To bring these together in one volume, stripped of their imperfections, systematized and arranged, is the object of the Penal Code, and "is a consummation devoutly to be wished."

CURRENT TOPICS.

Considerable misapprehension seems to exist in the minds of many newspaper writers as to the recent decision of the United States Supreme Court declaring valid an Indiana divorce decree. The court sustained the decree simply on the ground that the defendant having appeared in the action without raising the question of jurisdiction, the decree was conclusive upon the parties. The ordinary question as to the validity of a divorce granted against a defendant not a resident of the State not appearing in the action, and having only constructive notice of the proceeding, did not arise.

A very sensible thing has recently been done at Worcester, Mass., in causing the arrest of a man for attempting to commit suicide. Although we are not aware of any statute making it an offense, yet at common law an attempt to commit suicide is a misdemeanor. Were the law properly carried out in each instance, and the offender properly punished, the imprisonment imposed would serve the purpose of giving him an opportunity to reflect on the error of his way. The Penal Code, reported by the Commissioners of this State, makes the attempt at suicide punishable by imprisonment in a State prison not exceeding two years, or by a fine not exceeding one thousand dollars, or both. Were this the law and properly administered, it would be very likely to lead these rash self-slayers to rather bear the ills they have than fly to others, which a failure in their uncharitable designs would be likely to entail.

Lawyers, as a rule, give very little attention to the legal education of students studying in their offices. They have a sort of vague and general impression that these said students are studying law, but whether it is the law as laid down in the Institutes of Justinian or that contained in Kent's Commentaries, they seldom trouble themselves to ascertain. That there is now and then a noble exception to this rule, is made apparent by what we have learned of the method pursued by Judge Edmonds, of New York. We understand that he carefully supervises the studies of his pupils, giving them the benefit of his comprehensive knowledge and great experience, and that at stated times he examines them as to their studies, and also requires them to read theses on legal topics. How much time and attention the learned judge gives to his pupils, is manifest from the fact that the admirable "Address to his Law Students," begun in this number of the LAW JOURNAL, was prepared for and read to them. It is very doubtful whether there is any other lawyer in the country that has exhibited a like zeal and interest for the welfare of those studying under him.

We publish in another column the remarks of two of the leading lawyers of New York, made before the bar association of that city at its first meeting. They have the ring of the true metal, and indicate very fairly what the profession, not only of New York city but of the whole State, needs to restore it to its pristine glory. We have, from the beginning, advocated organized effort on the part of the bar to elevate its own standard, and to improve the character of our laws and of the administration of justice; and it is a gratification to know that the lawyers of New York have taken hold of the matter so thoroughly. It is only through organizations of this character that the bar can be lifted to that eminence from which it has been dragged by the hasty and injudicious legislation of the last quarter of a century, and we indulge the hope that the profession in other cities will adopt like measures for association. Out of these local organizations can easily be formed a State association, which will combine the most cultivated, acute, and vigorous intellect of the age, and will be all-powerful in settling many questions of supreme importance, both to the profession and the people.

The Code of Procedure, after more than twenty years' trial, has been found a satisfactory system of practice. Imperfect as it is in many respects, it works far more smoothly and produces much less delay in litigation than any former system. Not only in New York, where so brief a time ago it was originated, but in numerous States and Provinces besides it has proved acceptable to the bar and the people. And in England, a royal commission chosen from among the ablest jurists of the realm, have, after an exhaustive examination of every system of practice in use among civilized nations, recommended that of New York to Parliament. In contrast to our concise and simple code we find in the Federal courts, regulating the practice therein, a cumbrous and conflicting mass of precedent statute and rule, technical to the last degree, possessing neither certainty nor adaptability, and useful only for confining legal business in each court to those who are familiar with its regulations. The laws defining the practice in the inferior courts were never designed to produce uniformity, but to assimilate each court in its methods of procedure to the

courts of the State in which it might be located. But State legislation has long ago, in almost every instance, defeated that object, and we now have these inferior courts not only differing among themselves, but from the tribunals of their respective States in the mode of administering justice. There is no reason why one system of practice should not prevail in every judicial tribunal in the land. One form of original process might be used everywhere, from the Supreme Court of the United States to a court of a justice of the peace. One form of declaration would answer whether the subject in litigation was a jackknife, a farm, a vessel, or a franchise. We cannot tinker up the common law practice with success. England has experimented in that direction and pronounces it a failure. Cannot our Congress, even as Parliament has done, provide for a commission to examine the matter and see if it is not possible to render more simple and uniform the practice in the Federal courts.

A writer in the February number of *Putnam's Magazine*, in a well considered article upon trial by jury, adopts views similar to those heretofore expressed by us as to its advantages in civil actions. In cases both criminal and civil, where the State is a party, a jury may be necessary for the protection of the citizen. Here the contest is between weakness and poverty on the one side, and unlimited power and wealth on the other; and the tribunal in which the trial must be had is the agent and instrument of the stronger party. It is well that a body in sympathy with the citizen, and independent of the influences of power, should pass upon the rights of the parties. Juries seldom do injustice to the citizen, and when they erroneously decide in his favor, but little harm is done. But in the trial of private causes, no such necessity exists. The courts are unbiased as to the parties. Between citizen and citizen they are impartial, and no jury is needed to shield the individual against the influences of overwhelming power. So well satisfied are the profession of this, that they do not hesitate to waive a jury trial in the great majority of cases and proceed before the court or a referee. But in certain classes of actions a jury is always insisted upon by the plaintiff; not, however, because it is expected to give a more fair and just decision than the court; no, but in the hope that through sympathy or envy the rights of the defendant may be forgotten. The railroad case mentioned in *Putnam*, in which eight erroneous verdicts had been rendered, is but an illustration of what is done by juries in almost every suit for damages by breach of promise to marry, by seduction, or by railway accident.

In the decision of controversies between individuals each party should obtain his just due; nothing more, nothing less. The courts should sit as the administrators of justice, not as the almoners of charity, or the instruments of private revenge. The ruined girl and her seducer, the slighted maiden and her faithless lover, the bereaved widow and the corporation without soul, should stand equal before the tribunals of the law. While the jury remains this cannot be. Passion and prejudice will have control, and the appeal of sympathy be more powerful than the voice of reason.

Let us retain the jury to protect the liberty and property of the citizen. In doing that, it fulfills its mission. But we should not encourage it as an instrument of robbery and oppression, no matter how worthy the end we hope to attain. Let our courts seek to do justice between the people. They may, if need be, temper that justice with mercy; but they may never, in the name of charity, inflict a wrong even upon the greatest villain.

OBITER DICTA.

Prescription in a *que estate*. "Throw physic to the dogs!"

It is good advice to young lawyers to caution them against asking witnesses leading questions in their offices.

A lawyer in Boston once, in his answer to an action against a common carrier, spoke of the "act of the aforesaid God."

The laws of the old Plymouth (Mass.) Colony declared that no person licensed to keep a public house of entertainment *should be without good beer*.

We remember being in court when a counsel insisted on propounding a very long leading question. The other side objected that it was putting words into the mouth of the witness, when a member of the bar standing by remarked: "If that is so, his witness must have a remarkably large mouth!"

Jerry T. is one of those energetic, impulsive, steam-engine sort of men who have perfect confidence in their own abilities, and who are positive they are always right. Ask Jerry what the law is on a mooted point: "It is so and so; have read it all up; no doubt of it; can't be otherwise." Somebody once happily said that Jerry must have been the "*certain* lawyer" mentioned in Scripture.

Not long ago, a person was indicted in one of the United States District Courts for having in his possession a counterfeit United States bond, with intent, fraudulently, to dispose of the same. The counsel for the defense happened to be the possessor of an excellent pair of lungs, and kept them pretty well up to their work in his address to the jury. The district attorney, as he rose to reply, held up between his thumb and forefinger the alleged counterfeit instrument, and said, in that quiet tone, which is one of his chief charms as an orator:

"Except thou canst rail the seal from off this bond,
Thou but offendst thy lungs to speak so loud."

We heard a jury advocate, the other day, whose grotesque manner of presenting his case is, we think, seldom equaled. The following are some of the topics touched upon in a speech of an hour — action of trover: "Savages... civilization ... acting ... theaters ... Minerva... hoop skirts... Coliseum at Rome ... chickens ... Blackstone...Catholics... iron foundry... Eve... fox meat... eels... philanthropy... fig leaves ... Cayenne ... saw-dust ... cast-iron bull-dogs ... New Hampshire...May Flower...New York...Newton...Protestants... injunctions...Judge Cardozo...Edinburgh Review... St. Paul's conversion ... ward rooms ... Miles Standish... woman taken in adultery...Daniel Webster...centripetal force...Whig party...Judge R...Aristotle...Bible...muscle... Ojibeway wigwam...art...pictures...New England Primer... Ireland...England ... gentlemen... shoddy... Greece...Judge Balcom...Jim Fisk...Plato... frescoes...Constitution...Marshall...Jupiter... early life of opposite counsel...counsel's own boyhood... babies...Supreme Court... itching palms... Greek Slave...Venus de Medici...Leonardo de Vinci...Heabornes...Italy... baptism immersion... sprinkling... birth...

woman ... Africa... Radicalism .. Congress... living green... Washington ... Cicero ... Hamilton ... Treasury ... St. Paul's grave... the dear people...Demosthenes... coupons... liquor law ... Hale ... Lord Bacon... Chesterfield... elephantiasis... garten ... blue stockings ... velocipedes ... reforms... ballot-box ... Latin ... Greek ... revenge ... the cause of action in issue.

LEGAL NEWS.

Judge Washburn, of the Tenth Wisconsin Circuit, intends immediate resignation.

Three women have lately been appointed justices of the peace in Wyoming Territory.

Illinois judges have decided that bets can be collected of stakeholders by winning parties.

Judge D. R. Coleman, a prominent member of the Richmond bar, died in that city on the 20th ult.

Gen. Breckenridge, of Confederate notoriety, has been appointed attorney of the Cincinnati Southern Railroad.

The Virginia Legislature have adopted a resolution, vacating the seat in the Court of Appeals now held by Major Burnham of the army.

The United States Supreme Court has decided that Congress has no constitutional power to establish police regulations within the States.

Out of 544 cases brought before the Superior Court of Maine, in six terms, only 99 went to a jury; that is, the litigants preferred the decision of a judge in 405 cases.

During a trial in the Ross county (Ohio) court recently, a witness suddenly became insane whilst undergoing cross-examination, causing a general stampede of all in the court.

Gen. Charles F. Sedgewick, of Sharon, Conn., who has been for fifty years a member of the Litchfield county bar, is to deliver an address before the bar at the commencement of the April term, detailing his reminiscences.

Ex-Congressman A. G. Riddle has resigned his professorship in the Law Department of Howard University, at Washington, and it is said that John M. Langston will also tender his resignation in the course of a few days.

In a suit for divorce recently tried before Judge Patchen, of Detroit, it was decided that a farm should be equally divided between the severed couple, on the ground that the woman, by her hard work, had done as much as the man to acquire the property.

The Hon. William Willis, LL. D., a prominent lawyer and historical writer of Portland, Maine, died in that city on Thursday, the 24th instant. He was a partner of the late Senator Fessenden during twenty years, and was the author of a history of Portland, a valuable biographical treatise on the judges and courts of Maine, and other elaborate papers. He served in the State Legislature, and was at one time Mayor of Portland. Born at Haverhill, Mass., in 1794, he was graduated at Harvard University in 1813, and entered the legal profession. In 1835 he formed a partnership with Mr. Fessenden, which continued until 1855.

OUR STATE LIBRARY.

The State reports, since the rebellion, are of great importance and value to the profession, particularly at this time when our courts are about being reorganized, and yet none of them are up to the latest volumes. Inquiries are made for them almost daily, and the reply by the librarian invariably is, the legislature does not give us funds sufficient to purchase the latest works. It seems to us if there is any thing which should be attended to it is the purchase of law books, many of which five years from now can hardly be obtained for love or money, and, if at all, at greatly enhanced prices. Such economy is of the poorest. Let the appropriations for the purpose be sufficiently ample to keep the library fully up to the times.

OBITUARY.

CHIEF JUSTICE HINMAN.

The Hon. Joel Hinman, Chief Justice of the Supreme Court of Errors of the State of Connecticut, died at his residence, in Cheshire, on Monday, the 21st ult., aged 69 years. At a meeting of the Hartford Bar, held on the day following his death, the Hon. John Hooker, Supreme Court Reporter, spoke of the late Chief Justice substantially as follows:

Mr. Chairman—I think the hearts of us all are touched by the death of Judge Hinman. We have long been familiar with his presence in the Superior Court, and as the presiding judge of the Supreme Court, and he has had in a very high degree our confidence as an able and upright judge. I feel myself that I have sustained a personal loss in his death. As reporter of the court for the last twelve years, I have been probably more familiar with him than most members of the bar. While he was not a man with whom I should have naturally formed an intimate friendship, for we disagreed about almost every thing but law; yet brought by my official duties so much into his society, I came to respect and esteem and love him, and we have been for several years very warm friends. We talked up very frequently, and very good-naturedly, almost every thing that we differed about, from politics to Congregationalism and Episcopacy. As a judge, he was remarkable for his vigorous common sense. I have never known a man who had more. A bench, composed of several judges, as is ours, contains men of various mental constitutions, and such a man as he, forms an indispensable member of such a court. At the end of a long consultation among the judges, he would come in with a vigorous, incisive and decisive common sense, that served to settle the question. He had a large knowledge of law (for, as he told me, he had never forgot what good law he had once read), and was always able to refer readily to the principle that was to govern a case, and yet his opinion seemed to be rather the expression of common sense than of law. He had no fondness for legal casuistry, and a not very nicely discriminating mind. His honesty seemed to be rather constitutional with him, than to come from any very nice conscientiousness. He seemed to go right, because he could not help it. After hearing a complicated case, it seemed as if he had only to shake his head, and let his brain settle to a level, and the case was decided, and decided right. He never seemed to have any anxiety as to how he would come out, as he felt sure he would come out about right, and he never worried himself very much afterward from the fear that he might have gone wrong. His very freedom from anxiety was a guarantee against any perturbation of his mind or error of his judgment.

He was taken ill at New Haven while the Supreme Court was in session there two weeks ago to-night, and the next morning was advised by a physician whom he called in, to go home, as he might be ill for a few days, though no one supposed the matter to be serious. He was to take the eleven o'clock train, and I left him at the hotel and went into the court room at nine. A little before eleven I went to the hotel to help him off and to go with him, if he desired, to the railroad station. I had some pleasant talks with him as I was helping him pack his carpet-bag, but as he thought there was no need of my going to the station with him, I took leave of him there. The last thing, as I was going, I said to him, "Well, Judge, I hope this illness won't amount to much, but I have always feared that some short illness would carry you off. There must be a last time, and that generally comes when we don't expect it. Now I want to feel that you are ready to go." "Oh," said he, "Mr. Hooker, I believe I am ready. Good bye." And these were the last words that were ever exchanged between us. I supposed that he was getting better, and was taken entirely by surprise on hearing of his death last evening. I am sure the bench has lost an able judge. I know that I have lost a good friend.

BOOK NOTICES.

Report of Cases argued and Determined in the Supreme Court of the State of Vermont: By Wheelock G. Veazey. Vol. 41. New Series, Vol. VI. Montpelier: J. & J. M. Poland.

The profession of Vermont are fortunate in having a reporter who understands his business so well as does Mr. Veazey. The volume before us may be considered as a very fair model of what a report should be. The head notes are accurate; the statements of fact and the arguments of counsel are concise, though sufficiently full to present not only the question before the court for decision, but the manner in which that question arose. The index is unusually good, with cross references in abundance. The only thing lacking in it is a table of cases overruled, modified or explained.

While this report contains a large number of cases of considerable importance, it also contains several that ought never to have been reported. But this is no fault of the Reporter, as we understand that he is required to report *all* opinions rendered by the Supreme Court. We

hope to be able to give in the next number of the LAW JOURNAL a digest of the most important decisions contained in the volume.

New York Practice Reports: By Nathan Howard, Jr. Vol. 38; No. 3. Albany: William Gould & Son.

The most important cases contained in this monthly number of Howard's Reports are those of *Ramsey* v. *Erie Railway Co.*, and *People* v. *Albany and Susquehanna Railroad Co.* The opinion in the first was delivered by Mr. Justice BALCOM at Special Term, and contains a very careful review of the practice in granting injunction orders and appointing receivers. The Judge incidentally urges the passage of a law preventing the granting of injunctions against corporations and their directors without previous notice. The opinion in the second of these cases was delivered by Mr. Justice E. DARWIN SMITH, and is mainly a review of the facts elicited at the trial before him of the question of the validity of the election of directors of the Albany and Susquehanna Railroad company. There is one other case — that of *Wilbeck* v. *Holland, etc.* — of considerable importance, in which the question arose as to the duty of an express company to deliver a package carried by them to the consignee at his residence. The General Term of the fourth district *held* — Mr. Justice ROSEKRANS delivering the opinion — that such company were bound to use due diligence in ascertaining the residence of the consignee, and to deliver the package to him personally at his residence or elsewhere.

Titles to Real Estate in the State of New York: A Digested Compendium of Law, etc., for the use of Conveyancers and Students at Law. By J. W. Gerard, Jr. New York: Baker, Voorhis & Co. 1869.

This work, as the preface declares, "is intended to operate as a *practical manual* to facilitate the labors of the profession in the examination of titles, by having all matters connected therewith concentrated in one volume, and by affording a ready means for the instruction of students, clerks and other assistants of conveyancers."

A manual, as we understand it, is a hand-book, containing only the facts necessary or convenient to be understood in the department for which it is used. These should be stated in a clear but brief style and unincumbered by the reasoning from which they are deduced. They should be so arranged as to be certainly and readily accessible to any one at all acquainted with their subject. In a law manual, of course, authorities should be given for every statement. Mr. Gerard has in this volume collected together, from statute and report, a vast amount of matter concerning real estate. So far as we have discovered, his statements of principles are correct, and display not only industry but erudition and ability. But for every-day use in a lawyer's or conveyancer's office, we cannot see that this treatise is either more convenient or better than other works previously in existence. It contains too much for a manual; too little for a treatise on the law of real property. Its references to the Revised Statutes are wholly to the 5th edition, which, besides being out of date, is no more the Revised Statutes than are the session laws of the last legislature. It often goes beyond the requirements of its subject, as on pages 153 and 154 concerning contracts for the sale and purchase of land. It has other defects such as the omission of reference to local laws; as the mechanics' lien law of Rensselaer county, passed in 1865, and to the United States laws concerning the lien of official bonds. The index to the work is imperfect, and not full enough to be of value.

As a work for the use of the student it is excelled both by Kent and Washburn. In fact a manual book that is for use in the daily duties of the office presupposes an acquaintance with the principles of its subject matter that can only be gained from other sources.

The publishers have spared no pains in the make up of this book. In paper, printing and binding its equal in excellence we seldom meet.

TERMS OF SUPREME COURT FOR MARCH.

1st Monday, Special Term (Motions), New York, Barnard.
1st Monday, Circuit (Part 1), New York, Cardozo.
1st Monday, Circuit (Part 2), New York, Brady.
1st Monday, Special Term (Chambers), New York, Ingraham.
1st Monday, Special Term (Motions), Kings, Tappen.
1st Monday, Circuit and Oyer and Terminer, Kings, Gilbert.
1st Monday, General Term, Albany.
1st Monday, Circuit and Oyer and Terminer, Jefferson.
1st Monday, General Term, Rochester.
1st Monday, Circuit and Oyer and Terminer, Erie, Daniels.
2d Monday, Circuit and Oyer and Terminer, Dutchess, Barnard.
2d Monday, Circuit and Oyer and Terminer, Schuyler, Balcom.
2d Monday, Circuit and Oyer and Terminer, Genesee, Barker.
2d Tuesday, Circuit and Oyer and Terminer, Caldwell, Potter.
2d Tuesday, Special Term, Tioga, Parker.
3d Monday, Circuit and Oyer and Terminer, Westchester, Tappen.
3d Monday, Circuit and Oyer and Terminer, Schenectady, Rosekrans.
3d Tuesday, Special Term, Jefferson, Mullin.
4th Monday, Special Term, White Plains, Tappen.
4th Monday, Circuit and Oyer and Terminer, Yates, J. C. Smith.
4th Monday, Circuit and Oyer and Terminer, Herkimer, Mullin.
4th Tuesday, Special Term, Erie, Talcott.
Last Monday, Special Term, Monroe, Dwight.
Last Monday, Circuit and Oyer and Terminer, Tompkins, Parker.
Last Tuesday, Special Term, Albany, Miller.
Last Tuesday, Special Term, Cortland, Murray.

COURT OF APPEALS ABSTRACT.

James P. Agand and another, Exrs., etc., v. *John P. Ball, John Banker and Abram Myers.*

This was an action on a joint and several promissory note signed by all the defendants. It was proved upon the trial that the defendants, Banker and Myers, were sureties for Ball upon the note in question, and they relied for their defense upon an usurious agreement made between Ball and the plaintiff's testator for an extension of the time of payment of the note. *Held*, that the rule is well settled that a subsequent agreement to pay usurious interest for the forbearance of an existing security will not invalidate such security, notwithstanding such agreement to extend is void. It appearing, upon the face of the note, that the defendants were all principals, it devolved upon Myers and Banker, in order to make their defense available, to show that the plaintiff's testator knew at the time he made the agreement for an extension that they were sureties. The rule with us is that an agreement to extend the time of payment, made between the creditor and the principal debtor, cannot operate as a discharge of the sureties, unless the creditor, at the time of the agreement, knew that the relation of principal and surety existed between the debtors.

Upon the trial the defendants offered to prove by the defendant Ball that plaintiff's testator had knowledge of the fact that defendants, Banker and Myers, signed the note as sureties, and put the following interrogatory to the witness: "Do you know whether the testator had knowledge of the fact that defendants, Banker and Myers, signed the note as your sureties?" *Held*, that the offer was properly rejected under section 399 of the Code; that to make an exception on account of the rejection of evidence available, the party should make his offer in such plain terms as leaves no doubt what was intended; that if the offer is open to two constructions he cannot, in a court of review, insist upon that construction most favorable to him unless it appear that it was so understood by the court which rejected the evidence.

John Kelly, Sheriff, etc., v. *Corn Exchange Bank.*

Where an appeal was taken in August, 1868, from an order of the General Term affirming an order made at

Special Term, striking out portions of the complaint as irrelevant: *Held*, that at the time such order was not appealable, and that the amendment of section eleven, subdivision two of the Code, made in 1869, was only applicable to appeals from orders thereafter made.

Alexander Anderson, Admr., etc. v. *William M. Parks.*

This was an action for the wrongful conversion of certain bonds. It appeared that the bonds had been stolen from plaintiff's intestate; that the defendant had received them in good faith, and in the usual course of business as a broker, and made advances on them to nearly their full value in the usual course of business, without any notice of defect in the title. *Held*, that such bonds were negotiable instruments, transferable by delivery, and that all the rules of law applicable to negotiable paper apply to them; that one who takes them before maturity in good faith, and for a valuable consideration, holds by title valid as against all the world; that the defendant had become a *bona fide* purchaser of the bonds to the extent of his advances upon them, and that plaintiff could not maintain his action without first tendering the amount of the advances and making a demand for them; and that the defendant, having a valid lien on the bonds to the extent of his title, had a right to sell them to reimburse himself; also, that a broker who receives and sells negotiable paper, in good faith, is entitled to the same protection as the party to whom he sells; that the rule applicable on the sale of ordinary chattels does not apply to negotiable instruments, and that therein this case is clearly distinguishable from that of *Spraights* v. *Hawley*, 39 N. Y. 441.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CONNECTICUT.*

INN-KEEPER.

Guest. — A person receiving transient accommodation at an inn, for which he is charged by the inn-keeper, is a guest, and entitled to all the rights of a guest, although he be not actually a traveler. *Walling* v. *Potter.*

INSURANCE.

1. *Evidence: statements in policy.* — A plaintiff in a suit on a policy of insurance on the life of his wife, being charged by the defense with having obtained the insurance fraudulently, testified as a witness, and was asked on cross-examination, for the purpose of testing the accuracy of his memory, if he could tell the date of his subsequent marriage. The court allowed the inquiry for this purpose. *Held*, on motion for a new trial, that in respect to such an inquiry, depending for its propriety upon the circumstances of the case and not upon its relevancy, the judge might exercise his discretion. *Kelsey* v. *Universal Life Ins. Co.*

2. And held that, so far as the answer to the question might tend to prejudice his case with the jury, it was an objection for the witness to make, and not for his counsel. *Ib.*

3. In the application for the insurance, the wife had made certain written statements with regard to her good health. *Held*, that letters written and declarations made by her to third persons shortly before the application, in which she stated herself to be in bad health, were admissible in evidence against the plaintiff. *Ib.*

4. The policy contained the following provision, under the head of conditions and agreements: "That the statements in the application for this policy, and on the faith of which it is issued, are in all respects true, and without the suppression of any fact relating to the health or circumstances of the insured affecting the interests of this company." *Held*, that the statements of the application were to be regarded as warranties. *Ib.*

5. *Held*, however, that whether regarded as warranties or only as representations, as they were material and untrue, they would equally avoid the policy. *Ib.*

6. *Suit after time limited in policy.* — A policy of insurance contained a provision that no suit for the recovery of any claim on the policy should be sustainable in any court of law or chancery unless commenced within twelve months after the loss occurred. Where the amount due for a loss was attached by a creditor of the insured within twelve months, on a process of foreign attachment, and a suit of *scire facias* was brought against the company by the creditor after the expiration of twelve months, it was *held* that the original suit saved the claim from the limitation of the policy, and that the suit of *scire facias* was sustainable. *Harris* v. *Phœnix Ins. Co.*

7. The policy provided that the insured should, if required, submit to an examination under oath as to his loss, and that the loss should not be payable till such an examination had been submitted to. The insured filed the ordinary proofs of his loss, which were not satisfactory to the company, and they required a personal examination, and used due diligence to notify the insured of such requirement, but were unable to find him. *Held*, that the factorizing creditor stood in no better position than the insured, and that he could not recover the amount of the loss. *Ib.*

LEASE.

Re-entry. — A lease contained the following provision: "If said rent shall remain unpaid after the same shall become payable, the lease shall thereupon expire and terminate, and the lessor may, at any time thereafter, re-enter the premises and the same possess as of his former estate; and without such re-entry may recover possession in the manner provided by the statute relating to summary process; it being understood that no demand for the rent and re-entry for condition broken as at common law shall be necessary to enable the lessor to recover possession under said statute, but that all right to any such demand or re-entry is expressly waived by the lessee." *Held*, 1. That on the non-payment of rent when due and properly demanded the lease was voidable at the election of the lessor. 2. That though, to avoid the lease, the lessor need not make a formal re-entry, he must do some unequivocal act that would signify to the lessee his election to terminate the lease. 3. That the waiver of a demand and re-entry was limited to such demand and re-entry as were necessary for a recovery of the premises under the statute relating to summary process, and had no application to an action of ejectment. The decision in *Bowman* v. *Fool*, 29 Conn., 331, approved. *Read* v. *Tuttle.*

LIS PENDENS.

1. *Doctrine of.* — Whether the doctrine will be applied to a purchaser who does not take his title, pending the suit, from a party to the suit: *Quære. Norton* v. *Birge.*

2. If the doctrine be subject in its application to such a limitation, yet a purchaser whose grantor took a conveyance from a party to the suit while it was pending, stands in the same position, in respect to the application of the doctrine, as his grantor would have done. *Ib.*

3. Where a conveyance was executed before the suit was brought, but was not put on record till some time after the suit was brought, it was held that the grantee stood, in relation to the pending suit, just as he would have done if the conveyance had been taken during the pendency of the suit. *Ib.*

4. A made a conveyance to B, B to C, and C to D, all fraudulent, and N, with no actual knowledge of any infirmity in the title, took a mortgage of C. At the time he took the mortgage, the land records showed attachments on the property by A's creditors, and the law was so that such attachments might be made the basis of insolvent proceedings in the probate court, by the institution of which the attachments would be dissolved. These proceedings had, in fact, been instituted, but N took his mortgage with the knowledge that such attachments had been made, and had subsequently been discontinued, but with no inquiry as to whether insolvent proceedings had been instituted. When he took the mortgage a bill in

* From J. Hooker, State Reporter, and to appear in vol. 35 Connecticut Reports.

equity was pending, brought by the trustee in insolvency against B to set aside the fraudulent conveyance to him, and the deed of B to C, though executed and delivered before the suit, was not put on record or known to the trustee till a long time after the suit was brought. *Held*, in applying the doctrine of *lis pendens* to the title acquired by N, that if he was not fully chargeable with notice of the rights of the trustee in insolvency, yet it was not a case of any hardship in the application of the doctrine. *Ib.*

MILL-SITE.

Non-user. — The flowage act (Gen. Statutes, tit. 1, § 390,) provides that no dam shall be erected under its provisions to the injury of any mill-site on the same stream, on which a mill-dam shall have been lawfully erected and used, "unless the right to maintain a mill on such mill-site *shall have been lost or defeated by abandonment or otherwise.*" *Held*, that the statute by these terms did not intend a literal loss of the right to use such mill-site, but only such a neglect to use it on the part of the owner as showed that he had no intention of improving it again for milling purposes. *Curtiss* v. *Smith.*

PRACTICE.

1. *Costs.* — The statute (Gen. Statutes, p. 15, § 71,) provides that, where a plaintiff in the Superior Court shall withdraw his action within the last three days of the term, without notice to the defendant, the latter may enter for costs within the first three days of the next term. Where a suit was withdrawn on the fourth day before the end of the term without notice to the defendant, and the fact did not come to his knowledge until after the close of the term, it was held that he had no remedy for the recovery of his costs. *Bishop* v. *Pardee.*

2. *Costs in actions of trespass.* — The act of 1866, providing that in actions of trespass tried in the Superior Court, if the plaintiff shall fail to recover more than thirty-five dollars damages, he shall recover no more costs than damages, contains the following proviso: — "Provided, that when the defendant shall remove such action by appeal from a justice of the peace to the Superior Court, the plaintiff, on recovering judgment against the defendant, shall recover full costs." *Held*, that the proviso was not retrospective, and did not apply to an appeal pending at the time the act was passed. *Skinner* v. *Watson.*

3. *Notice: appointment of conservator.* — The statute (Gen. Statutes, p. 514, § 2) provides that service of an application for the appointment of a conservator shall be made by leaving a copy at the usual place of abode of the respondent. A respondent, at the time of such an application, was in the county jail as a prisoner, and the house where he had last resided, had, while he was imprisoned, been sold by the trustee of his insolvent estate and possession taken by the purchaser. *Held*, that service was sufficiently made by leaving a copy with him at the jail. *Dunn's Appeal from Probate.*

4. The application was returned to the court of probate and the hearing adjourned to a future day. A few days before the time of the hearing the respondent appeared before the judge of probate and consented that a certain person named should be appointed conservator, and the judge thereupon appointed him. At the time fixed for the hearing the respondent appeared and objected to the appointment of any conservator over him, and claimed the right to be heard with his witnesses and counsel, but the judge refused to hear him. *Held*, that the appointment of the conservator before the time fixed for the hearing was irregular and erroneous, and that the respondent, by consenting to the appointment of the conservator at the time he did, had not precluded himself from the right to be heard against the appointment at the time fixed for the hearing. *Ib.*

5. *Order on erasing a case.* — An order of the Superior Court, erasing a case from its docket, was reversed by the Supreme Court at its term in February, 1867, but no order was made by the latter court remanding the case, and it was not re-entered in the docket of the Superior Court until its September term, 1867, two terms having intervened. By statute, the Supreme Court, on reversing a judgment, may, if the reversal admits of the further prosecution of the suit, remand the case to the court below, and the plaintiff may enter it in that court for trial. *Held* that, upon the reversal of an order erasing a case from the docket, no order of the Supreme Court remanding the case was necessary, but that it was properly the duty of the clerk at once to re-enter it, and that on his neglecting to do so, the Superior Court might, at a later term, in its discretion order it. *Woodruff* v. *Bacon.*

6. An order erasing a case from the docket is to be regarded as a final judgment for the purpose of a review of it on error, but is not a judgment in the ordinary sense of the term. *Ib.*

7. Where a garnishee has mingled the money attached in his hands with his own, and has used it as his own, he may properly be required to pay interest on it. *Ib.*

8. And this interest attaches as an incident to the debt, and the factorizing creditor can recover it with the debt. *Ib.*

PROMISSORY NOTE.

1. *By trustee: business name.* — A Shaker community in this State, by the terms of a covenant signed by its members and by law, transacted business in the name of a trustee appointed by the elders. A negotiable note was given in the State of Massachusetts, for lands bought for the community, signed "Zelotes Terry." Terry was in fact a trustee at the time, and as a member of the community was disqualified from doing any private business. *Held*, 1. That, regarding the signature as simply that of an agent to a negotiable note, the principals would not be liable under the laws of Massachusetts, by which the case was to be governed. 2. But that the community might have adopted the name of "Zelotes Terry" as their business name, and that evidence was admissible to show that they had done so. *Pease* v. *Pease.*

2. A party can adopt a name, and will be holden by contracts executed in such name, and it makes no difference that the name so assumed is not an artificial one, but the proper name of a living person. *Ib.*

3. A non-negotiable instrument, given for land bought for the community, was signed "Zelotes Terry, Trustee." *Held* that, as the community was authorized to do business in the name of its trustee for the time being, and could sue and be sued in that name, and had no specific corporate name, the name of such trustee, with a term indicating his official character, was properly the corporate name of the community; and that parol evidence was admissible to show that "Zelotes Terry, Trustee," meant Zelotes Terry, trustee of the community. *Ib.*

4. *Defense of intoxication.* — Where the maker of a negotiable note defends against a *bona fide* holder, on the ground that he was intoxicated when he made the note, he must make out a case of complete intoxication. *Caulkins* v. *Fry.*

5. Where he was able to sign the note, and the next morning to remember that he had done so and for what the note was given, it was held that he had not shown a case of complete intoxication. *Ib.*

REVENUE STAMPS.

1. *On writs and process.* — The revenue stamp upon a writ, under the late act of Congress requiring writs to be stamped, was no essential part of the process. *Tucker* v. *Potter.*

2. It was not necessary, therefore, that a copy of such a writ left in service should contain a copy or memorandum of the stamp. *Ib.*

3. Congress had no power to make the stamp an essential part of the process, even if it had so intended. *Ib.*

4. But such was not its intention. *Ib.*

5. Whether Congress has the constitutional power to tax the judicial process of a State: *Quære. Ib.*

SET-OFF.

A debtor whose property had been attached, was carried into insolvency, the attachment being thereby dissolved. The attached property had been receipted, and under the statute the trustee in insolvency recovered judgment on the receipt, in the name of the sheriff, for the value of the property for the benefit of the estate. The receiptor was a creditor of the insolvent to a greater amount than the judgment recovered, and he brought a petition to have the debt due him set off against the judgment. *Held*, that the set-off could not be allowed. *Bishop* v. *Fowler.*

SPECIFIC PERFORMANCE.

1. *When enforced.* — The British government held, in the name of the respondent, the legal title to certain real estate in this State, originally taken of R. & L., as security for advances to them under a contract for the manufacture of rifles and for the performance of the contract. The petitioners had previously held the legal title, under a contract with R. & L., by which they were to hold it as security for certain purposes, with a right to purchase at an appraisal, and had released it to R. & L. to enable them to make the mortgage held by the British government. This release was made upon a condition that when R. & L. had performed their contract secured by the mortgage then to be given, the legal title should be reconveyed to the petitioners. This court having previously held that the property thus released by the petitioners stood in the position of a surety for the performance of the contract of R. & L., and that the property was discharged from its liability in this relation by reason of changes made by the British government in the contract secured by it, the petitioners now brought a bill in equity to compel the respondent to reconvey the legal title to them. It appeared that all the claim for which the petitioners originally held the property as security had been satisfied, and that they had no claim to such a reconveyance except upon the ground of their right to purchase the property at an appraisal. *Held*, that, as they had not averred any intention at present to exercise the right of purchase, but claimed only that they were entitled to a reconveyance that they might under the contract exercise the right at their option at some future time, the relief sought ought not to be granted. *Sharp's Rifle Manufacturing Co.* v. *Rowan.*

2. *Held*, also, that it was no reason for giving the legal title to the petitioners, that they had an independent claim against the British government on which the latter could not be sued in our courts, and in respect to which they would have an advantage if they held the legal title

and the British government was compelled to come into a court of equity as a petitioner to get it from them. *Ib.*

3. The British government having the legal title had an advantage in a conflict of equities, and a court of equity would not take away this advantage merely to give it to the other party. *Ib.*

STATUTE OF LIMITATION.

1. *Acknowledgment of indebtedness.* — Payments were made by one partner, after the dissolution of the partnership, but before the statute of limitations had taken effect, upon two notes given by the partners during the partnership, one joint and the other joint and several. There was nothing in the circumstances to indicate that the payments were made on the sole account of the partner who made them, although the latter had agreed, on the dissolution, to pay all the partnership debts, which was not known to the creditor. *Held*, that the acknowledgment of the indebtedness by the payments was sufficient to prevent the operation of the statute of limitations upon the notes against both the makers. *Bissell* v. *Adams.*

2. *Easements: husband and wife.* — The provisions of the statute of limitations with regard to the time of entry by the owner on lands of which he is disseized, apply equally to easements adversely used. And the limitation of the right of entry, in the case of a married woman, to five years after discoverture, applies to easements. Where a married woman owns real estate in fee, the husband and wife are seized jointly in her right, and an ouster of them would be a disseizin of both, and a right of entry would at once accrue to both and to each. *Coe* v. *Wolcottville Manuf'g Co.*

3. *On a bond to reconvey.* — H., in the year 1844, being sick, conveyed certain real estate to her sister N., as a provision for her minor daughter in case she should not recover. N. executed a bond to reconvey to H. in the event of her recovery. The bond was deposited by N. in a trunk used by them in common for keeping valuable papers. Both regarded it as binding without any other act. After the recovery of H., no demand was made on N., who died in 1865, having shortly before conveyed the land to W. *Held*, 1. That there was a sufficient delivery of the bond. 2. That the statute of limitations did not begin to run against the bond until N. had been requested to reconvey, or had put it out of her power to do so by conveying to another. *Ward's Appeal from Probate.*

SUNDAY.

Contracts made on. — Under the statute forbidding secular business on the Lord's day, a loan of money made on that day cannot be recovered. Nor can it be recovered in an action of general assumpsit upon a demand afterward made, as money of the plaintiff in the hands of the defendant. A party cannot be permitted to trace his title through an illegal act. *Finn* v. *Donahue.*

TAXATION.

1. *Of corporations.* — It is the general policy of the law to avoid double taxation, and this consideration is of weight in determining the construction of statutes imposing it; but where their meaning is clear the courts cannot hold such taxation illegal. *Toll Bridge Co.* v. *Osborn.*

2. A corporation was chartered in 1796 to build and maintain a toll-bridge, with power, "for the purpose of carrying the resolve into effect," to purchase and hold lands not exceeding one hundred acres. The company built the bridge, and soon after purchased a large quantity of mud flats, adjoining the bridge, and erected wharves upon a portion of it, which became of great value and were profitably rented. An act passed in 1847 provided that the real estate of any private corporation, "above what was required and used for the transaction of its appropriate business," should be liable to be assessed and taxed to the same extent as if owned by an individual. *Held*, that the real estate thus used by the company for wharves was liable to taxation under the statute. *Ib.*

3. Such a use of the real estate which the company was authorized to purchase and hold was not contemplated or authorized by its charter. *Ib.*

4. And the question as to what rights the company might have acquired by prescription did not properly arise, inasmuch as the charter, on which the company itself relied, showed clearly what was its appropriate business, and this was the sole question in determining the liability of the property to taxation. *Ib.*

5. The charter provided that the bridge and all property owned by the company appurtenant thereto should be considered personal estate and divided into shares. *Held*, that this provision related to the property of the stockholders as represented by the shares, and not to the property of the corporation itself in its relation to other parties, and that the property in question was therefore taxable as real estate. *Ib.*

TRESPASS.

Declaration in: proof. — A declaration in trespass alleged in one count that the defendant set a dog on the plaintiff, and in another that the defendant assaulted the plaintiff and beat and wounded him. The defendant pleaded the general issue, with notice that he should prove that the plaintiff was making a violent assault on the defendant's son, and that he set the dog on the plaintiff as the only means of defending his son, and that if the plaintiff was hurt, it was in consequence of his assault on the son, and in the necessary defense of his son by the defendant. *Held*, that this notice was applicable to the count for an assault by the defendant personally, and not merely to the count relating to the setting on of the dog, and that the defendant under it might prove a justification for his personal assault on the plaintiff. *Hanchett* v. *Bassett.*

TRUST.

Evidence: statute of limitation. — Several brothers and sisters purchased together a piece of land in 1842 under a parol agreement among themselves that A, one of their number, should take the title and hold it in trust for the benefit of their mother, during her life, and after her death for themselves. A in 1843 conveyed the land to B, who had no knowledge of the trust, and B soon after conveyed it to C, one of the sisters, she agreeing by parol to carry out the original trust. In 1845 C sold the property to a stranger, receiving the price for the same, which she held till her death, her mother receiving no benefit from it. In 1856 the mother died. In 1847 C married, and died in 1865. After her marriage and within six years before her death, she repeatedly acknowledged her indebtedness to her brothers and sisters for their shares of the money received by her. After her death, they presented a claim against her estate for the money. *Held*, 1. That the trust, so far as the interest of the claimants are concerned, was merely a resulting trust, that would be implied by law from their having paid for the land, and could be proved by parol evidence. 2. That the conveyance to B did not purge the trust in the hands of C, who had notice of it and agreed to perform it. 3. That the acknowledgment of the indebtedness by C, while married, was sufficient to prevent the operation of the statute of limitations on the claim. 4. That, in the circumstances, interest ought to be allowed on the money in the hands of C from the time she received it. *Booth's Appeal from Probate.*

VARIANCE.

Between declaration and proof. — A declaration alleged the consideration of a warranty of a quantity of potatoes to be an agreement "that the plaintiff would buy of the defendant a certain quantity, to wit, five hundred bushels of potatoes, at one dollar a bushel, to be paid, to wit, when the defendant should deliver them." The consideration proved was, an agreement that the plaintiff would buy all the good potatoes then growing in a certain field of the defendant, except such as the defendant should reserve for the use of his family, at one dollar per bushel, to be paid on delivery or within a reasonable time thereafter. *Held* to be a fatal variance, both in respect to the quantity, and in respect to the time of payment. *Held*, also, that the case was not helped by the *videlicet*. *Pulford* v. *Johnson.*

WILL.

1. *Bequests: when payable in gold.* — A testator, by a will executed in 1865, made the following bequest:—"I give to each of the children of my two sisters in France, two hundred dollars in gold." The testator had at the time two sisters living in France, one of whom had five children and the other one. A third sister had lived in France, but had died before the making of the will, leaving seven children who were then living. The testator knew of her death, and of the children that she left. *Held*, that the bequest was not void for uncertainty, and that the child and children of the two surviving sisters must be regarded as intended. *Held*, also, that the legacies were payable in gold coin. *Graw* v. *Brindley.*

2. *Construction of: evidence of assent.* — A testator gave all his estate, subject to certain bequests, to his nephew, C, provided he should relinquish all claim to his father's estate. *Held*, that this meant that C should relinquish his interest in his father's estate to his brothers and sisters, who were heirs with him. *Treat* v. *Treat.*

3. The will provided that, if C should not relinquish his interest in his father's estate, the property given him should go, one-quarter to the heirs of C's father and the rest to other parties named. An arrangement was entered into by C and all his brothers and sisters except H, who was not present, and by an aunt, by which C was to relinquish his interest in his father's estate to one of his sisters, and the aunt was to convey certain real estate to his two brothers H and M. The conveyances were made accordingly, and H entered into possession of the land conveyed to him, but in ignorance of the arrangement under which it was conveyed. The land was worth more than the share he would have received of C's interest in his father's estate, and he retained possession of it for four years after he had learned of the arrangement. *Held*, that his assent to the arrangement would be inferred, and that there was no forfeiture of C's interest under the will of his uncle. *Ib.*

4. Where an arrangement is manifestly for the benefit of a person, slight evidence of his assent to it will be sufficient. *Ib.*

5. A court of probate has no power to decree a forfeiture under the conditions of a will. *Ib.*

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LAW AND LAWYERS IN LITERATURE.*

IX.

Another interview between St. Peter and a lawyer is described in Carr's "Remarks of the Government of the several Parts of Germanie, Denmark," etc. Amsterdam, 1688: "And now, because I am speaking of Pettyfogers, give me leave to tell you a story I mett with when I lived in Rome. Goeing with a Romane to see some Antiquityes, he showed a chapell dedicated to one St. Evona, a lawyer of Brittaine, who he said came to Rome to entreat the Pope to give the lawyers of Brittaine a Patron, to which the Pope replied, that he knew of no Saint but what was disposed of to other Professions. At which Evona was very sad, and earnestly begd of the Pope to think of one for him. At last the Pope proposed to St. Evona that he should goe round the church of St. John de Latera blindfould, and after he had said so many Ave Marias, that the first Saint he layd hold of should be his Patron, which the good old lawyer willingly undertook; and at the end of his Ave Maryes he stopt at St. Michel's altar, where he layd hold of the Divill, under St. Michel's feet, and cryd out, this is our Saint; let him be our Patron. So, being unblindfolded, and seeing what a Patron he had chosen, he went to his lodgings so dejected, that in a few months after he dyed, and, coming to heaven's gates, knockt hard. Whereupon St. Peter asked who it was that knockt so bouldly. He replied that he was St. Evona the advocate. Away, away, said St. Peter; here is but one Advocate in heaven; here is no room for you lawyers. O but, said St. Evona, I am that honest lawyer who never tooke fees on both sides, or pleaded in a bad cause, nor did I ever set my naibours together by the eares, or lived by the sins of the people. Well, then, said St. Peter, come in. This newes coming down to Rome, a witty poet writ on St. Evona's tomb these words:

'St. Evona, un Briton,
Advocat non Larron,
Haleluiah.'"

SMOLLETT.

One of the most entertaining legal characters in fiction is Tom Clarke, the attorney, in Sir Launcelot Greaves. The character of a lawyer simply good would, of course, be utterly uninteresting, and so the author has contrived to invest this character with interest by rendering him ineffably tedious. He says of him at the outset, that his "goodness of heart even the exercise of his profession had not been able to corrupt. Before strangers he never owned himself an attorney without blushing, though he had no reason to blush for his own practice. * * * He piqued himself on understanding the practice of the courts, and in private company he took pleasure in laying down the law; but he was an indifferent orator, and tediously circumstantial in his explanations."

Captain Crowe narrates how his grandmother and his maiden aunt, by the assistance of an attorney, "hove him out of his inheritance." "'Yes, indeed, sir,' added Mr. Clarke, 'those two malicious old women docked the intail, and left the estate to an alien.' Here Mr. Ferrett thought proper to intermingle in the conversation with a 'Pish! what, dost talk of docking the intail? Dost not know that by the statute Westm., 2, 13 Ed., the will and intention of the donor must be fulfilled, and the tenant in *tail* shall not alien after issue had, or before.' 'Give me leave, sir,' replied Tom, 'I presume you are a practitioner in the law. Now you know, that in the case of a contingent *remainder*, the intail may be destroyed by levying a fine, and suffering a recovery; or otherwise destroying the particular estate, before the contingency happens. If *feoffees*, who possess an estate only during the life of a son, where divers *remainders* are limited over, make a *feoffment* in fee to him, by the *feoffment* all the future *remainders* are destroyed. Indeed, a person in *remainder* may have a writ of intrusion, if any do intrude after the death of a tenant for life; and the writ *ex gravi querela* lies to execute a devise in *remainder* after the death of a tenant in tail without issue.' 'Spoke like a true disciple of Geber,' cried Ferrett. 'No, sir,' replied Mr. Clarke, 'Counsellor Caper is in the conveyancing way—I was clerk to Serjeant Croaker.' 'Ay, now you may set up for yourself,' resumed the other, 'for you can prate as unintelligibly as the best of them.' 'Perhaps,' said Tom, 'I do not make myself understood. If so be as how that is the case, let us change the position, and suppose that this here case is *tail after possibility of issue extinct*. If a tenant in tail after a possibility make a *feoffment* of his land, he in reversion may enter for the forfeiture. Then we must make a distinction between *general tail* and *special tail*. It is the word *body* that makes the *intail*: there must be a *body* in the *tail*, devised to heirs, male or female, otherwise it is a fee-simple, because it is not limited of what *body*. Thus a corporation cannot be seized in *tail*. For example, here is a young woman—what is your name, my dear?' 'Dolly,' answered the daughter, with a courtesy. 'Here's Dolly—I seize Dolly in *tail*—Dolly, I seize you in *tail*.' 'Shan't, then,' cried Dolly, pouting. 'I am seized of land in fee—I settle on Dolly in *tail*.'" For the continuation of this discussion see the original report.

At a later period, Ferrett observed that Greaves was a common nuisance, and ought to be prosecuted on the statute of barratry. "'No, sir,' resumed Mr. Clarke, 'he can not be convicted of barratry unless he is always at variance with some person or other, a mover of suits and quarrels, who disturbs the peace under color of law. Therefore he is in the indictment styled, *communis, malefactor, calumniator*, et *seminator litium*.' 'Prythee truce with thy definitions,' cried Ferrett, 'and make an end of thy long-winded story. Thou hast no title to be so tedious, until thou comest to have a coif in the court of common pleas.'"

Tom also laid down the law of robbery. "'Taking away another man's movables,' said he, 'and personal goods, against the will of the owner, is *furtum* and felony according to the statute; different, indeed, from robbery, which implies putting in fear on the

king's highway, *in alta via regia violenter et felonice captum et asportatum, in magnum terrorum*, etc.; for if the robbery be laid in the indictment as one *in quadam via pedestri*, in a foot-path, the offender will not be ousted of his clergy. It must be *in alta via regia;* and your honor will please to take notice that robberies committed on the river Thames are adjudged as done *in alta via regia;* for the king's high stream is all the same as the king's highway.'"

Captain Crowe and Tom, suspected of being highwaymen, were set upon and beaten, their horses and money were taken from them, and they were dragged before a justice, who committed them for vagrancy. Tom thus delivers himself on this complication: "'As there was no just cause of suspicion, I am of opinion the justice is guilty of a trespass, and may be sued for *falsum imprisonamentum*, and considerable damages obtained; for you will please to observe, sir, no justice has a right to commit any person till after due examination; besides, we were not committed for an assault and battery, *audita querela*, nor as wandering lunatics by the statute, who, to be sure, may be apprehended by a justice's warrant, and locked up, and chained, if necessary, or be sent to their last legal settlement; but we were committed as vagrants and suspected highwaymen. Now, we do not fall under the description of vagrants, nor did any circumstance appear to support the suspicion of robbery; for to constitute robbery, there must be something taken; but here nothing was taken but blows, and they were upon compulsion. Even an attempt to rob, without any taking, is not felony, but a misdemeanor. To be sure, there is a taking in deed, and a taking in law; but still the robber must be in possession of a thing stolen; and we attempted to steal ourselves away.'"

Mr. Gobble, the justice, is also a great character. Sir Launcelot being brought before him, he thus addresses him: "'The laws of this land has provided — I says as how provision is made by the laws of this here land, in reverence to delinquems and manefactors, whereby the king's peace is upholden by we magistrates, who represents his majesty's person better than in e'er a contagious nation under the sun; but howsomever, that there king's peace, and this here magistrato's authority, cannot be adequably and identically upheld, if so be as how criminals escapes unpunished. Now, friend, you must be confidentious in your own mind, as you are a notorious criminal, who have trespassed again the law on divers occasions and importunities; if I had a mind to exercise the rigor of the law, according to the authority wherewith I am wested, you and your companions in iniquity would be sewerely punished by the statue; but we magistrates has a power to litigate the sewerity of justice,'" etc.

Mrs. Gobble, the justice's wife, pronounces the knight "a vagram, and a dilatory sort of person," and says if she was her husband, she would "fork him with a primineery."

In the "Adventures of Ferdinand Count Fathom," is an amusing account of a lawyer's bill, in which the count found himself charged with three hundred and fifty attendances. "He could not help expostulating with him on this article, which seemed to be so falsely stated with regard to the number; when his questions drew on an explanation, by which he found he had incurred the penalty of three shillings and four pence for every time he chanced to meet the conscientious attorney, either in the park, the coffee house, or the street, provided they had exchanged the common salutation; and he had great reason to believe the solicitor had often thrown himself in his way, with a view to swell this item of his account."

CHURCHILL.

The law of libel in England, under Lord Mansfield, reached an extremely unjust and unpopular interpretation. In pursuance of the idea, "the greater the truth the greater the libel," juries were instructed that their province was the question of publication alone, and a great deal of judicial bullying was resorted to for the purpose of extorting verdicts on this question, which, although consonant with evidence, jurors felt would be the foundation of unjust and excessive judgments. The poet Churchill loses no opportunity of rebuking Mansfield for producing this state of the law. For instance, he speaks of one who prayed a judge

> "That some new laws he would provide,
> (If old could not be misapplied
> With as much ease and safety there
> As they are misapplied elsewhere),
> By which it might be construed treason
> In man to exercise his reason,
> Which might ingeniously devise
> One punishment for truth and lies,
> And fairly prove when they had done,
> That truth and falsehood were but one;
> Which juries must indeed retain,
> But their effects should render vain,
> Making all real power to rest
> In one corrupted rotten breast,
> By which false gloss the very Bible
> Might be interpreted a libel."

TOM MOORE

treats of the same idea, in much the same spirit, and with the same inevitable last rhyme, in "A Case of Libel." He describes the Devil as coming to London, and putting on the habiliments and demeanor of a gentleman. One of the newspapers, however, warns people that he is the evil one, and the fiend takes legal advice as to his rights in the premises. The result is described by the poet, as follows:

> "Away he posts to a Man of Law,
> And 'twould make you laugh could you have seen 'em,
> As paw shook hand, and hand shook paw,
> And 'twas 'hail, good fellow, well met,' between 'em.
>
> Straight an indictment was preferred —
> And much the Devil enjoyed the jest,
> When, asking about the Bench, he heard
> That of all the Judges, his own was *Best*.
>
> In vain Defendant proffer'd proof
> That Plaintiff's self was the Father of evil —
> Brought Hoby forth, to swear to the hoof,
> And Stultz to speak to the tail of the Devil.
>
> The Jury (saints all snug and rich,
> And readers of virtuous Sunday papers)
> Found for the Plaintiff — on hearing which
> The Devil gave one of his loftiest capers.
>
> For oh, 'twas nuts to the Father of Lies,
> (As this wily fiend is nam'd in the Bible),
> To find it settled by laws so wise,
> That the greater the truth, the worse the libel!"

Shelley was not alone in his abuse of Lord Eldon, for Moore, also, gives him his compliments in "A Vision, by the Author of Christabel." The author dreams that he was carried by a vicious spirit into the Court of Chancery.

"Around me flitted unnumber'd swarms
Of shapeless, bodiless, tailless forms;
(Like bottled up babes, that grace the room
Of that worthy Knight, Sir Everard Home)—
All of them, things half-killed in rearing;
Some were lame — some wanted *hearing;*
Some had through half a century run,
Though they hadn't a leg to stand upon.
Others, more merry, as just beginning,
Around on a *point of law* were spinning;
Or balanc'd aloft, 'twixt *Bill* and *Answer*,
Lead at each end, like a tight-rope dancer.
Some were so *cross* that nothing could please 'em;—
Some gulp'd down *affidavits* to ease 'em;—
All were in motion, yet never a one,
Let it *move* as it might, could ever move *on*.
'These,' said the Spirit, 'you plainly see,
Are what they call suits in Chancery!'

"I look'd, and I saw a wizard rise,
With a wig like a cloud before men's eyes.
In his aged hand he held a wand,
Wherewith he beckon'd his embryo band,
And he mov'd and mov'd, as he wav'd it o'er,
But they never got on one inch the more.
And still they kept limping to and fro,
Like Ariels around old Prospero—
Saying, 'Dear Master, let us go.'
But still old Prospero answer'd 'No.'
And I heard the while, that wizard elf
Muttering, muttering spells to himself,
While o'er as many old papers he turn'd
As Hume e'er mov'd for, or Omar burned.
He talk'd of his virtue—'though some, less nice,
(He own'd with a sigh) preferred his *Vice*'—
And he said 'I think'—'I doubt'—'I hope,'
Called God to witness, and damn'd the Pope;
With many more sleights of tongue and hand,
I couldn't for the soul of me understand.
Amaz'd and pos'd, I was just about
To ask his name, when the screams without,
The merciless clack of the imps within,
And that conjuror's mutterings, made such a din,
That, startl'd, I woke—leaped up in my bed—
Found the Spirit, the imps, and the conjuror fled,
And bless'd my stars, right pleas'd to see,
That I was not, as yet, in Chancery."

No doubt the great Chancellor forgave the poet this irresistibly funny banter. If he had been like some modern judges, he would have brought him into Chancery by an injunction restraining the publication.

In "The Fudge Family in Paris," Phil. Fudge writes to his brother, Tim Fudge, Esq., Barrister at Law, as follows:

"Who shall describe the pow'rs of face,
Thy well fee'd zeal in every case,
Or wrong or right—but ten times warmer
(As suits thy calling) in the former—
The glorious, lawyer-like delight
In puzzling all that's clear and right,
Which, though conspicuous in thy youth,
Improve so with a wig and band on,
That all thy pride's to waylay Truth,
And leave her not a leg to stand on.
Thy patent, prime morality,—
Thy cases cited from the Bible—
Thy candour, when it falls to thee
To help in trouncing for a libel."
"These are the virtues, Tim, that draw
The briefs into thy bag so fast;
And these, oh, Tim—if Law be Law—
Will raise thee to the Bench at last."

COOPER.

This novelist has a good deal to say of the subject in hand. He, himself, was in law pretty much all his life. What with prosecuting editors, who criticised his later and poorer novels, and a standing fight with his neighbors at Cooperstown, whom he accused of trespassing on his manorial rights, we may readily suppose he was in a most unenviable state of mind. He was a man of haughty manners, of unyielding temper, and of aristocratic ideas. After all he wrote in praise of the Indian character, one might expect him to side with the Anti-Rent movement, but I am informed that he published several novels against it. I believe he was generally successful in his libel suits, for in his day the people of this country were much more proud of a second-rate author than of a first-rate editor; but he must at some time have met with a rebuff, for in "The Ways of the Hour" we find a systematic and elaborate attack on the trial by jury. The key-note is sounded in the preface. He here announces the object of the book to be "to draw the attention of the reader to some of the social evils that beset us; more particularly in connection with the administration of criminal justice." As to jury trial he says: "In our view, the institution itself, so admirable in a monarchy, is totally unsuited to a democracy." He refers to the prejudices of juries against railroad companies, and against the claims of non-resident creditors, and to the influence of politics in the composition and verdicts of juries. And he makes the startling announcement: "It is certain that the juries are falling into disrepute throughout the length and breadth of the land."

In this book, written in 1850, we find plenty of sneers at the newly adopted Code of Procedure, and at the system of choosing judges by popular election; although the author discloses that he is as grossly ignorant of the design and scope of the one, as he must necessarily have been of the practical results of the other. The plot is as absurd as could be conceived. A young lady is indicted for the murder of an aged married couple, in whose family she with another woman, a German, had been an inmate. The house burns down; two human skeletons are found in the ruins, bearing marks of violence on the head. A piece of money is found in the possession of the accused corresponding to a peculiar piece known to have been kept by the old people among their hoard in a stocking. The old man and the German woman were both missing, but the medical testimony leaned to the theory that the skeletons were both female. The accused is first put on trial for the murder of the old man. With no more proof than the foregoing of the *corpus delicti*, and no evidence on the part of the defence, to speak of, and in spite of a charge very favorable to the accused, the jury find the prisoner guilty. She is sentenced to die, but just then the old man walks into court! Some discussion ensues as to what to do in this juncture. One of the lawyers suggests an examination of the Code! But, leaving matters just as they are, the prisoner, sentenced to die for the murder of an individual alive and well in court, is put on trial for the murder of the old woman! Out of this embarrassing predicament the fair accused is delivered by her own acuteness. She herself conducts the cross-examination of the people's chief witness, a woman who identifies the piece of money; and worrying her as only one woman can worry another, makes the witness confess that she stole the stocking-hoard, and put the peculiar piece of money in the prisoner's purse, and that the wounds on the skulls of the deceased were caused by a ploughshare which fell on them. Of course the young lady was acquitted, and it was not deemed worth while after this to put her on trial for the arson, of which she also stood indicted. Mr. Cooper, however, does not explain to us what was done with the sentence of death, nor whether the Code furnished any road out of the difficulty.

One might be surprised that an author of Cooper's calibre should seriously anticipate that such triviali-

ties as these could shake the system of trial by jury; but I must do him the justice to say that he did not anticipate any thing of the sort, for he tells us in his preface that he "has not the vanity to suppose that any thing contained in this book will produce a very serious impression on the popularity of the jury;" but when in the same connection he informs us that he designs the book "to cause a portion of his readers to reflect on the subject," I must confess that the most obvious reflection is, that if juries were constituted and justice administered as the author depicts them, it is no wonder that he procured some verdicts in his favor in libel suits.

GAY

addresses his fable, "The Dog and the Fox," to a lawyer, and introduces it as follows:

"I know you lawyers can with ease,
Twist words and meanings as you please;
That language, by your skill made pliant,
Will bend to favor every client;
That 'tis the fee directs the sense,
To make out either side's pretense.
When you peruse the clearest case,
You see it with a double face,
For scepticism is your profession;
You hold there's doubt in all expression.
Hence is the bar with fees supplied,
Hence eloquence takes either side,
Your hand would have but paltry gleaning,
Could every man express his meaning.
Who dares presume to pen a deed,
Unless you previously are fee'd?
'Tis drawn; and to augment the cost,
In dull prolixity engrost;
And now we're well secured by law,
Till the next brother find a flaw.
Read o'er a will. Was't ever known
But you could make the will your own?
For when you read, 'tis with intent
To find out meanings never meant.
Since things are thus, *se defendendo*,
I bar fallacious *innuendo*."

GRAY.

It is interesting to learn the views of the elegant author of the "Elegy in a Country Churchyard" on the "Study of the Law." They are found in a letter to his friend West, who had thoughts of devoting himself to the profession: "Examples show one that it is not absolutely necessary to be a blockhead to succeed in this profession. The labour is long, and the elements dry and unentertaining; nor was ever anybody (especially those that afterward made a figure in it), amused, or even not disgusted in the beginning; yet upon a further acquaintance there is surely matter for curiosity and reflection. It is strange if among all that huge mass of words there be not somewhat intermixed for thought. Laws have been the result of long deliberation, and that not of dull men, but the contrary; and have so close a connection with history — nay, with philosophy itself, that they must partake a little of what they are related to so nearly. Besides, tell me, have you ever made the attempt? Was not you frighted merely with the distant prospect? Had the Gothic character and bulkiness of these volumes (a tenth part of which, perhaps, it will be no further necessary to consult, than as one does a dictionary), no ill effect upon your eye? Are you sure, if Coke had been printed by Elzevir, and bound in twenty neat pocket volumes, instead of one folio, you should never have taken him for an hour, as you would a Tully, or drank your tea over him?"

THE SUPREME COURT OF THE UNITED STATES.

Before the Constitution of the United States fell into what, to speak plainly, must be called its present discredit, there was no institution created by it which interested the foreign observer more strongly than the Supreme Court of the federation. Although its decision could only be called forth by private disputes, M. de Tocqueville justly speaks of a court which had the power of declaring whether a law consented to by all existing authorities was valid as "standing at the head of all known tribunals." The language of the Continental writers, who described it before 1860, was invariably eulogistic and even enthusiastic, and many of them noticed, as honorably characteristic of the English race, the fact that the branch of it which organized the greatest democracy of the world had placed it under the protection, not of a string of pretended eternal truths, nor under that of the people at large, nor under that of the legislative body, but under the guardianship of a bench of irremovable judges. The writer of a very interesting paper in the *Nation* of New York, calls attention to a crisis which is just occurring in the history of this august tribunal, and incidentally describes the fall of its credit among the people of the United States. "Thirty years ago," we are told, "the Supreme Court, and, indeed, the judiciary generally, stood as high in the estimation of the public as it is given to mortal authority ever to stand. No doubt of its purity lurked in men's minds; no political bias was believed to influence its decisions. It was looked upon by the common consent of all parties as the great landmark, the one great bulwark of society which was sure to withstand all storms, and to secure the nation whose laws it administered in the blessings of life, liberty and the pursuit of happiness." The first sensible decline of its reputation is alleged to have occurred when it pronounced the famous Dred Scott judgment. But this loss of popularity must only be understood of the section of the population which became ultimately dominant, since it is probable that the South rejoiced as much as the North mourned over the decision of the Supreme Court that Congress was incompetent, by an enactment sanctioning a compromise, to fix forever the territorial limits of slavery. Though most important and most unfortunate in the long run for those who elicited it, this decision, though strict law, was probably good law. And, indeed, the *Nation* admits that the real quarrel of the people of the North with the court was, that it would not expressly acknowledge that slavery was intrinsically wicked — a proposition which, whether true or not, it could assuredly never have laid down without a gross dereliction of duty. When, however, the temporary disruption of the Union left the Supreme Court in exclusive connection with its northern section, it became inevitable that suspicion should turn for the first time into hatred and dread. For, if the court had decided, as it very possibly must have decided if its jurisdiction had been appealed to, it would have deprived the North of all power of aggression or resistance, assuming its decision to have commanded obedience. The least astute reader of the Constitution of the United States can see that, to say the least, a plausible case can be made out for hold-

ing that laws declaring paper money a legal tender, and permitting a conscription for the army, are inconsistent with careful provisions for the sanctity of contracts and the liberty of the person. The subjugation of the South doubtless re-established respect for the court among the nation as a whole; but the Republican party soon learned to regard it with the extremest jealousy as soon as the reconstruction laws were determined upon. It is not likely that there is any member of the party who does not feel they are very near the wind, indeed, and it was notoriously the hope that the Supreme Court would declare them unconstitutional, which animated President Johnson during his struggle with Congress.

It is all but certain that, if the judges had laid down during the war the law which most lawyers expected from them, the people of the North would have set aside their authority; and in that case the wreck of the institutions of the United States would have been all but complete. But the court, we are told, gave no really important decision (if we except those on belligerency), during the whole of the war. In spite of this prudence, it seems to have been regarded by the majority of Northerners as a dangerous partisan body, and every attempt was made to change its character by filling all the seats on the bench which became vacant with persons qualified for them only by subordination to the cause of the North. More open attacks were made on the court when all power fell after the war into the hands of the Legislature. An act of Congress taking away an appeal in a case already pending threatened the most extreme measures; but an extraordinary bill rendering a majority of two-thirds of the judges necessary before a law passed by Congress could be declared unconstitutional, but allowing a bare majority to declare it constitutional, was permitted to drop, though doubtless the Republicans could have carried it. This, however, seems to have been the last attempt on the independence of the court, and we are assured that its credit and popularity has been rising ever since. It is not without natural and justifiable pride that the writer in the *Nation* points to this tendency in the ship of State to right itself. It is distinctly, he tells us, because President Johnson so disgraced himself that the dignity and self-restraint of the Supreme Court met at last with the appreciation which they deserved. We may be pardoned for adding that the violence of Congress had much to do with the change; but we are equally of opinion that it is creditable to the American people, that they should turn with relief to the deliberations of judges from the spectacle of factious contention in the Legislature and furious intemperance in the executive.

It is fortunate for the Supreme Court that popular feeling has set in favor of the principles on which it was constructed, since never had President such an opportunity as President Grant for destroying its purity and independence. We shall make no apology for borrowing a description of the constitution of the court, and of the changes about to be made in it, which the American writer considers to be necessary even for his own countrymen. The Supreme Court has hitherto consisted of a chief-justice and eight associate judges, sitting generally at Washington. All causes, however, originate locally, and are tried in the first instance by a local judge, known as a district judge of the court, and appointed by the President. Appeals from the district judge, in which very large amounts are at stake, lie direct to the Supreme Court at Washington. But in the cases of lower amount which constitute the bulk of the litigation, the appeal is to the Circuit Court, which has, up to this time, been composed of the district judge and one of the judges of the Washington court, "on circuit." For the purpose of exercising the local jurisdiction of the United States they are divided into as many circuits as there are judges of the Washington court, and into a large number of districts, each State generally forming one district, though some of the larger States, *e. g.*, New York, are divided into two or more. We can easily believe that the strength of the court, as thus constituted, has gradually become unequal to dealing with litigation, which increases proportionately to the growth of the United States in population and wealth. Accordingly, an act of the last session of Congress adds one new associate judge to the court at Washington, and creates no less than nine judges, to be called circuit judges, with functions before unknown. The Circuit Court, which, as we have said, disposes of the bulk of the appeals, will now consist of the district judge, together with either a judge of the Supreme Court or one of the new circuit judges; and the *Nation* alleges that it will be, in fact, the new judges who will exercise the local jurisdiction. No complaint seems to be made of the particular mode of strengthening the Supreme Court adopted by Congress, but it is said that the facilities for packing it, once for all, which the act confers are quite without precedent. It has hitherto been a rare occurrence for a President to have a seat to fill in the Supreme Court once during a single term of office; but President Grant has one new judge to nominate to the Washington court, and nine judges of a totally new kind to spread over the country.

We are glad to perceive that telegraphic intelligence of later date than the article we have been noticing announces that President Grant has made the very appointment which the *Nation* considers of the best omen, by giving the new associate judgeship to the Attorney General, Mr. Hoar. It is not wholly for selfish reasons that an Englishman rejoices at the maintenance of the judicial reputation of a tribunal to which all political thinkers look with interest, and all lawyers with respect. Yet we may be forgiven for expressing a hope that the revived popularity of the Supreme Court will lead Americans to read with more attention the judgments which it gave during the war on the rights and duties of neutrals. If the authority of the court is not fatal to Mr. Sumner's arguments, we are, at least, justified in expecting it to be shown how the two are to be reconciled.

Robert D. Bogart, the defaulting naval paymaster's clerk, applied to Judge Benedict lately for leave to make a motion for a new trial, on the ground that new evidence in his favor has been discovered. The judge directed that the necessary papers should be prepared and submitted to him for inspection.

AN ADDRESS TO LAW STUDENTS.

At about the close of the reign of Charles X, of France, when were pending in the French courts some of those prosecutions of the press which ended in the expulsion of the Bourbons, one of the king's ministers ventured to speak to the chief judge of their court of dernier resort in respect to those prosecutions. He ventured so far in his anxiety as to say to the judge, that the monarch would regard a particular decision of the question as a great service rendered to the crown. The answer of the judge was becoming: "Sir, my court renders judgment — not service."

On an occasion in our own courts, when one who had occupied a place on the bench and returned to the bar had cited against him one of his own decisions, he was evidently annoyed. His adversary applied to him the couplet of Shaftesbury:

> "The eagle's fate and his was one —
> That in the shaft that made him die,
> Espied a feather of his own,
> With which he used to soar so high."

This is what Bacon calls *mucrones verborum* — pointed speeches; and Cicero terms *Salinae* — salt-pits that one may extract salt from, and surely ideas can never be more effective than when thus clothed in a garb at once forcible and pleasing.

This faculty is susceptible of great improvement by cultivation. You will readily call to your minds the instance of this, given by Moore in his "Life of Sheridan," where he relates in how many different forms he found among Sheridan's papers the sentence which was finally given forth in the imputation that some one had "drawn on his memory for his wit, and on his imagination for his facts."

And it is worthy of cultivation, for it is often a powerful weapon in the hands of a skillful debater, and is quite an essential element of that eloquence which is now expected of the lawyer who aims at eminence.

There are several considerations, of comparatively modern origin, which render the cultivation of oratory essential to the lawyer. One arises from his necessary participation in the political struggles of his day, where he cannot hope to compete with success with the host of public speakers that spring up around him without laborious preparation. Another arises from the manner in which the monopoly of the profession has been removed, and the door for competition thrown wide open for the admission of all classes of intellects. And yet another arises from the election of judges and the consequent frequent changes of them, whereby the stern severity which once forbid the court in *banc* from being a field for the learning or the practice of oratory, has been removed.

These and other causes, on which I cannot pause now to dwell, have tended greatly to popularize the eloquence of the bar, and demand from the practitioner a wider range of thought and illustration than would have been tolerated in olden time.

It is not, however, merely in speaking that the lawyer's eloquence is to be displayed. He must also be a good writer. The vast increase of business among us of late years has rendered the submission of causes on written arguments now quite common. Written opinions are now much more frequently required from the profession than formerly, and the access to the bench, where opinions must be written to give satisfaction, is now so much easier than it was in times past that the practitioner must prepare himself for this very attainable phase of duty.

Hence to acquire a good style is quite essential to the educated lawyer; and the more so, because the auditory before whom it is to be displayed is becoming daily more critical. Could judges hear the comments of the bar, when a carelessly written and loosely framed opinion is delivered by them, they would be apt to give more time to the choice of their language. To think of a judge's using such an expression as this: "Diversified almost to infinitude by the studious adaptations of depraved ingenuity." Yet it will be found in the reports of our Supreme Court. Or this, which will be found in the report of a case in the Probate Court: "The report of these decisions are in manuscript, and are not presented." Or this, where, in our Court of Errors, where the question was, what passed under a residuary devise, one of the judges said: "I also can paint to my imagination the venerable Hollander, seated in his own chair which he brought with him from Holland, about commencing with his will. I see his anxious countenance and venerable form slowly, yet firmly, grasp his pen, and commence the solemn writing with these words, 'In the name of God, Amen,' with much thought and reflection."

Be the line of thought what it may, when clothed in such a garb, it is shorn of much of its power, and will necessarily belittle rather than elevate him who thus reminds us of the shield of Achilles, with ignorance on its front and an untamed warrior behind it.

But of all knowledge that may come within the range of the lawyer's consideration, there is none so important to him as a knowledge of human nature. With some it is, I am aware, in a measure, intuitive. It was so with Elisha Williams, to whom I love to refer.

I once knew a man, who rose no higher in the profession than the defender of suits in a justice's court, but he had a marvelous knowledge of the human heart. He seemed always to know precisely what to say or do to attain his object. Whether before a court or jury, or in the legislative halls (for he was once a member of the Legislature), or in the ordinary walks of life, he was a man of extraordinary influence. Uneducated, and somewhat irregular in his habits, he yet seemed to know, as it were by intuition, precisely what motive would be likely to influence his hearer. With proper training and education, possessing this power, he would have made a splendid lawyer. As it was, he was only an extraordinary pettifogger, and fell an early sacrifice to his habits.

Intuitive knowledge to such an extent is rare, yet we have all of us the faculty of reading the human heart, which is capable of cultivation and unlimited improvement. And I surely do not overrate its importance when I speak of it as indispensable to the successful lawyer.

You are addressing a jury. One of them perhaps is slow and cautious in thought, another rapid and impulsive. One is ignorant and uninformed, and another intelligent and educated. One is narrow-minded, and sets an undue value upon money. Another is enlarged and liberal in his views, attaching value only

to what is abstractly right. One is full of prejudice for clan or class; another fair, calm and impartial. In fine, the variety of intellect and feeling you are to move is illimitable. You cannot influence them all by the same course, yet it is your province to reach them all. You may offend the ignorant one, by talking in language so far above his own, that there will be forced upon his mind a comparison between his deficiency and your advantages. So you may repel the instructed one by dwelling too long and too minutely upon the topics on which he may think no man can be uninformed. And thus step by step, from ignorance of human nature, you may alienate the jury from your cause rather than attract them.

So when addressing the bench, you will find the same variety of intellect and mental habit, though displayed in a different form, and you will experience the same necessity of knowing how the mind is to be reached.

So when your client comes to you to state his case for your advice, you will want to know how to judge of him. Perhaps he has been very angry at his opponent, and has so far overcome his passion as to assume an outward appearance of calm, while the storm of passion is still raging beneath the surface. Unless you can detect the signs of this slumbering emotion, you cannot tell how far his story is colored by his feelings, nor can you be sure that you advise rightly, and do not incur the hazard of misleading him. Perhaps he has a clumsy and confused mode of stating his case. Perhaps there is something secret connected with it which he desires to conceal, but which it is important you should know in order to advise him wisely and well.

These and a thousand other instances which will occur in your practice, will all tend to admonish you of the necessity of your being able to read your client's mind, maugre all he may say to you, and this will be the more important to you, because that any ultimate defeat in his cause that may flow from a want of this power will inevitably involve you as well as him in the disastrous consequences.

So, too, with witnesses on the stand. If you do not know how to deal with them — if you are incapable of discovering the motives that influence them, you will be wanting in one of the most important duties of your calling. Perhaps he is a too willing witness, and will allow his anxiety for your success so to color his testimony as utterly to discredit him. He may be a reluctant witness, from whom you are compelled to drag the truth as by cart ropes. Perhaps he is willfully falsifying the truth and exercising a keen ingenuity in misleading you. He may be under the influence of passion or prejudice, and thus be inclined to give a distorted view of what he knows. Perhaps he may be timid and terrified at the novelty of an unwonted position, or he may be dogged and sullen in his determination not to be entrapped by the lawyer.

In fine, not to waste words on this topic, every imaginable motive which can influence human action must be familiarly known to him who is to engage in the trial of causes and the eliciting truth from oral testimony.

But there are two errors very common in the profession which the prudent lawyer will always avoid.

One is the causeless abuse of your adversary's witnesses. This always excites the sympathies of the jury in his favor, and against you. They participate in his feelings, not yours, and they are very apt to imbibe a prejudice against your client, when they fancy they see you have no other hope of success.

Besides, such a course is really derogatory to an honorable mind. The witness's mouth is sealed, and yours is privileged to be open. It is not very chivalrous to abuse that privilege, when it is personally so safe for you to do so. And you will find, that while the utmost freedom of remark will be tolerated where circumstances warrant it, unjustifiable harshness towards a witness will always recoil upon you to your injury.

I am aware that sometimes this habit is indulged in to please the client, or because he desires it. But when unwarranted by any of the facts of the case, the effect is the same, whether the act is the result of your or your client's will. In such a case your client is a fool, and you must not listen to him; but on the other hand, it is your duty to protect him from the consequences of his own folly.

Another of those errors is the unnecessary cross-examination of your adversary's witnesses. I have seen more suits lost from this cause than from any other.

Some of the profession seem to think that the object of a cross-examination is to draw out from the witness all the facts that he knows. Others find their combativeness excited by adverse testimony, and stumble along in the indulgence of their passion, until they have unwittingly strengthened their adversary's case. Others, again, yield to their client's suggestion, whose mind, perhaps, is too agitated to see ultimate effects, or beyond the mere incident in question, and to whom the lawyer then owes the protection of his own calmness of judgment.

Whatever may be the case, the fact is patent that the object of a cross-examination is very generally misunderstood, or lost sight of, and dismay and defeat often follow. It requires a very sound judgment, and a deep knowledge of human nature, to know how, and how far, to cross-examine an adversary's witness. One of the most eminent members of the New York bar seldom indulged in a cross-examination, and such, I believe, was the habit of Daniel Webster. Of late, however, the bar, setting aside these examples, seem to deem such a feat, to be like the deep sea-line of the sailor, its depth and consequent value to be measured by its length.

Hence, in a great degree, it is, that our trials in modern days have extended over such large spaces of time. In the days of Lord Kenyon (1796), speaking of a trial which lasted from 9 A. M. to 10 P. M., and was not then finished, he said: "It was left to modern times to bring forward cases of such extraordinary length." What would he say of more modern trials, like the anti-rent trial in Columbia, for instance, which lasted nearly five weeks, of as many hours each day? In that case, I am aware that the extraordinary length of the trial arose from the abuse of the privilege of cross-examination, and such, I believe, will generally be found to be the case.

It is, however, a pernicious practice, as well to the

practitioner engaged, as to the administration of justice generally. The bar owe it to themselves to correct the evil, for the consequences will be visited upon them and not upon the bench, and they ought ever to bear in mind, that while they are the pedestal on which the statue of the bench is erected, they cannot diminish the pedestal without sinking the statue.

One quality, becoming in every man, is most especially demanded of the lawyer. I mean moral courage — the capacity to say "No" when it ought to be said, and the ability to do, without shrinking, that which conviction teaches ought to be done. In the whole course of his professional life, and particularly in the consummation of it on the bench, at which so many aim, this quality is of inestimable value, and is, indeed, at times, indispensable.

It is often the province of the lawyer to defend his client against the unhappy consequences of popular prejudice; often his duty to stand by him at the hazard of personal consequences to himself; he is often called upon to defend the poor and the friendless against the oppressions of those who could, with their power or their wealth, greatly aid or oppress him; and sometimes to hazard the favor of the court by resisting what he sees would be unjustly ruinous to his client.

He who can stand calmly firm and intrepid at such times is, indeed, a worthy member of our profession. He who cannot will but make himself a living exemplification of the truth that weakness is worse in its consequences than crime, for the simple reason that one can divine the motives and guard against the conduct of a rogue, but cannot of a fool.

It is, however, when the lawyer ascends the bench that this quality becomes the most valuable, and is the most frequently called into play, for there is no requisition more imperative on the judge than that of adhering firmly to principle, regardless of consequences, alike to himself and to others. To do this, requires either a peculiar organization which is rare, or long practice in the walks of the active professional life; and he who fails in attaining it, however profound his learning or great his genius may be, will fail of attaining eminence as a judge.

This has always been a matter of so much difficulty, that in the source whence we derive our jurisprudence, and in our own institutions, the independence of the judiciary has been constantly aimed at, and, in a great measure, successfully achieved. Unhappily, more modern practices have assailed this cardinal principle, and, with us, the independence of the judiciary begins to yield to popular clamor. It is the election of judges, and their short tenure of office, which is performing this work.

Even if no judge is to be found weak enough to shape his action in reference to a re-election, no incumbent, however independent he may really be, can escape the imputation from some depraved source, that such a consideration will influence his action.

And hence has arisen a modern practice among the newspapers of the day of discussing judicial decisions, and threatening the functionary who delivers them with party vengeance.

This practice cannot be too earnestly deprecated, for it is invading the independence of the judiciary — the preservation of which has long been deemed of vital importance in all our institutions, and it is subjecting the administration of justice to all the fluctuations of party politics, and all the prejudices of popular clamor.

It is in the power of the profession to apply one remedy, if not the only one, to the growing evil, and that is by cultivating among themselves, and thus reflectively on the bench, an utter disregard of newspaper animadversions upon their professional deportment.

Sergeant Talfourd was a striking illustration of the ease and safety with which their threatened vengeance may be disregarded. He gave some offense to the London press, and they displayed their resentment by refusing to notice him; so that whenever the causes in which he was engaged appeared in the reports of the day, his side was either entirely omitted, or his views were reported as those of Mr. , or Mr. ——.

I am not aware that he ever experienced any injury from this line of conduct, or that his business was at all impaired by it. Certainly he lost no reputation or standing by it, for he was soon afterward promoted to the bench, and so remained with honor till he died.

At all events, the members of the bar owe it to their profession, and to the independence of the judiciary, in which they are most deeply interested, to resort to all means in their power to arrest a practice which can be fraught only with disastrous consequences.

To threaten a judge with personal injury for deciding a question according to the honest dictates of his conscience and judgment, is terrible enough. But to be able to successfully execute such threat, is inconceivably so. It requires no very vivid imagination to paint the scenes of uncertainty and confusion that must flow from an established prevalence of this unhappy practice.

But I am admonished that I may be extending my remarks beyond the limits of your patience, and therefore I hasten to a close, though to the neglect of other topics, on which I might dwell, perhaps, with pleasure as well as profit. There is, however, one other topic on which I must pause a moment, because without it such a discourse as this would be incomplete.

Hitherto, I have spoken of the lawyer rather than of the student — of the practicing licentiate, rather than of the probationer; and I have done so, because your preparatory course will soon terminate, and your hour of trial in the busy walks of the profession begin. Had I now room to do so, I would gladly speak of your course of studies, of the works that may be worthy your attention, and the just merit of the most prominent of them, and of the value of antiquarian studies connected with the law.

Modern times have given birth, especially in this country, to many new works, which cause the acquisition of first principles to be much easier than formerly. Foremost among them in our country are Kent's Commentaries, Greenleaf's Treatise on Evidence, and Parsons on Contracts and Mercantile Law. These are standard and unexceptionable works. Some of Story's Commentaries rank near to them; but they smack too much of the scissors, and the citations are not always reliable.

Kent's single work is a valuable monument to his

genius and learning, and affords a rare instance of a man's having earned both reputation and fortune after attaining the age of sixty, and after the Constitution of his State had declared him incompetent to be longer a judge. His judicial reputation earned before that period was indeed great, but it pales into insignificance before his fame as an author.

Greenleaf and Parsons are alike valuable for their learning, for the precision and beauty of their style, and for the clearness of their elucidations of the topics whereof they wrote.

These writers have done their part toward the emancipation of our laws, our language, and our legal literature from foreign dependence. And as Bacon truly remarks, that every lawyer owes to his profession some contribution to its stores of knowledge, so we may well hope that as time rolls on, others will contribute their rivulets to the mighty stream of learning which is yet to flow in our midst.

To trace laws to their origin, is not only a source of interest, but of knowledge to the lawyer. For thus it is that we are better enabled to comprehend the exact nature of a rule by studying out its origin.

To me, the study of what I may call the antiquities of the law is, I confess, peculiarly interesting, and amid the musty records of the past I find many a valuable gem.

Thus we have on our statute book a law of recent existence with us, but whose origin can be traced far back into past ages. I refer to the statute which provides that the relatives or representatives of a slain person may recover from the perpetrator of the homicide damages measured by a pecuniary standard. I found some twenty years ago such a principle prevailing among the Indians on our frontiers, and it is but a revival of the weregild* of our Saxon ancestors. But it has an origin still more ancient, for in Homer, Ajax is made to say to Ulysses,

"A sire, the slaughter of his son forgives,
The price of blood discharged, the murderer lives."

The practice fell a sacrifice among our ancestors to the refined principle that the public wrong absorbed the private injury, and now after an absence of a thousand years from our jurisprudence, it appears again among us in an evidently unconscious revival of the past.

When the Statute of Limitations was first enacted, it was in the form that no action should be brought after six years, etc. The act was received with great favor as a statute of repose. It was first held that the defendant need not plead it in any form, but might take advantage of the fact on the trial. Afterward it was held that if the fact appeared on the pleadings, the defendant might demur, or if it did not thus appear, he must plead it. At first it was held that the statute was an absolute bar of itself. Afterward it began to fall into disfavor, because at times it had operated perniciously, and the courts began to be astute in finding modes of avoiding it. At one time, it was held that a promise to pay the debt would take the case out of the statute. Next, that a mere acknowledgment of indebtedness would answer, and finally the courts went so far as, in the quaint language of some commentator, to render it necessary for a debtor, if he wished to avail himself of the statute, to knock his creditor down if he spoke to him about the claim. But now we have got back to the point of requiring a positive promise, and in writing, to revive the debt.

The olden mode of administering justice also interests me. In Sayre's Reports, 35, is a case where a new trial was granted, because there was so much noise in court that the jury could not hear what the judge said, nor the clerk hear the verdict.

In Bacon's Abridgment, title Verdict, p. 19, a case is spoken of where, at *Nisi Prius*, in a suit between a bishop and an earl, the cause was tried out of doors, and two of the jurors went away because a great tempest arose.

In the proceedings against Sir Giles Mompesson and Sir Francis Mitchell, in 2 Howell's State Trials, 1119, 1131, we have the original of Sir Giles Overreach and Justice Greedy, in Massinger's play of "New Way to pay Old Debts."

So the characters and fortunes of the brothers Edgar and Edmund, in Shakspeare's King Lear, are taken from one of our ancient law reports.

Bacon's Abridgment (title Statute), says a statute can do no wrong, but it may do some things which seem very strange; it may make a woman a man to some civil purposes, for it may make her a mayor or a justice of the peace.

In Jenkins' Centuries, containing cases as far back as A. D. 1220, we have a law which Scott has woven into his "Fortunes of Nigel." It is this: A strikes B in Westminster Hall sitting the courts. A shall be indicted of this, and if he be convicted, his judgment shall be that his right hand be cut off, he be imprisoned for life, and his lands and chattels be forfeited to the king. (1 Century, case 81.)

His 2d Century, case 55, lays down the principle (since overruled with us), that "The Law of God, of nature, and of nations created kings, which law is not alterable by any creature."

And his 3d Century, case 44, contains a principle which might without harm be domiciled among us, viz., the king's grant of an office which requires skill, to an unskillful man is void.

This reporter, David Jenkins, was a Welch judge, in the days of the Long Parliament. He was a sturdy royalist, and refused to acknowledge their usurped authority, though offered a pension if he would do so. He was condemned to death, but his execution was suspended, and he was kept many years in prison. It was during his imprisonment that he compiled this work, and he sent it forth with these touching words in his preface: "Amidst the sound of drums and trumpets, surrounded by an odious multitude of barbarians, broken with old age and confinement in prisons, where my fellow-subjects, grown wild with rage, detained me for fifteen years together, I bestowed many watchful hours upon this performance."

But I am wandering far beyond my intention. To me, the antiquities of the law are too favorite a study to enable me easily to resist the temptation of dwelling upon them.

I pass to the single topic to which, before indulging in this digression, I intended to confine the residue of

* Weregild—The price or fine set on a person's head for the murder of man.—*Bailey.*

this paper. That topic is "Integrity," at once the duty and the privilege of the profession.

There are some callings wherein it must be exceedingly difficult to maintain a high standard of moral integrity. It must, for instance, be difficult in that calling where the rule of *caveat emptor* prevails, for thus is taught that it is a legal privilege to suppress the truth. So it must be in that where stratagem and force are the instruments, and human life and human blood the end. So, too, in that where there is an arbitrary standard of excellence, to which the adherent is bound always to conform. So, too, in that where custom or association has imposed restraints upon the freedom of speech and action.

But the lawyer has no such trammels upon his aspirations for integrity. He may be honest if he will, and that which he may be, it is, I repeat, his duty to be.

A higher standard of integrity seems to be set up for the lawyer than for many others.

Thus the vendor of goods may suppress from the purchaser his knowledge of secret defects in the article of trade; the lawyer may not with honor so act. The banker may use for his own purposes the money left with him for safe-keeping — for the lawyer to do so is destructive to his reputation and his professional prospects. With most of the community the secrets confided may be voluntarily betrayed — nay, even be extorted against every obligation of honor; but the lawyer may not divulge them, even if base enough to desire it. Most people may retain the property intrusted to them, if they choose to respond in a money-eyed penalty; the lawyer may not do so, but he must literally perform the trust committed to him.

These are legal obligations resting upon him, while there are others equally forcible, the result of association. Thus there is an *esprit du corps* in the profession which visits with relentless rigor dishonest or disreputable conduct. Hence, while merchants and bankers by thousands fail with the moneys of others in their hands, how seldom do we hear of a lawyer's doing so. So, while all around us we hear of the betrayal of confidence in others, how seldom is a lawyer known to reveal his client's secrets!

One thing the lawyer must ever bear in mind, — that it is from his profession in every civilized government that the most important office known among men is filled.

I think it is Hume, who, speaking of the English Constitution, says, all this array of king, lords, and commons, of army and navy, is but to place twelve men in the jury-box; thus conveying the just idea of the paramount importance of the administration of justice. The controllers and directors of that administration are, in every well-ordered government, selected for that task, and withdrawn, in a great manner, from other occupations, and that selection, in the higher and most important tribunals at least, is generally made from the profession of the law. It is not always legally imperative that it should be made from them; but it results rather from choice — thus exhibiting the confidence in the profession of the governing power wherever lodged. That that confidence is deserved, at least in this State, may be inferred from the fact, that whatever convictions for delinquency there may have been in other callings, no judge selected from the profession, for now more than a hundred years, has been impeached.

Yet the temptations thrown in the way of the judges are often very great, and more so with us now than ever. The compensation accorded to them is very small, in comparison with those afforded in other pursuits. They have here no retiring pensions to render comfortable the remains of a life worn out in the public service. They are required to submit to a style of living which forbids all hope of accumulation for the imbecility of age. And yet on their judgment are often dependent life and fortune, under circumstances which might prompt a large outlay to save either. Chancellor Kent and Chief-Justice Jones are two instances, among others that might be named, where, after long service on the bench, the individuals have retired poor, and returned to the pursuits of the profession to earn a livelihood for their declining years. Yet their integrity was never for a moment suspected. Why is this? Partly because, say what the world may upon the subject, our profession does enjoin a high moral standard; and partly because of that *esprit du corps* or public opinion in the profession, which would deal mercilessly with him who would so far betray it as to forfeit the high confidence that is reposed in us.

It is this position, so materially affecting the best interests of society, and so enveloped in the demands of a severe integrity, that the lawyer must ultimately occupy. As yet, there has been no one hardy enough to transgress this inflexible requirement of his profession. Alas! for him who shall first venture on the experiment! He will realize the prophetic denunciation of Bacon, where he asks: "Who can see worse days than he that, yet living, doth follow in the funeral of his own reputation?"

It is well that this should be so, for every variety of interest is committed to our care — every consideration affecting the happiness of our fellow-men is within the scope of our action, and we must show ourselves worthy the great trust reposed in us. Life, personal freedom, property, reputation, are confided to our guardianship. Often the deepest and most fearful secrets of our clients are intrusted to us. Wife, children, friends — the dearest domestic relations are brought within our action, and more of everything which goes to make up individual happiness is, of necessity, confided to us than to any other class of people. We have but one simple mode of meeting this responsibility, and that is by every action of our professional life showing ourselves deserving it.

There is, however, one drawback to the reputation, if not to the reality, of our integrity. I allude to the indiscriminate advocacy of our clients' cause, right or wrong.

I am aware that some moralists defend the practice, on the ground that the lawyer, in such an emergency, is but, as it were, the mere amanuensis of his client, his mere mouth-piece, uttering his words, instead of its being personally done; because the lawyer is, from his training, better able to perform the task; and that he is no further responsible for the integrity of what is said, than is the manufacturer of clothes for the quality of the fabric brought to him for that purpose.

I will not presume to dictate to others on this much mooted subject, but I must confess that for my part I cannot assent to this doctrine, and I would that the profession would repudiate it.

I am willing to concede that the lawyer ought not, on mere suspicion of his client's guilt, to withdraw his aid. But taking the extreme case, which does sometimes occur, that of the client's confessing his guilt to his counsel, in such, and cognate cases, it is that I dissent from the doctrine.

I am aware of the severity of virtue that this view exacts from the profession, and how difficult it will be for the young lawyer to act up to it, for it must often deny to him retainers when he most requires them. But he may, perhaps, find encouragement in attempting it, in the anecdote that is related of Franklin's early life.

He had just started in Philadelphia a newspaper, with scarcely other means of carrying it on than his own industry. At this time there was brought to him, with the proffer of ample renumeration for its insertion in his paper, an article casting some severe personal reflections. He requested time to think of it, and at the end of the period he returned the article to its author, saying, that he had tried the experiment of living on bread and water, and finding that he could do so he refused to insert it.

There is another aspect in which the American lawyers' integrity is subjected to a trial not common in other countries. We have tried the experiment of government through the instrumentality of written constitutions, and we have confided to the legal tribunals the power of protecting the fundamental law from the encroachments of the legislative and executive departments. And as power is ever stealing from the many to the few, so, many questions of such encroachments have arisen among us, and the lawyer is called upon to take part in the discussion, often in conflict with his political predilections. There is but one honorable course for him to pursue, and that is, to remember that the cause of self-government and constitutional freedom throughout the world may be affected by his action, and may demand of him yet again a personal sacrifice at the shrine of duty; and to remember that he owes a stronger allegiance to the fundamental law than to either his party ties or his personal interest.

And now, young gentlemen, having touched upon all the topics which my limits would allow, I will close by commending to your favorable regards an advertisement of a western lawyer which, forty years ago, I found in a newspaper, and inserted in my common-place book. He advertised thus:

"1. I will practice law, because it offers to me opportunities of being a more useful member of society.

"2. I will turn a deaf ear to no man because his purse is empty.

"3. I will advise no man beyond my comprehension of his case.

"4. I will bring none into law who my conscience tells me should be kept out of it.

"5. I will never be unmindful of the cause of humanity, and this comprehends widows, fatherless, and those in bondage.

"6. I will be faithful to my client, but never so unfaithful to myself as to become a party to his crime.

"7. In criminal cases I will never underrate my own abilities; for if my client proves a rascal, his money is better in my hands; and if not, I hold the option.

"8. I will never acknowledge the omnipotence of the Legislature, or consider their acts to be law beyond the spirit of the Constitution.

"9. No man's greatness shall elevate him above the justice due to my client.

"10. I will never consent to a compromise when I conceive a verdict essential to my client's future reputation or protection, for of this he cannot be a competent judge.

"11. I will advise the turbulent with candor, and if they will go to law against my advice, they must pardon me for volunteering it against them."

Having set this example before you, I take my leave, with the hope that you may so deport yourselves in your profession as to be convinced that it is better to be wise and virtuous than to be rich.

CHANGING VENUE IN CRIMINAL CASES.

At the recent Rensselaer Oyer and Terminer, an important question was decided by Justice Peckham, upon a motion to change the venue in the case of *The People* v. *William Witbeck and others*, indicted for murder in the killing of deputy sheriff Griggs, of Rensselaer county, on the ground that an impartial trial could not be had in that county. The prisoners are anti-renters, and the deceased came to his death while endeavoring with a force of assistants to dispossess them of their farm in Rensselaer county, under process of the court. The counsel for the People contended that an impartial jury could not be obtained in Rensselaer county, for the alleged reasons: first, that the sympathy of the community is strongly anti-rent, and associations hostile to the landlords exist; second, that the *Troy Whig* newspaper had published articles defending the prisoners, and calculated to inflame the popular feeling against the landlords; and third, that the first grand jury found a bill for riot only, and against the representatives of the landlords as well as against the prisoners; the second grand jury ignored the charge entirely, and it was not until the third that an indictment for murder was obtained; and argued that any attempt to impanel a petit jury would fail. The People's affidavits tended to show that the first two grand juries had been tampered with by anti-renters and their friends; but this charge, as well as the charge of hostile associations, was strenuously denied by the counter affidavits, and we inferred from the judge's opinion pronounced on the decision of the motion, that he gave but little weight to this branch of the charge. The conduct of the first two grand juries was conceded, and his Honor attributed it to the inflammatory articles of the *Whig*, although there was no evidence that any member of either grand jury or of the petit jury had ever seen one of those articles, or that they were written or instigated by the prisoners or any of their friends. The prisoners' counsel endeavored to account for that conduct, by showing that it was proved before both of those bodies, that the writ under which the officer was acting at the time of his death had been previously executed, and argued that its force had consequently been spent, and the deputy sheriff was consequently

an interloper. They also showed that no difficulty had ever been experienced in procuring juries or obtaining convictions or judgments in anti-rent cases in that county. The motion was granted without any attempt to impanel a jury, and the case was sent to Saratoga county. We regard this decision as an important and novel one, as well as very flattering to the vanity of editors. The only reported cases in which a change of venue was granted before an attempt to impanel a jury, are *The People* v. *Webb* (1 Hill, 179), in which it was shown that the defendant, indicted for a libel on James Fennimore Cooper, had subsequently written and published in his own newspaper a letter calculated to prejudice the public mind against the prosecutor, and circulated the same among the jurors, three-fourths of whom confessed to having received it; and *The People* v. *Long Island R. R. Co.* (4 Parker, 602), in which it was shown that inflammatory and threatening hand-bills against the defendants had been circulated, excited and disorderly public meetings held, repeated indictments for nuisance found against the defendants, and hostile petitions circulated among the grand jury. Really, in Judge Peckham's view, newspapers are become a dangerous power for friend as well as foe. It behooves a prisoner to procure an injunction restraining all the newspapers from speaking a word in his favor. It used to be thought desirable to have a good character, but the time has now come, it seems, when the Scripture is fulfilled, "Woe unto to you when all men shall speak well of you."

CURRENT TOPICS.

The Legislature of California have before them, and will, it is said, pass, a bill allowing the husband and wife to testify in an action for divorce on the ground of adultery. We have never been able to discover any sound reason for excluding their evidence in such cases—as was done in this State, by the act of 1867. Under that act it is possible for a man to commit adultery in the very presence of his wife, and yet to be able to successfully defend a suit for divorce. The exception is an anomaly, and the Legislature of the State would do a wise thing in striking it out.

The present Revised Statutes are divided into parts, chapters, titles, articles, sections and subsections. As a matter of arrangement there is no objection to this, but for purposes of reference it is complicated and annoying, and frequently leads to mistakes in legislative enactments. It will do no harm to keep up the divisions in any revision that may hereafter be made, but the sections should be numbered consecutively after the manner of the Code of Procedure. This will not interfere with the plan of arrangement, while it will facilitate and render certain reference to the statutes, and afford assistance to the memory in retaining and recalling the precise location of any portion desired.

The Senate of the State of Iowa have passed a bill allowing women to act as lawyers, and it is said that the bill will meet with no opposition in the lower house. Following fast on this news comes a despatch informing us that a female justice of the peace of the same State has just tried her first cause. We are informed that this female jurist "presided with much dignity," and "is thought to have shown *great delicacy of feeling* in her decision, whether technically correct or not." We have not the slightest objection to the fair ones practicing law and acting as justices to their heart's content, but to let "delicacy of feeling" take the place of the established rules of law, is an innovation for which our nerves are not prepared.

The New York *Times* gets into a sort of "frenzy in full mourning" whenever it speaks of the legal profession. Its most recent effusion was a disreputable and malicious personal attack upon the Hon. Charles O'Conor, because that gentleman had not denied the statement put forward that he had taken up Mr. Fullerton's case gratuitously. Here is a "specimen brick" from the article: "When a lawyer talks of giving his professional services without compensation, we may be very sure that he is in pursuit of a fat quarry, and never means to leave it until he has tasted the last drop of its blood." The fact that the editor of the *Times* is an Englishman, and, we believe, an unsuccessful lawyer, is sufficient to account for the animus of all his flings at both the judiciary and the bar. When he confined himself to "glittering generalities," his words were about as important as those of a scolding housewife, but now that he has descended to attempts to blacken the characters of some of the most honorable members of the profession, it is a matter of some consequence, and deserves the outspoken denunciation of every lawyer. What thinks the Bar Association of the City of New York?

If the statutes of the State shall be again revised we trust that the duty may be intrusted to a body of men numerous enough to perform the work in a satisfactory manner. It will be impossible for a commission of three or even of five men to give that attention to details that is required for the successful codification of the statute law. We believe provision should be made for the appointment of a commission of not less than sixteen competent lawyers, two to be taken from each judicial district. Thus might be assembled a body of experienced persons familiar with the existing statutes, their practical working throughout the State, their defects and the proper remedies therefor. Besides, each portion of the State would be represented and its local wants made known, and a sufficient number would be secured to do their work thoroughly and well. If, however, in accordance with recent custom, the labors of revision are intrusted to a few, we fear that the result will be a crude and imperfect compilation, acceptable neither to the legal profession nor to the people. The extra expense of the more numerous commission will not be great, and, in view of the advantages probably resulting therefrom, not to be thought of. It is with the present legislature to decide whether the coming revision shall be a mere makeshift, or a collocation of law that will be an honor to our own and a model to every other State.

In a recent number of the LAW JOURNAL we suggested that in all cases of indictment for seduction under promise of marriage, the only competent evidence of the promise should be a written contract, executed with the same formula as other contracts.

A case has just occurred in Lake county, Illinois, that leads us to believe that even in civil actions for breach of promise to marry, parol evidence of the promise should not be received. In that case the parties were the only witnesses as to the promise, the plaintiff swearing positively that a promise had been made, and the defendant swearing equally positively that he had never made any promise whatever. The defendant was proved to be a man of character, reputation, wealth and social position, while it was proved that the woman had deserted her husband and four children; that she had been a strolling fortune teller, clairvoyant, mesmerist and medium, and with as many *aliases* as a New York thief; that she had been twice convicted of misdemeanors and sent to jail; that she had been the inmate of a house of ill-fame, and had been guilty of the most shocking indecency and lewdness, and that she had followed the army as a common prostitute. Yet in the face of all this undisputed evidence, and a strong charge in favor of the defendant, the jury, after being out five days, failed to agree. That a jury should fail to agree with such evidence before them, is either a strong argument in favor of doing away with trial by jury, or of requiring stronger evidence to sustain a like case.

Women with voting propensities probably look upon the Territory of Wyoming as their "Paradise Regained," and were we at all maliciously inclined we should wish for a general hegira of all that ilk thitherward, and that it might prove to them the "country from whose bourne no traveler returns." At least one man must look upon it as "Paradise Lost." It is heralded that a jury was recently impaneled, in that romantic region, composed of eleven women and one man. The condition of this "lone, lorn" man, shut up in a jury-room with eleven women just elevated to so lofty an altitude, cannot be described, but may be imagined. Compelled to listen to their desultory and stormy discussion of points of law and points of dress, of facts and of fashions, unable to drink or smoke or decide the case by a game of "seven up," how he must have writhed, how his soul must have been harrowed up! Let us pity the sorrows of this poor juryman. The telegram does not inform us whether or not this jury "agreed;" but we infer that it did not, since it would be paradoxical for eleven women to agree on any one thing under the sun. If the law-makers of Wyoming have any regard for their fellow men, they will provide that there shall be no recurrence of this melancholy spectacle. We do not object to female jurors, but eleven to one is too much for human nature to endure. It is simply "cruelty to animals." Let them provide that in all future juries there shall be at least *two* men, for aid and comfort! — or, better still, that there shall be "six and six." Thus the good men of Wyoming shall be relieved from the terror that now hangs heavily over them.

The nomination of Judge Strong to the Supreme Bench of the United States has been confirmed by Congress, but that of Judge Bradley still "hangs fire." While we entertain little doubt that both of these men are competent to honorably fill the position, it is a disagreeable fact to reflect upon that their political proclivities, and their preconceived notions on the legal tender question, have been about the only basis for their confirmation considered by the Senate. Their abilities as lawyers and jurists seem to have been entirely overlooked in the race after partisan judges. Very few outside of the Senate will question the propriety of the proposition that judicial ability should be about the only test as to a nominee's fitness for a seat on the Bench of the highest tribunal in the country; and yet this test is about the only one that is ignored. The evil of this is not confined to the endangering of popular privileges; the dignity of the bench is lowered in the eyes of the public, and popular confidence in the law is weakened. The conduct of several railroad and other corporations relative to the recent legal tender decision, is a striking illustration of this fact. They decline to pay their bonds, bearing date prior to 1862, in gold, though the highest court in the country has decided that they were so payable. It is generally, and no doubt correctly, understood that the Senate has made opposition to that decision a condition of affirmance of nominees to that court, and these corporations very naturally say the decision will be overruled. It is a matter of history that so long as the courts of a country maintain their integrity and independence, the rights of the people are safe, but when judges become political partisans and mere sycophants of the dominant power, anarchy is imminent and popular rights in peril.

The Constitution of the recently formed Bar Association of the city of New York, and the address of the Executive Committee, published elsewhere, are worthy of the attention of the profession of the State. The object of this organization is declared to be, "to maintain the honor and dignity of the profession of the law, to cultivate social intercourse among its members, and to increase its usefulness in promoting the due administration of justice." It is an undoubted fact that during the last quarter of a century the profession has deteriorated sadly from the high and honorable position which it before occupied. This deterioration had its origin mainly in the Constitutional changes of 1846, which, by removing nearly all barriers to admission to the bar, have made it possible for a class of men to take on the name and character of members of the learned and honorable calling, without having themselves either learning or honor, and with no care to preserve the dignity, integrity or traditions of the profession, nor any ambition above the almighty dollar. Though as yet this class is small in comparison with the better portion of the profession, yet it is constantly on the increase, and its tendency is to drag the reputation of the whole profession down to its miserable level. The only hope of rescue from this degradation is in the profession itself, and the only method is by organization, — "to come together as a body; to look the question fairly in the

face, and if we find that we have been tainted by the influence of the times, to undertake ourselves the work of purification; to revive a past renown and give new life to traditions which we believe to be only dormant but not extinct." Such the Committee declare to be their purpose, and such should be the purpose of the profession at large. If any general or permanent good is to be wrought it must be through the combined effort of the bar of the State, and to this end the profession in every city and county should associate. Thence will naturally and speedily arise "an Association of the Bar of the State of New York, worthy of the past history of the bar, powerful by its intelligence and learning, and influential by its integrity and patriotism." When such an association shall have been formed, the day of the regeneration of the bar will be at hand.

GENERAL TERM ABSTRACT.

FIRST DISTRICT.—FEBRUARY TERM.

Irregularities in the jury-room.—In this case, after the jury had retired, they sent in to the judge for an annuity table, and the judge sent them the Code opened at the little annuity table contained in it. The jury gave a verdict of $5,000 for plaintiff; and defendants, on their appeal, raised the point, among others, that this sending in of an annuity table was irregular and vitiated the verdict, being done without the defendants' consent. Judge BRADY, reviewing at great length the decisions as to communicating to the jury matters after they had retired, from them draws the conclusion that where the document communicated could plainly have had no effect on their decision, and verdict is sustained by the evidence properly before them, the court will not interfere on account of such trifling irregularity. *Shaffner* v. *Second Ave. R. R. Co.*

Hearsay evidence.—According to the decision of the court below, the plaintiff's wife was raped by the defendant, and she died from the injuries received therefrom. The main testimony in the case was the statement made by her to her husband partly immediately after and partly one or two days later, but there was some confirmatory testimony. Judge INGRAHAM, giving the opinion of the court, grants a new trial, on the ground that the statements of the wife not made immediately after the occurrence, were improperly admitted. Judge BRADY, however, dissented, holding that such statements came within the exception of the law made in cases where the sufferer is the only possible witness and has died. *Spatz* v. *Lyon.*

Notice of protest through the post-office: civil war.—The defendant in this suit was the indorser of a note, and resided in Greenville, South Carolina. The plaintiff sought to give him notice of protest after the civil war had broken out, and after the President's proclamation that the Southern States were in a state of insurrection, and that all communication between the citizens of the two sections was unlawful, by depositing the notice in the post-office directed to the defendant at his place of residence. The court below held this notice good, but the General Term held that at that time a complete interruption of communication had taken place by the acts of our own Government, of which the plaintiff was bound to take notice; that the Government was not bound to preserve the letters and forward them at the earliest opportunity, but the defendant himself was bound, at the earliest opportunity, to renew his notice, and in default of proof of his having done so the judgment must be reversed and a new trial ordered. *Harden* v. *Boyce.* Opinion by BRADY, J.

Liability of stockholders.—The parties to the suit were all stockholders of the Mexican Ocean Mail and Inland Company, which failed. A judgment was obtained against Mr. Aspinwall, and on it he sued his co-stockholders for contribution, and obtained judgments against them. The defendants in those suits appealed, claiming, that under the act of incorporation the stockholders were only "severally" liable, and therefore, could not sue each other for contribution. *Held*, that though the cases in which contribution has been ordered have been usually cases of joint liability, yet the reason rests on the equitable principle, that common advantage is to be met by common loss. *Aspinwall* v. *Ramsay et al.* Opinion by INGRAHAM, J.

Partnership property.—Matthews, an employee of Rawdon, Wright, Hatch & Edson, bank-note engravers, discovered the green ink which has since become so well known in the greenbacks. Edson procured from him an assignment of his patent. At that time there was but little call for the green tint. Edson offered it to his firm, and they, after three months' consideration, declined to purchase it of him, preferring to stand in regard to it on the same basis as other companies—that of paying so much per thousand impressions. Subsequently the firm, with the other chief note engraving firms, united in the American Bank Note Company, each throwing in all its machinery, and which was named in a schedule which each partnership submitted. The final agreement bound each partner to surrender all the means, machinery, etc., which was owned by each establishment to the new company. The new company continued to pay a royalty to Edson till about 1860, when an effort was made to buy him out. The payment of the royalty was then continued to 1863. After that the company refused to pay more, and commenced an action to get back the money they had already paid, and Mr. Edson commenced a suit for his royalty.

On the trial before the referee of the two suits, he held that Mr. Edson's relations to his partners made his purchase of any of the means by which their business could be carried on, a purchase for their benefit, and the purchase therefor inured to the benefit of the company. He therefore gave judgment in both cases against Mr. Edson, and Mr. Edson appealed. *Held*, that the purchase by a member of the firm of matters pertaining to the business of the firm is not absolutely void in favor of the purchaser, but to be considered as only exposing the member of the firm who makes them to a liability to the firm to render them an account of the profits. That in this case it appeared distinctly that the firm had waived their rights, and the right remained in Edson with their consent. It was never, therefore, transferred by the partners to the company. With regard to the transfer by Edson to the new company, *held* that it merely conveyed his interest in the property belonging to the company. *American Bank Note Company* v. *Edson.* Opinion by INGRAHAM, J.

EIGHTH DISTRICT—FEBRUARY TERM.

The relator was incorporated for the purpose of constructing and operating a horse railroad between certain points in the villages of Dunkirk and Fredonia. It acquired the right from the adjacent owners to lay its track and maintain and operate its road upon the public highways; and afterward laid and maintained its railroad track in such highways. The respondents assessed the relator for so much of the railroad as was laid and maintained upon the highways in the town of Dunkirk, as real estate. And a writ of certiorari was issued for the purpose of reviewing that decision. It was held, in affirmance of the proceedings, that the interest acquired by the relator in the land, and the superstructure affixed to and upon it in constructing the railroad, were properly assessed as real estate. *The People ex. rel. The Dunkirk and Fredonia Street Railroad Co.* v. *John Cassily and others, Assessors of the town of Dunkirk.* Opinion by DANIELS, J.

The plaintiff brought this action in a justice's court for the recovery of the possession of personal property alleged to be wrongfully detained from him by the defendant.

The property was of the alleged value of about twelve dollars; and damages were claimed by the complaint for its detention exceeding the sum of fifty dollars. This claim, it was held, entitled the defendant to a new trial on appeal in the County Court, although the value of the property as assessed, and the damages recovered before the justice, did not together amount to the sum of fifty dollars. *William R. Merrill, Respondent*, v. *Samuel Patterson, Appellant.* Opinion by DANIELS, J.

The plaintiff joined in the same complaint against the defendant, as executor, two causes of action for professional services as an attorney and counselor at law. The first accrued against the testator in his life-time. The second against the testator after his appointment as executor, and while he was acting in that capacity. The defendant, by his answer, took issue upon the entire complaint. That was held to be a waiver of the objection, that the two causes of action could not be properly united in the same complaint; and to render it the duty of the referee to whom the action was referred for trial, to try and dispose of the issues upon both causes of action; but that the judgment should have been against the defendant as executor on the first cause of action, and against him personally on the one accruing upon his own retainer for services performed for him after his appointment. *John G. Record, Respondent*, v. *Anson W. Keith, Executor, etc., Appellant.* Opinion by DANIELS, J.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF VERMONT.*

ASSIGNMENT.

A due bill as follows: "Due Mr. Harvey Groot two hundred and ninety-five dollars in part payment for a piano forte, said piano to be selected by Mr. Groot," dated and signed, is assignable, and the assignee or his agent would have the same right to select a piano that the assignor had. *Groot* v. *Story.*

BAILMENT.

1. A rode with B from Barton to Newport, knowing that B had hired the team to go only to Barton, but exercised no control over it. *Held*, that A was not liable as a trespasser to the bailor of the team. *Hubbard* v. *Hunt.*

2. If a pledgee or pawnee of a chattel, or one having it in his right only, sell it as if he were the absolute owner before he has a right to, the general owner may maintain trover, and in that action recover according to the value of his interest in the property. *Kidney* v. *Persons.*

BASTARDY.

Evidence on the part of the defense, in a prosecution for bastardy, tending to show sexual intercourse by the plaintiff with others than the defendant, and acts of indecent familiarity with them tending to show such intercourse, outside of the time within which, according to the course of nature, the child in question could have been begotten, is inadmissible. Nor is this evidence rendered admissible by inquiries as to such acts, being first made of the plaintiff on the stand, and her denial of them. Nor does her answering without objection give the defendant the right to introduce evidence to contradict her answers, even for the purpose of impeaching or discrediting her testimony. *Sterling* v. *Sterling.*

CONTEMPT.

1. A writ of injunction issued to restrain the defendants from removing certain machinery which was in their possession. *Held*, that they would be guilty of a contempt if they stood by and quietly suffered it to be removed, even though they did not themselves actively participate in the removal. *Stimpson et al* v. *Putnam et al.*

2. The fact, if true, that an injunction was improperly granted, is a reason for its dissolution; but, until dissolved, it must be obeyed, no matter how unreasonable in its terms or unjust in its operation. *Ib.*

* From 41 Vermont Reports.

CONTRACT.

1. A court of law will not set aside a contract for inadequacy of consideration alone. The inadequacy may be such as to furnish evidence of fraud. *Kidder* v. *Chamberlin.*

2. Where a laborer leaves his employer before his term of service has expired and without his employer's consent, and the employer, although insisting that he does not admit his liability, offers to pay him for his labor at the rate he would have received if he had labored until the end of the time agreed upon, or makes a tender of the amount due at that rate, he (the employer), both by his offer of payment and by his tender, waives the forfeiture of the wages for the services performed. But the laborer is not entitled to recover more than the contract price, in any view of the case, unless he had good cause for leaving. *Patnote* v. *Sanders.*

EJECTMENT.

1. To maintain an ejectment, it must appear that there has been a disseizin of the plaintiff, as well as a wrongful possession by the defendant. *Chamberlin* v. *Donahue.*

2. If the defendant is in possession with the plaintiff's permission and acquiescence, without claim of ownership or refusal to yield the possession, a demand of possession, or a request to quit in a reasonable time, is necessary in order to render the defendant's occupancy wrongful, and as constituting an ouster of the plaintiff. *Ib.*

FOREIGN JUDGMENT.

The orator having commenced a suit in equity against the defendant before the Supreme Court of Massachusetts, in which he sought relief and decree upon the same claim, and upon the same grounds that he is seeking relief by his present bill, the defendant having appeared in said suit in Massachusetts and made defense therein, and said cause having been heard, and a decree passed dismissing the bill by that court, which is conceded to have had jurisdiction, it was *held*, that the matter in dispute had passed *in rem judicatam*, and the decree is conclusive. *Low* v. *Mussey.*

FRAUDS, STATUTE OF.

Where a verbal contract is to be performed within a year by one party, but not by the other, the question whether the statute of frauds applies or not depends on whether the suit is brought against the party who was to perform his part within the year. If it is so brought, the statute would not apply; but if brought against the party whose agreement was not to be performed within the year, then the statute would be a bar. *Sheehy* v. *Adarene.*

HIGHWAYS AND BRIDGES.

1. Towns are not liable for injuries to travelers by coasting on sleds in highways. This is not an insufficiency of a highway, within the meaning of statute which renders towns liable for injuries by reason of insufficiencies, though the selectmen neglected to forbid coasting. *Hutchinson* v. *Concord.*

2. The town and public having for more than forty years treated as a highway a space without the limits of the highway as originally surveyed and laid out, the same as if it had been within such limits, the town is bound to keep the same in repair, and is liable for injuries by reason of its insufficiency, the same as if it was embraced within the original survey. *Bagley* v. *Ludlow.*

3. Towns owe a statutory duty to travelers, for the breach of which the party injured may maintain an action to remove from the margins of their highways objects unlawfully deposited there, which, by their frightful appearance, make it unsafe to travel the road with ordinary horses. *Morse and Wife* v. *Richmond.*

4. The duty of the town to remove the obstruction from the highway does not attach until they know of it, or ought to know of it, nor while it is upon the highway a reasonable time for the purpose of transportation over it. *Ib.*

5. Though a town is not bound to work the whole width of the road where the travel does not require it, yet they

have a right to control the whole width, and have a corresponding duty. If they suffer objects to remain deposited on the margin which, by their frightful appearance, make the whole road unsafe, they will be liable for such accidents by fright as are the natural result of their neglect. *Ib.*

6. Towns are liable for injuries from insufficiencies of highways caused by sudden freshets, if the highway surveyor of the district had time after notice of the defect to repair it before the accident with the means in his control, considering as well his means by virtue of his official statute authority as the means in his hands individually. *Clark* v. *Corinth.*

7. No lack of diligence could be charged upon the town until notice to the proper officers of the insufficiency, in a case where it is not claimed that the freshet was itself so extraordinary as to amount to a notice that the road would need repairs, or that the dangerous condition of the road had existed long enough to charge the town officers with fault in not having discovered its condition without notice. *Ib.*

HUSBAND AND WIFE.

1. It is only where a decree of nullity by the Supreme Court is necessary to secure the proper descent or distribution of the estate, that a petition for that purpose, after the death of one of the parties to the marriage, would seem to be necessary or proper. *Pingree, administrator,* v. *Goodrich.*

2. A petition to annul a marriage cannot be sustained after the death of one of the parties to the marriage, where the cause alleged renders the marriage null and void from the beginning, without any such proceeding. *Ib.*

3. In no instance does the statute give any right to the administrator to bring a petition to annul a marriage. He is not the representative of the deceased for any such purpose. Only *relatives* of the deceased interested in contesting the validity of the marriage, are authorized by statute to petition that it may be annulled. *Ib.*

4. One-third of the personal estate of an intestate husband vests in his widow immediately upon his decease, and in case of the decease of the widow, before assignment by the probate court, the same passes to her legal representative. *Estate of Johnson* v. *Estate of Johnson.*

5. This was the common law rule prior to the statute (Gen. Sts. 384, § 1), and that statute, providing that the widow shall have such part of the personal estate of her intestate husband "as the probate court may assign to her according to her circumstances and the degree and estate of her husband, which shall not be less in any case than one-third, after the payment of the debts, funeral charges, and expenses of administration, unless for her misconduct or prejudice the right she already had, of any of its incidents. *Ib.*

INNKEEPER.

1. The plaintiff, who was a minor, went with his father, with a horse and wagon, to the inn kept by the defendant, to attend the trial of a suit which the innkeeper had brought against the father. When they arrived, the horse and wagon were delivered to the servant of the defendant, to be put up and taken care of; and the plaintiff and his father entered the inn where the defendant was in charge, and laid aside their overcoats in the room where they entered, and in presence of the defendant. In due time the father called for dinner for himself and the plaintiff, which they had; and they remained in the inn till evening, when the bill was paid and they left. *Held*, that the relation of innkeeper and guest was thereby created between the plaintiff and the defendant. *Read* v. *Amidon.*

2. A guest is not relieved from all responsibility in respect to his goods on entering an inn. He is bound to use reasonable care and prudence in respect to their safety, so as not to expose them to unnecessary danger of loss. *Ib.*

3. A guest having laid his gloves down under his overcoat on a bench, in the presence of the innkeeper, it was a question of fact to be determined upon by the jury, in view of all the circumstances, whether he was so careless with respect to his gloves as to exonerate the innkeeper from liability for their loss. *Ib.*

INTOXICATING LIQUOR.

If a seller of intoxicating liquor in New York, to a party in Vermont, intentionally aid the purchaser in evading the prohibitory law of Vermont in respect to the traffic in intoxicating liquors, by forwarding the liquor to the purchaser in a concealed or disguised form, calculated to accomplish that object, the seller cannot recover for the liquor in this State, even though it was not agreed between the parties, prior to, or at the time or on the occasion of the sale, that the seller would thus aid the purchaser. *Aiken* v. *Blaisdell.*

JUROR.

1. The fact that a juror is not sworn is an irregularity which the parties may waive. The court certainly should not set aside a verdict for this cause unless the party asking it, as well as his counsel, was ignorant of the fact during the trial. Failing to show that they were thus ignorant, the court would be justified in the inference that they were not, and if not, the irregularity should be treated as waived. *Scott et al.* v. *Moore et al.*

2. An application to the court after announcing their decision, to receive affidavits showing the fact of such ignorance, is addressed to the discretion of the court. The refusal to receive them is a point not subject to exception. *Ib.*

MEMORANDUM.

1. A witness having referred to a pocket memorandum to refresh his memory during his examination in chief, the opposite party is entitled to take and examine the same for the purpose of cross-examination. And the witness cannot refuse its production and examination on the ground that it contained private memoranda of his acts as a detective, and that to do so would be a breach of confidence and a personal injury; certainly not, unless it appears to the court that he has *reasonable* ground of belief that he would thereby subject himself to personal injury. *State* v. *Bacon.*

2. A paper containing dates, figures and amounts, recently made, partly from recollection, and partly from original entries, bills and receipts, concerning matters that transpired long before, may be referred to by a witness, not for the purpose of refreshing his recollection as to the correctness of the entries, but to enable him to state with accuracy the details of things of which he had from recollection made a memorandum, but could not carry them in his mind so as to be able to repeat them without the aid of the paper. *Pinney* v. *Andrus.*

PARTNERSHIP.

1. A sale by one member of a partnership, consisting of two partners, of his half of the partnership property, except the accounts, and suddenly leaving the State, operates as a dissolution of the partnership. *Ayer et al.* v. *Ayer.*

2. Each partner has equal legal right to collect the debts due the partnership, but in making such collections he acts for the partnership, and not in his sole, exclusive right, and is accountable as partner, for whatever he collects. *Ib.*

3. An attorney employed by one of the partners to make such collection, is the attorney of the firm, and accountable as well to one partner as the other, and equally subject to the direction and control of one as the other of the partners. *Ib.*

4. The plaintiffs A and B were partners; A suddenly disposed of all his property, and sold his interest in the firm, except the accounts, to G, and absconded from the State, leaving the partnership book of accounts, embracing the account in suit, in the hands of G, with directions

to collect them. B immediately notified the defendant to pay to no one but himself, and demanded the company books of G, who refused to surrender them or give him a copy of the accounts. B then brought this suit, after which the defendant paid the debt to G and took from him a release of it. G subsequently informed A what he had done and A approved. *Held*, that G's discharge of the debt constitutes no defense to this suit. *Ib.*

PERPETUAL MOTION.

The plaintiffs are entitled, as a matter of law, to recover the entire sum which they paid the defendant for a perpetual motion machine and the secret of its construction, though the humbug was too transparent to deceive the prudent; and though the plaintiffs themselves, after the purchase, made use of the secret which the defendant revealed to them; it being established that the plaintiffs were in fact deceived into the purchase by the defendant's fraudulent representation that the machine embodied a principle which it did not, and that the plaintiffs had, on discovering the fraud, returned the machine to the defendant. *Kendall et al.* v. *Wilson.*

PROMISSORY NOTE.

1. The delivery of a promissory note payable to bearer, by its holder and owner, with a right "to collect it and use the avails as needed," is an assignment of it. *Lamb, administrator*, v. *Matthews.*

2. Such a delivery by no means constitutes an agency, nor confers upon the holder a mere power of attorney, which is revoked upon the death of the person who delivers it. *Ib.*

3. If at the time of the delivery there was an express understanding that, at the death of the person giving it, it should be surrendered to the executor of the deceased if uncollected, it is still an assignment, but an assignment with a limitation; and, if the limitation does not appear upon the note itself, the maker of it, who has paid it in ignorance of the understanding, could in no way be affected by it. *Ib.*

4. Where a note payable to F, or order, was written in New Hampshire and sent to H in Vermont, who signed and returned it to F, who procured the plaintiff to indorse it as an accommodation indorser, and the court found under the circumstances of the case that said accommodation was for the benefit of both F and H, it was *held* that the liability of the plaintiff was that of surety — not that of guarantor simply. *Norton* v. *Hall.*

5. When the note fell due, the plaintiff being unable to pay it, the bank holding it demanded additional security, and accordingly the plaintiff assigned to the bank as collateral certain notes for $1,800, secured by mortgage, which the bank held until the plaintiff paid said note, which was more than six years after it became due. *Held*, that, H having failed to pay the note when due, the plaintiff had a right to make this arrangement for time with the bank, and that H could not avail himself of the statute of limitations as a defense in a suit by the plaintiff against him brought within six years from the time the plaintiff paid said note. The payment by the plaintiff was not a voluntary payment. *Ib.*

6. B held notes against R, upon which the statute of limitations had run, and asked R to renew them by giving a new note, or by indorsing something on them. R declined to renew the notes in either manner, but said: "I will come up soon and have a general settlement of accounts, and if all accounts are all right, other matters will be all right;" and upon another occasion he said to B, "we have a long string of accounts to look over; if I find that all right and satisfactory, the notes will be all right." *Held*, that these declarations made by R, taken in connection with his refusal to renew the notes, are not sufficient to show any acknowledgment of an existing liability with a willingness to remain liable, or from which to imply a promise to pay the notes. *Brayton* v. *Rockwell.*

7. The naked acknowledgment of an existing indebtedness is not sufficient. The acknowledgment must be of such character, or made under such circumstances, as to indicate, or be consistent with, a willingness to be held liable for the debt. *Ib.*

RAILROAD.

1. The principle is now well settled in this State, that railroad companies, as common carriers, may make valid contracts to carry and transport property beyond the limits of their own roads; and, when they do, they are bound to deliver the property at its place of destination according to their contract, and are liable for all injury to such property prior to its delivery, although such injury happens after the property has passed over their road on its way, and while in the charge of other carriers over whom they have no control. This contract may be either expressed or implied. *Morse* v. *Brainard et al., trustees of the Vt. & C. and Vt. C. R. R. Co's.*

2. In England, the rule is, that where a railroad company, as common carriers, receive property destined and directed to a point beyond the terminus of their own road, they are bound to deliver it at its place of destination, without a stipulation to that effect; and if the company would avoid such obligation they must do it by a stipulation limiting their liability to injuries happening upon their own road. *Ib.*

3. But in this country the rule established in most of the States, including Vermont, is, that the company are liable for injuries that occur beyond the termination of their own road only when they stipulate to deliver the property at a point beyond. *Ib.*

RESIDENCE.

The issue being as to where a person, now deceased, resided at a certain time thirty or forty years ago; it was *held*, that an account book of another party, also now deceased containing items of account with such person, having a tendency to make it probable that he resided in a certain place at that time, no question being made but that the account was correctly kept, is admissible, and may be considered by the jury, with the other evidence in the case, in determining the issue between the parties. *Cavendish* v. *Troy.*

SALE.

The law is perfectly well settled in this State, that to render a sale of property void as to creditors, both the vendor and the vendee must participate in the intent to delay the creditors of the vendor, at least to the extent of the vendee's having knowledge of such intent on the part of the vendor. *Leach* v. *Francis et al., and Francis* v. *Leach et al.*

SOLDIERS' BOUNTY.

1. Deserting the service by a soldier before the end of his term of enlistment, is not such a failure of consideration as forfeits or defeats his right of action upon a town order for bounty payable on demand, given him by the selectmen of the town to the credit of which he enlisted, at the time of enlistment, in pursuance of a vote of the town. *Bingham* v. *Springfield.*

2. The consideration of the contract between the soldier and the town was, not that the plaintiff should perform three years' service as a soldier in the United States army, but that he should *enter into a contract with the United States* to perform that service, and be mustered in under that contract to the credit of the town. *Ib.*

3. If the town could on equitable grounds set up the defense of desertion at all, as the desertion is not a breach of the contract with the town, the town could avail itself of it only to the extent of the failure to perform the service; so that the plea in this case, which was to the whole declaration, was, in any view, bad. *Ib.*

4. A minor having enlisted into the military service of the government with the consent of his father, is entitled

to receive and control such compensation as he is entitled to from the government otherwise, under his enlistment contract; and the town bounty, paid by the town to which he gave his credit, belongs to him and not to the father. *Baker* v. *Baker.*

5. The consent to the minor's enlistment is a virtual emancipation or discharge of the minor from all obligations of service or obedience to the father, so long at least as the enlistment contract exists. *Ib.*

TRESPASS.

1. Where, in an action of trespass for an assault and battery, the defendants having pleaded the general issue, the plaintiff testified, without objection, in the opening, to the circumstances of the assault upon him, that he was constable and was serving process by attaching property of the defendants when they struck him,—the defendants cannot claim in argument, not having made the point before, that there was no legal proof that the plaintiff was constable, and if constable, that there was no proof that he had authority to serve the writ in another town or county without a special vote of his town; this process having been served in Wolcott, when the plaintiff was constable in Hardwick. *Wakefield* v. *Fairman et al.*

2. In the opening in such case, the plaintiff is only obliged to prove the blow to have been struck by the defendants.. His testifying to the circumstances does not increase the measure of burden on his part, nor is that of the defendants diminished. *Ib.*

3. L., an officer, accompanied by C., the execution creditor, had attempted to levy upon a mare which F., the debtor, had sold to W., and had been resisted by F. and W., and the mare escaped during the affray, and afterward W. mounted her and rode off. L. then directed C. to take hold of F., and hold him while he went after W. and the mare, which C. did. *Held*, that, as the execution did not run against F.'s body, and as he did not interfere or threaten to interfere with L.'s going after the mare, this imprisonment of F. was a trespass, and having been done by C., by L.'s direction, both were liable for it. *Leach* v. *Francis et al. and Francis* v. *Leach et al.*

4. In actions of trespass, where the evidence discloses that a personal indignity has been done the plaintiff, exemplary damages may, in the discretion of the jury, be awarded the party injured, and the extent of the insult, the fact that the trespass was committed in the night, the unprotected situation of the plaintiff's family, and the degree of malice on the part of the defendants, are legitimate subjects of consideration on the question of damages. *Ellsworth* v. *Porter et al.*

TROVER.

1. The fact that a demand embraces more property than the party is entitled to would not justify the other in refusing or neglecting to deliver within a reasonable time that part of the property demanded to which the demandant was entitled. *Gragg* v. *Hull.*

2. But where the demandant informs the other at the time that he would not accept any less than the whole that he demanded, the latter would be absolved from tendering that portion of the property demanded which the demandant was entitled to. *Ib.*

3. A party is entitled to reasonable time to deliver property after demand, unless he refuse absolutely to deliver the property; and what would be a reasonable time would depend in a measure upon the distance the property was from the place of demand. *Ib.*

WAGERING CONTRACT.

If, by the law of the place where a wagering contract is made and executed, the losing party may maintain an action for the money paid, the action is transitory, and may be sustained in *any* forum which obtains jurisdiction of the parties. On the other hand, a right of action for a penalty is local in its nature. *Flanagan* v. *Packard et al.*

WARRANTY.

1. Where the parties to a sale of sheep, on the first day settled the terms of a valid executory agreement in respect to them, and, as a part of the agreement, the vendor warranted the sheep sound and free from foot-rot; and on the second day when the vendee went to pay for them, as agreed upon, he discovered they were unsound, and believed they had the foot-rot; and the vendor repeated his statements made on the first day, that the sheep were sound and free from the foot-rot; that he would warrant them so; it was *held*, that the two interviews constituted but one trade and one warranty. *Pinney* v. *Andrus.*

2. A vendor *may* warrant against a defect which is patent and obvious, as well as any other. *Ib.*

3. The plaintiff, having alleged in his declaration a special waranty against the foot-rot, and as a breach, that the sheep had the foot-rot, is entitled to recover upon proof of the breach, without regard to whether the existence of the disease was obvious and discoverable, or was discovered and known, by the plaintiff when he made the purchase. *Ib.*

LEGAL NEWS.

Trenton law students have a mock court.

An English lawyer is suing an English Bishop for libel. He lays his damages at $5,000.

A woman has been committed for trial in New York for attempting to kidnap a little girl.

Charlotte B. Ray, a young colored woman, is studying law at the Howard University Law School, Washington, D. C.

Among the jurors drawn for the March term of the Albany county (Wyoming Territory) court, were eleven ladies.

It is estimated that the number of judgments recorded at present in the several courts of Virginia is between $350,000 and $400,000.

Some of the English laws seem queer to Americans. Thus, at Leeds a stoker at a mill was recently sent to prison for a month for neglecting to fire his furnace properly.

When Judge Ingraham sentenced Townsend, the New York murderer, to death, he alluded to the plea of drunkenness set forth by his counsel, and said that if the law admitted any such excuse there would be no punishment for crime.

The suit of John M. Binckley, ex-Assistant Attorney-General, ex-Solicitor of Internal Revenue, etc., etc., against Hon. E. A. Rollins, late Commissioner of Internal Revenue, for libel, has been removed from the Baltimore City Court to the U. S. Circuit Court for the Maryland district, and will come off in April.

A judge in Sauk Rapids, Minnesota, combines with his judicial duties the functions of a provision dealer. A newspaper speaks of having seen nice fat beef hanging up in the court room while a case was on trial, besides sacks of grain, feed and flour were strewed about the floor. His honor is often obliged to leave the bench to attend to his customers.

Justice Shelton, of Aberdeen, Ohio, died at that place last week. The justice discharged the duties of magistrate for thirty-five years, and during that time he married over four thousand couples. It was he that gave to Aberdeen the name of "The Gretna Green of America." Thither eloping lovers fled at all hours of the day or night and were speedily married by the justice. The legislature, a few years ago, found it necessary to pass a special act legalizing his marriages.

South Pass, Iowa, has passed through a trying scene, which was nothing less than that of the first judicial proceedings in this country presided over by a woman. It was a case of prosecution against a

county official for the recovery of a fine, and the proceeding was commenced before Mrs. E. Morris, the newly appointed justice of the peace. The court-room was crowded, and "Justicess" Morris presided with much dignity. She dismissed the case on the ground that she, being the successor of the accused herself, could not with propriety try the case, as being a party interested. She is thought to have shown great delicacy of feeling in her decision, whether technically correct or not.

In September last, Mrs. Myra Bradwell, editor of the Chicago *Legal News*, applied to the Supreme Court of Illinois for a license to practice law, and her application was denied solely on the ground that the disabilities of her married condition rendered it impossible that she should be bound by her obligations as an attorney. Mrs. Bradwell afterward submitted a very able printed argument to the court, and the court reconsidered her application, but last week again denied it. In denying the application, Mr. Justice Lawrence delivered a very elaborate opinion, deciding that no woman can be admitted to practice law in Illinois. An attorney, the court says, is not merely an agent, but an officer, whose business it is to assist in the administration of justice. If a woman can fill this office, every office in the State will be open to her. The adverse argument is based mainly on the common law, as it affects the property of women under the statute relieving somewhat its rigors and the usages under it which have denied women the right to hold office. The grim judges were very polite, and told how much pleasure it would give them to grant licenses to women, but they took care to close up the avenues against the reformers, by remarking that "courts of justice were not intended to be made the instruments for pushing forward measures for popular reform." Mrs. Bradwell, in referring to the opinion in her journal, says: "What the decision of the Supreme Court of the United States in the Dred Scott case was to the rights of the negroes as citizens of the United States, this decision is to the political rights of women in Illinois — annihilation."

THE BAR ASSOCIATION OF NEW YORK.

ADDRESS TO THE MEMBERS OF THE BAR—THE CONSTITUTION OF THE ORGANIZATION.

The Executive Committee of the Bar Association of the city of New York, recently formed, have issued the following address:

To the Members of the Bar of the City of New York:

Some of our numbers who were strongly impressed with the importance in many ways of having our profession in this city organized into an association, having conferred together at intervals during the past year, resolved to make a beginning towards accomplishing this object. A short form of pledge was prepared and sent to a number of gentlemen for signature. When about two hundred names had been secured, it was thought proper to call the signers together for conference, and the result of their meeting was the appointment of committees to draft a constitution and to nominate officers. The constitution has been adopted and the officers provided for in it have been chosen, and what has so far been done is now submitted to the profession at large, with the earnest hope that the project will receive the approval of every lawyer who has the dignity and honor of his calling at heart, and who feels the necessity of the harmonious co-operation of an upright Bar and a pure Judiciary in the administration of justice.

It may be asked, why was not the whole body of the profession consulted? Our answer is that such a course seemed impracticable. No one had authority to convene a general meeting of the Bar. Had such a meeting been called those who might have assembled would have had no more authority than any self-constituted committee. It was always necessary, in such enterprises, for a few to take the first steps. They naturally, in so doing, expose themselves to criticism, and must rely upon the integrity of their motives and the wisdom of their plans for their justification. The circular was sent to many besides those who signed it. Some delayed, others were absent, but we wish to assure all that there was no intentional avoidance of those who it was thought would unite with us. It is hoped, therefore, that any who may feel that they were justly entitled to be consulted, will consider the labor of seeing personally a large number of individuals, and explaining to each the details of unmatured plans, and will generously overlook any apparent assumption of authority on our part in view of the importance of the object proposed, and of the obvious difficulties of any plan.

In this spirit it is also hoped that they will accept for the present the constitution now submitted. It is the result of much discussion and consideration, and yet may seem to many quite defective. When the Association shall embrace a larger proportion of the profession, a review of the work will naturally take place.

It may seem invidious to require that any member of the Bar should submit to scrutiny his claims to membership in such an association, but as some selection is indispensable, no other plan seemed on the whole so unobjectionable as to constitute a committee to pass upon all applications. It is hoped that the character of the gentlemen who compose this committee, and the large number of negative votes required to exclude an applicant, will furnish an assurance against any caprice or injustice in their action.

The question has been frequently asked, what do you propose, what is to be gained by joining this association? We answer that our immediate object is simply organization.

It seems like an abdication of its legitimate position, that the Bar of the city of New York, numbering its members by thousands, should have absolutely no organization whatever; that its influence in all matters affecting either its own dignity and interests as a profession, or the general good as connected with the advancement of jurisprudence or reforms in the administration of justice, should be only that divided and dispersed influence of its members which, from being divided and dispersed, goes for nothing. When its members were fewer and a longer probation was required for admission to its ranks, the traditions of the profession served, to some extent, to answer the purposes of a corporate organization. But since 1846, the era of our present State Constitution, events affecting, not the Bar only, but the whole fabric of public and social life, have succeeded each other with unparalleled rapidity. The barriers to admission to the Bar have been substantially removed; the distinctions between attorney, solicitor and counselor, have been obliterated; the judges have been made elective by the popular voice for a short term only, and a system thus introduced which has necessarily exposed them to partisan influences.

During the same period has come into operation a new system of procedure which gives to the judges so elected larger discretionary powers than ever before, and a patronage in the appointment of receivers and referees, and in the granting of commissions and allowances, the exercise of which is at least dangerous.

With these changes, more immediately affecting our profession, have come during the same period the discovery of new gold fields, the immense issues of paper currency during our civil war, the excitements, the social vicissitudes produced by that conflict, the changes in measures of value, the growth of corporate enterprise, the increase of luxury and the social demoralization which confront us on every side.

What has been the effect of all these things on the bar? Many say its glory and dignity are gone, that it has ceased to be a noble profession, and is merely a trade with the rest. We do not admit this charge. But we mean to come together as a body, to look the question fairly in the face, and if we find that we have been tainted by the influence of the times, to undertake ourselves the work of purification, to revive a past renown, and give new life to traditions which we believe to be only dormant, not extinct. What specially is to be undertaken ought not to be determined by the few who have taken the lead in the enterprise. The Association will itself, after mature consideration, decide upon its own action; but lest the feeling which has prompted the present movement should, after its first impulse, flicker and die out, it is proposed to make our Association a permanent institution; to procure a commodious building up-town, and to establish in it a well-appointed law library. Having, besides this, rooms for consultation and social intercourse, we feel that we shall offer, especially to the younger members of the bar, an equivalent at least for the expense of membership. The larger our numbers, the more readily and speedily will our purposes be accomplished. With five hundred members, our pecuniary success would be assured, and we have encouragements that voluntary donations will at once enable us to lay the foundation of a library that will soon become the pride of our Bar. We work not for ourselves only, but for those who are to come after us, and we are confident that the spirit of our profession once aroused, we can do all that we require.

We have not been unmindful of our brethren in the other portions of the State. We could not imperil our own immediate objects by undertaking a more general organization, but we look forward to the forming of similar associations in other cities and counties, with which we hope to be affiliated, and if from them may grow an Association of the Bar of the State of New York worthy of the past history of that Bar, powerful by its intelligence and learning, and influential by its integrity and patriotism, the benefits of such an association not only to ourselves, but to the entire commonwealth, can hardly be overestimated.

The following are the names of the Executive Committee:

William M. Evarts, Henry Nicoll, Hamilton W. Robinson, Augustus F. Smith, William E. Curtis, William C. Barrett, James Emott, Charles A. Rapallo, Henry A. Tailer, Stephen P. Nash, Samuel B. Garvin, Sidney Webster, James C. Carter, John E. Parsons, Wm. G. Choate, Francis C. Barlow.

The following is the Constitution of the Association as adopted Feb. 15, 1870:

ARTICLE I. This Association shall be called "The Bar Association of the City of New York."

ART. II. The Association is established to maintain the honor and dignity of the profession of the law, to cultivate social intercourse among its members, and to increase its usefulness in promoting the due administration of justice.

ART. III—SEC. 1. The members of the Bar who signed the preliminary articles are hereby declared to be members of this Association; but such of them as shall omit to subscribe to this constitution, and pay the admission fee, on or before the 15th

day of March next, shall cease to be members, and can only become such by subsequent admission.

Any member of the profession, in good standing, residing or practicing in the city of New York, may become a member, by vote of the Association, on recommendation of the committee on admissions, as hereinafter provided, and on subscribing to this constitution and paying the admission fee.

SEC. 2. The committee on admissions shall have power to make such regulations in relation to proposals for membership and notice thereof, and as they may from time to time deem needful. Candidates against whom there shall be five negative votes in the committee shall not be recommended for admission. Upon being recommended, a vote by ballot shall be taken in the Association, and one negative vote in every five shall exclude the candidate.

ART. IV.—OFFICERS.—The officers of the Association shall be a president, five vice-presidents, a recording secretary, a corresponding secretary and a treasurer. There shall also be an executive committee of fifteen members, of which committee the president shall, *ex officio*, be a member; and a committee on admissions, to consist of twenty members. These officers and committees shall be elected at the annual meeting to be held on the second Tuesday of January in each year. The Association may provide in its by-laws for such other standing committees as it may deem necessary.

ART. V. The Executive Committee shall be vested with the title to all the property of the Association until it may be incorporated, as trustees thereof, and shall manage its affairs subject to the constitution and by-laws. They shall provide a permanent place for the use of the Association, and shall appropriate such sums as they may deem fit for a library and reading room.

ART. VI. A Library Committee to consist of five members, shall be appointed by the Executive Committee, to hold office during their pleasure, and, subject to their directions, shall have charge of the library and reading room, with power to expend upon the same such moneys as may be appropriated by the Executive Committee or procured by voluntary subscription.

ART. VII. The Judges of the Courts of the United States, of the Court of Appeals, of the Supreme Court, and of all other Courts of Record of the State of New York, shall have the use of the library and reading room of this Association without the payment of fees.

ART. VIII.—MEETINGS OF THE ASSOCIATION.—There shall be an annual meeting of the Association on the second Tuesday of January, and other stated meetings on the second Tuesdays of March, June and November, in each year. At these stated meetings, and at any regular adjourned meeting thereof, all the powers of the Association may be exercised. Special meetings may be called at any time by the Executive Committee, and shall be called upon the written request of twenty members.

At such special meetings no business shall be transacted except such as shall be specified in the call thereof. The presence of fifty members, in addition to such members of the Executive Committee as may be present, shall be necessary to constitute a quorum at any meeting of the Association.

ART. IX.—ADMISSION AND ANNUAL FEES.—The admission fee shall be $50, to be paid on signing the constitution.

The annual dues shall be $40, payable half yearly, on the first days of May and November, each year; and any member in default, after thirty days' notice, shall cease to be a member, unless excused by order of the Executive Committee.

In case of members of less than six years standing at the Bar, the Executive Committee may, until they shall have attained that standing, give them a credit for one-half their initiation fee, and remit one half their annual dues.

ART. X.—Any member of this Association may be suspended or expelled for misconduct in his relations to this Association or in his profession, on conviction thereof, in such manner as may be prescribed by the by-laws, and all interest in the property of the Association, of persons resigning or otherwise ceasing to be members, shall vest in the Association.

ART. XI.—This constitution shall go into immediate effect, and an election of officers and committees, herein provided for, shall forthwith be had. They shall hold their offices until their successors are elected at the annual meeting on the second Tuesday in January, 1871.

ART. XII.—All elections shall be by ballot. The officers elected shall enter upon their duties immediately upon their election, and shall hold office until their successors are elected or appointed.

In case of a vacancy in any office, it shall be filled by appointment of the Executive Committee, until the next annual election.

ART. XIII.—This constitution may be amended by a two-third vote of the members present at any stated meeting of the Association, provided that notice of the proposed amendment, subscribed by ten members, be given at a previous meeting.

ADMITTING ATTORNEYS AS A MATTER OF RIGHT.

The old courts of common pleas in our State exercised the power of admitting attorneys to practice before them. Many citizens of all parts of the State will remember that incorrigble joker, Hon. George R. Davis. One morning, just after the opening of the Rensselaer county court of common pleas, a committee reported that they had examined James Pine, of Hoosic, a candidate for admission to practice, and found him qualified. Judge Davis, then holding the court, ordered Pine to be admitted, and he was sworn in. A young constable from the town of Hoosic, by the name of Briggs Keach, standing with his staff guarding the entrance to the bar, stepped forward to a point within arm's length of the judge, and demanded to be sworn in as an attorney of the court. "By what right?" inquired the judge. "You have just admitted Jim Pine, and he has only tended stud horse one year, and I have two years, and I demand to be sworn in," replied Keach. "Swear him in," said Judge Davis, and he was sworn in.

BOOK NOTICES.

The American Law Register: D. B. Canfield & Co., Philadelphia.

The February number of this venerable and able law periodical contained an article on "Good Will in Partnerships," by the Hon. Isaac F. Redfield, besides its usual number of decisions and abstracts.

The American Law Times: Published in connection with the Law Times Reports. Edited by Rowland Cox. Washington, February, 1870.

The *American Law Times* is mainly devoted to the publication of "Leading Cases"—so called—selected from the decisions of the United States Courts and of the several State courts. Many of the decisions reported are of no importance outside of the jurisdiction that pronounces them, while others are of value to the profession at large.

—We have received a well printed pamphlet of thirty-two pages, containing the argument of the Hon. Platt Potter, Justice of the Supreme Court, in the Breach of Privilege Case. Numerous and material errors and omissions appearing in the newspaper reports of the argument, the Judge has, at the request of a large number of the members of the bar of several counties, consented to its publication, corrected, from the stenographer's notes and the manuscript. The argument, as printed in a recent number of the LAW JOURNAL, was from the stenographer's notes, and contained some errors which have been carefully corrected in this edition.

—We acknowledge the receipt of a prose literal translation of "The Suitors," of Racine, by Levi Bishop, Esq., of the Detroit bar, published in 1862, and dedicated to the Bar of Michigan. Mr. Bishop was induced to send it to us, by his perusal of the translations of some scenes from the same play, which appeared in a recent number of Mr. Browne's series of articles on "Law and Lawyers in Literature," now being published in our pages. We suggest to Mr. Browne to translate the whole play into English verse, and thus furnish the profession with a companion to Mr. Bishop's excellent rendering.

TERMS OF SUPREME COURT FOR MARCH.

2d Monday, Circuit and Oyer and Terminer, **Dutchess**, Barnard.
2d Monday, Circuit and Oyer and Terminer, **Schuyler**, Balcom.
2d Monday, Circuit and Oyer and Terminer, **Genesee**, Barker.
2d Tuesday, Circuit and Oyer and Terminer, **Caldwell**, Potter.
2d Tuesday, Special Term, Tioga, Parker.
3d Monday, Circuit and Oyer and Terminer, **Westchester**, Tappen.
3d Monday, Circuit and Oyer and Terminer, **Schenectady**, Rosekrans.
3d Tuesday, Special Term, Jefferson, Mullin.
4th Monday, Special Term, White Plains, Tappen.
4th Monday, Circuit and Oyer and Terminer, **Yates, J. C. Smith.**
4th Monday, Circuit and Oyer and Terminer, **Herkimer**, Mullin.
4th Tuesday, Special Term, Erie, Talcott.
Last Monday, Special Term, Monroe, Dwight.
Last Monday, Circuit and Oyer and Terminer, **Tompkins**, Parker.
Last Tuesday, Special Term, Albany, Miller.
Last Tuesday, Special Term, Cortland, Murray.

The Albany Law Journal.

Albany, March 19, 1870.

JOHN C. SPENCER.*

It has been said by an eminent English writer, that Macaulay was the philosopher and Lamartine the poet of history. With equal propriety it may be said, that John C. Spencer was the philosopher and Ogden Hoffman the poet of the New York bar. Not that the latter, like Talfourd, actually divided his time between law and poetry; not that he, like Lord Tenterden, was more "proud of his iambics and hexameters" than of his triumphs at the bar. Yet Mr. Hoffman did not yield to the opinion, that legal arguments and forensic efforts require no decoration of elocution to render them forcible and effective. He did not, therefore, endeavor to emancipate himself from all oratorical rules; but he knew how to adapt his elocution to profundity and comprehensiveness; to the rules of logic; to the philosophy of "the dull black letter of the law." Often, however, before a jury, his vivacity — his facility of sentiment — his power of picturesque illustration — his pathos, aroused emotions something like those created by the inspiration of the poet.

The meditative character of Mr. Spencer's mind led him to philosophic disquisitions — to the contemplations of the abstract student — to the coinage of logical deductions. His mind did not "work by sudden and strong impulses, leaping with irresistible force to its conclusions, but by calm and laborious processes, tending silently, yet surely, thereto." He was not easily excited by the delicate and exquisite beauties of poesy; he never indulged in a variety of imagery — in flights of fancy — in touches of pathos. Therefore his speeches at the bar, in the popular assembly, in legislative bodies, were delivered in language severely correct, scrupulously pure, but free from all rhetorical drapery. He possessed the power of giving an ethical interest to his subject — of penetrating deeply into it — of establishing, by the clearest and subtlest train of reasoning, those delicate lines which divide apparently analogous precedents.

Another feature of Mr. Spencer's mind was the singular sagacity with which he seized upon questions of fact, the facility with which he disentangled the point in dispute from sophistry and error, and reduced a perplexed and elaborate question of law to a plain problem of common sense. Thus, without the magic of Mr. Hoffman's eloquence, he was as powerful and as successful before a jury as he was before those courts where nothing but plain questions of law are discussed and settled. This was fully demonstrated by the manner in which he conducted the great case of the *People* v. *How*, at Angelica, in 1824. This was a case peculiarly adapted to the facile and kindling eloquence of Hoffman, but which was managed with signal success by the unimpassioned Spencer, who, with the force of reason and argument alone, overthrew the hypotheses on which was built a powerful and brilliant defense.

When Talfourd took his pen, he became the critical essayist — the poet, who, with strong or delicate touches, impressed, as it were, his own vivid mind on the scenes which he described — the dramatist, whose creative imagination caught a hint from Euripides, which gave "Ion, a play of destiny," to the world; the writer of those sonnets, which are tinged with style of Wordsworth, who was his ideal of a poet. When Mr. Spencer wrote, as he often did, his pen was an instrument of his great logical powers. The merit of his style as a writer consisted in the facility and perpiscuity with which he reasoned, explained, or described.

All his written productions bear the impress of the same powerful and philosophic intellect which characterize his legal and legislative speeches. This is manifested in the revision of the New York Statutes, those lasting monuments of the legal learning and research of himself and his co-revisers; in reviewing, criticising, and annotating De Tocqueville's great work on American Democracy; in writing those legal arguments which often enlightened judges, and determined the decisions of courts; in those elaborately written pamphlets, which operated with such effect on the public mind; and in those legislative reports and documents, which so plainly evince his ability as a statesman.

As there was no man that ever made less parade of his intellectual endowments, there were few less disposed to tolerate learned vanity in others, and he often rebuked ostentatious pedantry and empirical impudence with a caustic pen and a satirical tongue which gained him bitter enemies.

The apparent austerity and haughtiness of his manner detracted something from his popularity, yet he was, for many years, a successful and leading politician in the State. Such was the respect which the people entertained for his ability and his unfaltering honesty, that they forgave his faults, and the many unpopular traits in his character. When before them as a candidate for official position, he never failed to receive the strong support of his party. By a popular vote, he was repeatedly elected Member of Assembly, State Senator, and Representative in Congress.

Soon after Mr. Spencer was elected Speaker of the Assembly in 1820, Erastus Root met him on the steps of the Capitol: "Spencer," said he, "if you would only see people whom you meet; if you would get rid of your confounded haughtiness, you would soon become more popular in the State than Tompkins ever was; but as it is, everybody is afraid of you; they think you sour, proud, and crusty." "Why, Mr. Root, I do see people when I meet them, but nature never made a Chesterfield of me; I like people, and do not mean to be haughty; at any rate, I do not feel so," said Spencer. "I beg your pardon, but you do not see people when you meet them," said Root; "for instance, I saw Dr. Miller, from Cortland, this morning, and he told me that you don't pretend to notice him, when you meet him; and only yesterday I met you on State street, and although I gave you one of my best bows, I never received so much as a nod from you." "Why really, Mr. Root, I have not the least recollection of meeting you yesterday on State street or any-

*Extract from the "Bench and Bar," a work in preparation by Mr. L. B. Proctor of Dansville, N. Y.

where else," was the reply. "I know that, and I know how to excuse your abstracted thoughts. When you met me yesterday, you was studying out the argument which you are to make next week in the Court of Errors against me; but the people, our sovereigns, Mr. Spencer, don't understand these matters. They are imperious; they must have a nod, or a bow, on all occasions, or else we are guilty of rebellion to sovereign majesty. So, learn to nod and bow to everybody, for it is the court etiquette of the day, and makes great men out of well dressed nobodies," said Mr. Root.

THE PUBLICATION OF THE COURT OF APPEALS REPORTS.

Section 73 of the judiciary act of 1847, as amended by chapter 224 of the laws of 1848, provides for the appointment of a reporter of the decisions of the Court of Appeals, to be denominated "State Reporter," to hold his office three years from the date of his appointment.

The power of appointment is given to the Governor, Lieutenant-Governor and Attorney-General. This section makes it his duty "to report every cause argued and determined in that court which it shall direct him to report, and such others as the public interest shall, in his judgment, require."

The act also makes it the duty of the judges "to deliver to him such written opinions as they shall prepare upon questions of law," and declares that "every decision of the said court which shall be reported shall be so reported *as soon after the same is made as practicable.*"

Section 2 of chapter 224 of the laws of 1848 declares that the "reporter shall have no pecuniary interest in such reports, but the same shall be published under the supervision of the reporter, by contract to be entered into by the reporter, Secretary of State and Comptroller, with the person or persons, who, in addition to furnishing the said Secretary of State sixty-four copies of each volume, shall agree to publish and sell the said reports on terms the most advantageous to the public, and at a rate not exceeding three dollars for a volume of five hundred pages; regard being had to the proper execution of the work." Said officers are also required, before entering into a contract, to receive and consider all proposals made to them for the publication of said reports.

Section four of the act declares: "As often as the reporter shall have prepared for publication sufficient of the reports, with notes and references, to constitute two hundred and fifty pages, of the usual size of law reports, he shall cause the same to be published in pamphlet form, with such headings as will appear in the bound volumes, and shall furnish a copy thereof to each county clerk's office at the expense of the State, and keep the same on sale at contract prices for all persons who may want to purchase; such printing to be done by the person who shall contract to publish the reports under this act, at and in proportion to the prices stipulated in his contract."

The third section of the act was amended in 1850 (chap. 245 of Laws of 1850), so as to read: "It shall not be lawful for the reporter or any other person within this State to secure or obtain any copyright for said reports of the judicial decisions of the Court of Appeals, but the same may be published by any person."

The second section of chapter 245 of the laws of 1850 declares that "the copyright of any notes or references made by the State reporter to any of said reports shall be vested in the Secretary of State for the benefit of the people of this State."

The salary of the State reporter was fixed at two thousand dollars (chap. 277, § 3, Laws 1847). An extra allowance of from one thousand to fifteen hundred dollars has sometimes been made by the legislature.

George F. Comstock was the first State Reporter, and received his appointment December 27, 1847.

The first contract for the publication of the reports was made with Little & Co., at two dollars and fifty cents per volume, they being the lowest bidders, and the first volume published under the contract (Comstock Reports, Vol. 1) was issued in June, 1849.

As soon as Little & Co. published the first and second volumes of Comstock's Reports they were immediately reprinted by Gould, Banks & Co. They were also reprinted in Ohio, and Little & Co. had no remedy, for the law of 1848 was entirely inadequate to accomplish the object for which it was passed. The contract was a farce. There could be no copyright for any portion of the book, and hence no protection. To meet the case, on the 9th of April, 1850, the amendments of 1850, above mentioned, were passed, and a new section vesting the copyright of the notes, etc., in the Secretary of State for the benefit of the people of the State.

On the 20th day of April, 1850, a new contract was made by the State officers with Little & Co. for five years, by the terms of which Little & Co. were to have the exclusive benefit of the copyright to be taken out in behalf of the State, and the contract therein declared to be an assignment and transfer of such copyright to Little & Co. Under this new contract on the 21st day of November, 1850, Little & Co. (having first secured the copyright according to the requirements of the acts of Congress) published the third volume of Comstock's Reports. Gould, Banks & Co. at once reprinted this volume as they had the two previous ones, and Little & Co. brought a suit to restrain them from publishing and selling any copies of this volume. Little & Co. were successful in this suit, which is reported, 2 Blatchford's C. C. Reports, 165; affirmed on appeal, S. C., page 362.

Mr. Comstock's term of office expired December 27, 1851, and out of the materials he then had on hand he made the fourth volume of his reports, and sold it upon his private account. The volume was published by Gould, Banks & Co. and immediately reprinted by Little & Co., who supposed they were entitled to it under their contract. Little & Co. brought an action against Gould, Banks & Co. to restrain them from selling their edition. The case was decided against Little, the court holding that the volume having been prepared after Mr. Comstock's term of office expired, he was entitled to the copyright. *Little et al.* v. *Hall et al.*, 14 How. U. S. Rep. 165.

Henry R. Selden was Mr. Comstock's successor. He made six volumes — the last two of which were

made after he went out of office, and disposed of as private property.

Francis Kernan succeeded Mr. Selden. He made four volumes — the first of which was published by Little & Co. Their contract then expired, and the next contract was made with Gould, Banks & Co. at two dollars per volume. Under this contract they published the last three volumes of Kernan's Reports and the first six volumes of Smith's Reports.

The next contract was made with William Gould at one dollar and twenty-three cents, and one dollar and fifty-six cents, according to the size of the volume. If under six hundred and fifty pages, the former price, and if over, the latter. Under this contract he published the last seven volumes of Smith's Reports, when his contract expired, and a new contract was made with Weare C. Little at graduated prices — the highest being two dollars and fifty cents for a volume of over seven hundred pages. Under this contract he published the first ten volumes of Tiffany's Reports. After Mr. Tiffany's term of office expired he prepared the eleventh and twelfth volumes of his reports, which he sold to William Gould.

Samuel Hand was appointed State Reporter January 5, 1869, Mr. Nelson having been previously elected Secretary of State and Mr. Allen Comptroller.

The former comptroller not having signed Mr. Little's contract, the new board served a notice on Mr. Little that they should disregard his contract, and invited proposals for the publication of the reports. On the 10th day of March, 1869, they made a new contract with A. Bleecker Banks for the publication of the reports for the term of three years. The fourth clause of Mr. Banks' contract reads as follows:

"The party of the second part shall at all times after the publication thereof, respectively, keep the said volumes for sale at the following prices: For a volume of five hundred and fifty pages, sixty cents; for a volume of six hundred and fifty pages, eighty cents."

Under this contract the first volume of Hand's Reports has been published. The volume contains six hundred and fifty-seven pages, and the publishers demand two dollars and fifty cents for it. We should like to know on what principle of construction of contracts they are entitled to this sum. If they are entitled to two dollars and fifty cents for the volume, they may demand any price they please, and the contract is a farce. By the terms of the contract, for a violation thereof Mr. Banks forfeits all rights under it, and "five thousand dollars to be recovered by the parties of the first part, or their successors in office, for the use of the people of the State of New York."

We call upon the Attorney-General, one of the parties of the first part, to move in this matter and see that the rights of the people are preserved, and that these reports are kept on sale at the contract price. Thus he will do the people and the profession a much greater and more acceptable service then he can possibly do by attempting to preserve the dignity and "respect" of the Court of Appeals in the manner to which we have elsewhere alluded.

A bill increasing the pay of the judges has passed in the New Jersey Senate.

LAW AND LAWYERS IN LITERATURE.*

X.

AN ODE.

Many legal odes have been written, but none better than this: "To a Sparrow alighting before the Judges' Chambers in Serjeants' Inn, Fleet street. Written in half an hour, while attending a summons:"

"Art thou solicitor for all thy tribe,
That thus I now behold thee?—one that comes
Down amid bail-above, an under scribe,
To sue for crumbs?—
Away! 'tis vain to ogle round the square,—
I fear thou hast no head—
To think to get thy bread
Where lawyers are!

"Say—hast thou pulled some sparrow o'er the coals,
And flitted here a summons to indite?
I only hope no cursed judicial kite
Has struck thee off the rolls!
I scarce should dream thee of the law—and yet
Thine eye is keen and quick enough—and still
Thou bear'st thyself with perk and tiny fret:—
But then how desperately short thy *bill!*
How quickly might'st thou be of that bereft!—
A sixth 'taxed off'—how little would be left!

"Art thou on summons come, or order bent?
Tell me, for I am sick at heart to know.
Say—in the sky is there 'distress for rent,'
That thou hast flitted to the courts below?
If thou *wouldst* haul some sparrow o'er the coals,
And *wouldst* his spirit hamper and perplex—
Go to John Body—he's available—
Sign, swear, and get a bill of Middlesex,
Returnable (mind—bailable!)
On Wednesday after th' morrow of All Souls.

"Or dost thou come a sufferer? I see—
I see thee 'cast thy *bail*-ful eyes around;'
Oh, call James White, and he will set thee free.
He and John Baines will speedily be bound,
In double the sum
That thou wilt come,
And meet the plaintiff Bird on legal ground.
'But stand—oh, stand aside!—for look,
Judge Best, on no fantastic toe,
Through dingy aren—by dirty nook—
Across the yard into his room doth go;—
And wisely there doth read
Summons for time to plead,
And frame
Order for same.

"Thou twittering, legal, foolish, feather'd thing,
A tiny boy, with salt for latitat,
Is sneaking, bailiff-like, to touch thy wing;—
Canst thou not see the trick he would be at?
Away, away! and let him not prevail.
I do rejoice thou'rt off, and yet I groan
To read in that boy's silly fate my own;
I am at fault,
For from my *attic*, though I brought my *salt*,
I've failed to put a little on thy *tale!*"

B. N.

These initials, probably those of Nicholas Breton, are subscribed to the prefatory address of a singular book entitled, "I Would, and Would Not," published in London, in 1614. An idea of the author's plan, as well as his style, may be conveyed by the following stanzas applicable to our subject:

"I would I were a man of such deepe wit,
As might discerne the depth of every cause;
That wheresoere I did in Judgement sit,
I might be held a Note-booke in the Lawes.
My braine might seeme a kinde of miracle,
And every word I spake an Oracle.

"And yet I would not, for then, woe were me,
I should be troubled with a world of Cases;
Both rich and poore would then my Clients be,
Some with their pleasing, some with piteous faces;
And when the Rich had left their briberie,
I should not rest for *Forma pauperie.*"

FRANCIS QUARLES,

In "Emblems Divine and Moral," speaking of the "golden age," says:

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* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

"There was no client then to wait
The leisure of his long-tail'd advocate;
The talion law was in request,
And chanc'ry courts were kept in every breast;
Abused statutes had no tenters,
And men could deal secure without indentures."

RUGGLE,

the facetious author of "Ignoramus," has introduced some macaronic burlesques on Law Latin in that amusing play. Ignoramus himself thus recites how he will endow his mistress Rosabella:

"Si possem, vellem pro te, Rosa, ponere pellem;
Quicquid tu vis, crava, et habebis singula brava;
Et dabo, *fee simple*, si monstras *Love's pretty dimple*.
Gownos, silkcoatos, kirtellos, et petticoatos,
Farthingales biggos, stomacheros, et periwiggos,
Pantoffilos, cuffos, garteros, *Spanica* ruffos,
Buskos et soccos, tiffanas, et *Cumbrica* smockos,
Pimpillos, pursos; ad ludos ibis et ursos."

I fancy it would be fitter to read *canos* for *ursos*, if the husband were expected to pay for all this toggery.

In another scene, Ignoramus, perusing a legal document, breaks out to his clerk with: "O, ho! vide hic est defaulta literæ; emenda, emenda; nam in nostra lege, una comma evertit totum Placitum." Describing the sway that Cupid has acquired over him, he says: "Primum cum amabam Rosabellam, nisi parvum, misit parvum Cape, tum magnum Cape, et post, alias Capias et pluries Capias, et Capias infinitas; et sic misit tot Capias, ut tandem capavit me, utlegatum ex omni sensu et ratione mea. Cum scribo instrumentum, si femina nominatur, scribo Rosabellam; pro Corpus cum causa, corpus cum cauda; pro noverint universi, Amaverint universi; pro habere ad rectum, habere ad lectum; et sic vasto totum instrumentum."

This play, written to ridicule the Latinized English and other barbarisms of the Law, was enacted before King James, who was observed to chuckle at it. Among the actors were the gentlemen who were afterward known as Lord Hollis, the Bishop of Peterborough, the Dean of Canterbury, Earl Northampton, and Lake, Secretary of State. The ridicule was deserved, but still great men differ on the subject, for Blackstone says: "The truth is, what is called Law Latin is really a mere technical language, calculated for eternal duration, and easy to be apprehended both in present and future times; and on those accounts best suited to preserve those memorials which are intended for perpetual rules of action. The rude Pyramids of Egypt have endured from the earliest ages, while the more modern and more elegant structures of Attica, Rome and Palmyra have sunk beneath the stroke of Time."

"MICHAELMAS TERM,"

is the title of an ancient broadside ballad preserved in the British Museum. The benefits derived by people of various occupations at this season are described, and lawyers come in for a share:

"Some atturnies, and some that solicite law cases,
That at the vacation in the country plods.
They, like to King James, can use double faces,
And bribe to set neighbor with neighbor at odds.
Now hither they come, with their bags full of law,
But the profits they all to themselves do confirm;
Although it be but for a trusse of rye straw,
The case must be try'd at Michaelmas term.

* * * * * * * * *

The lawyers' hands are still itching for fees,
Which makes the plain husbandman let out his farm,
To come up to London to eat bread and cheese,
While lawyers eat roast meat in Michaelmas term."

In another old ballad, called "Robin Conscience," we find the following:

"Thus banished from the court I went,
To Westminster incontinent,
Where I alas was sorely spent
for coming;
The lawyers did against me plead,
'Twas no great matter,' some there said,
'If Conscience quite were knock'd in th' head;'
then musing,
From them I fled with winged haste;
They did so threaten me to baste,
Thought it was vain my breath to waste
in counsel.
For lawyers cannot me abide,
Because for falsehood I them chide,
And he that holds not on their side
must down still."

COSIN.

The following "Lawyer's Creed" might be in danger of being considered blasphemous if it had been written by a layman, but as the work of Dr. John Cosin, a prelate of the seventeenth century, I suppose it is entirely orthodox:

"Credo in Dominum Judicem pro arbitrio statuentem;
In Attornatum meum, omnium litium creatorem;
Et in duodecim viros in cassibus nostris nihil intelligentes.
Credo Westmonasteriensem Aulam esse Ecclesiam Catholicam;
Statua omnia, prohibitiones, decreta, et reportus, esse traditiones apostolicas;
Sed omnes lites futuras esse æternas;
Et nullam esse debitorum remissionem;
Si plus velis,
Credo omnes academias et artes humaniores esse abolendas, in secula seculorum, Amen."

As an offset, I quote the following from an early volume of the *Gentleman's Magazine*—a fitting receptacle for such enlightened sentiments: "The Portion of a Just Lawyer. Whilst he lives, he is the Delight of the Court, the Ornament of the Bar, a Pattern of Innocency, the Glory of his Profession, a Terror to Deceit, the Oracle of his Country. And when Death calls him to the Bar of Heaven, by the *De habendo corpus cum causa*, he finds the Judge his Advocate, nonsuits the Devil, and continues one of the Long Robe in Glory."

BULWER.

In a note to the edition of "Night and Morning," published in 1851, Lord Lytton says: "The work lays claim to one kind of interest which I certainly never intended to effect for it, viz., in exemplifying the glorious uncertainty of the Law. For, humbly aware of the blunders which novelists not belonging to the legal profession are apt to commit, when they summon to the *denouement* of a plot the aid of a deity so mysterious as Themis, I submitted to an eminent lawyer the whole case of 'Beaufort *versus* Beaufort,' as it stands in this novel. And the pages which refer to that suit were not only written from the opinion annexed to the brief I sent in, but submitted to the eye of my counsel, and revised by his pen. N. B.—He was feed. Judge, then, my dismay, when I heard, long afterward, that the late Mr. O'Connell disputed the soundness of the law I had thus bought and paid for! 'Who shall decide when doctors disagree?' All I can say is, I took the best opinion that love or money could get me; and I should add, that my lawyer, unawed by the alleged *ipse dixit* of the great Agitator (to be sure, he is dead), still stoutly maintains his own views of the question. I have, however, thought it prudent, so far to meet the objection suggested by Mr. O'Connell, as to make a slight alteration in this edition," etc.

I have not had the curiosity to endeavor to discover the alleged error, because the error, if any existed, was the fault of our profession, and not that of the novelist, assuming the correctness of his lordship's statement. It is to be feared, however, that his lordship was parsimonious in the matter of the fee; or that, being a second-rate novelist, he naturally took to a lawyer of like rank. But I have cited his note to commend the good sense of his example to all novel writers who touch on Law, and especially to such as Lever and Cooper.

LYNDSAY.

While we are grubbing among ancient remains, it would be wrong to pass over Sir David Lyndsay's *Monarchie*, in which a personage termed "Experience" thus speaks of Law:

"I would some Prince of great discretion
In vulgar language plainly causde translate
The needful Lawes of this Region:
Then would there not be halfe so great debate
Among us people of the low estate.
If every man the verity did know,
We needed not to treat these men of Law.

To do our neighbour wrong, we would beware,
If we did fear the Lawes punishment:
There would not be such brawling at the Bar,
Nor men of Law chine to such Royal rent,
To keep the Law if all men were content,
And each man do as he would be done to,
The Judges would get little thing adoe."

"GIOVANNI IN LONDON,"

has a scene with the following

TRIO.

First Lawyer, Second Lawyer, Giovanni.

Air—"Soldier, give me one pound."

First Lawyer:
"Giovanni, give me one pound.

Second Lawyer:
Giovanni, give me two.

First Lawyer:
Trial it comes on to-day;

Second Lawyer:
And nothing can we do.

First Lawyer:
You must give a fee
Both to me—

Second Lawyer:
And me.

Both Lawyers:
For oh! the law's a mill
That without grist will never go.

Giovanni:
Lawyer, there is one pound; *(to first lawyer)*
Lawyer, there are two; *(to second lawyer)*
And now I am without a pound,
Thanks to the law and you.
For oh! I feel the law
Has clapped on me its paw;
And oh! the law's a mill
That without grist will never go."

"THE GENTLEMAN IN BLACK,"

is the title of a little volume, published anonymously in London in 1831, with illustrations by Cruikshank. The story is of two young men, English and French respectively, who, having run through their fortunes by dissipation, enter severally into a contract with the Devil, by which they are to have an unlimited supply of money on demand, provided they would sin one second the first year, two seconds the next, double that the third, and so on during life. All the sins committed before and after, over and above the stipulated amount, were to be taken into account. "So that you see," said Lucifer, "not even a hermit need live more immaculately." The scene is laid in the time of the French Revolution. The Englishman, ignorant of the Frenchman's compact, accidentally falls in with his *confrere* in iniquity, and on discovering the similarity of their circumstances, they are as naturally bound together as Dr. Rappaccini's daughter and the young medical student, in Hawthorne's fascinating tale (which see). A jolly time they have for twenty-eight years, when the Devil reminds them that they are in arrears, and it becomes apparent on calculation that in order to transact the stipulated amount of wickedness, for that year, it would require, reckoning sixteen hours to the day, some two thousand three hundred and thirty days. Looking ahead one or two years added to their perplexity. Right here, the Englishman called into requisition the services of old Bagsby, a lawyer, who, after proposing a compromise which the G. in B. was not inclined to accept, threatened to throw the business into Chancery. "'Into where!' cried the gentleman in black, starting upon his legs, upsetting his black snuff-box and blackguard, letting fall his black smelling-bottle, oversetting his black bag and disarranging his black-edged papers, while his black hair stood erect upon his head, and his black Geneva cloak swelled out rigidly behind, as though thrust forth and supported by a mop-stick. 'Into Chancery,' repeated old Bagsby, gravely; 'Mr. Ledger will pay the money into court.' 'From whence it will never come out in my time,' roared the gentleman in black, like a lion taken in the toils. 'No, no; I accept the merchant's offer.'" Cruikshank's illustration of this scene is very amusing.

Perhaps if the Devil (or the author) had known how strongly courts have always leaned toward the enforcement of contracts similar to the one in question, he would have had less horror of Chancery. There is the great leading case of *James* v. *Morgan*, 1 Levinz, 111, which was an action in special assumpsit, on an agreement to pay for a horse a barley corn for the first nail in his shoes, and double every other nail, which, as there were thirty-two nails, amounted to five hundred quarters of barley; under the instructions of the court the jury gave as damages the full value of the horse, £8; and it is inferred that the contract was considered valid, from the fact that on a motion in arrest of judgment, the verdict was affirmed. I know Mr. Story, in his work on Contracts, cites the case as establishing a contrary doctrine, but he seems to be mistaken. Then, too, there is the other great case of *Thornborow* v. *Whiteacre*, 2 Lord Raymond, 1164, in which the court on demurrer were inclined to hold good a contract to deliver, in consideration of 2*s.* 6*d.* paid, and 4*l.* 17*s.* 6*d.* to be paid, two rye corns on the then next Monday, and double every succeeding Monday for a year, which would have required the delivery of more rye than was grown in the whole year; the judge observing that although the contract was a foolish one, yet it was good in law, and the defendant ought to pay for his folly; but the case was compromised, and no judgment was given. But on the question of the tediousness of Chancery the Devil and

the author are sound, for that institution seldom failed to ruin one party to the litigation, and frequently ruined both.

Hearing of his friend's escape, the Frenchman, after fruitless endeavors to interest the clergy in his behalf, retains Bagsby to effect his discharge. The G. in B., learning this, endeavors to seduce the lawyer from his client and to act for him. Bagsby refuses to listen until he shall receive a retaining fee. The Devil thereupon pulls out an immensely long and serpentine purse, one end of which still seems hid in his pocket, and the lawyer's virtue begins to ooze out; when some callers interrupt them, and the purse rushes like a live thing into its owner's pocket; it was, in fact, a *fee tail*, and the owner disappears. The picture of this feeing scene is enough to make a lawyer sigh at its improbability.

In the discharge of his duty to his French client, Bagsby goes to France, and is there associated with a Jesuit, a friend of the Frenchman. The Devil observes: "A double-tongued Jesuit, and an old wily, slippery, English lawyer! Fearful odds! What chance have *I* between them? I don't feel myself at all comfortable." So great is his dread of this partnership of law and religion, that he accedes without much demur to Bagsby's proposition, to compromise the affair, by having his client pay back half the moneys and the Devil remit half the sins, and at the end of fourteen years, the question to be resumed as left on that day. Bagsby draws up an interminable instrument, which the Devil has not the patience to read, but seeing the heads are right, executes and delivers it, and receives a check for half his moneys. Thereupon he goes into a fit of immoderate laughter, and informs Bagsby that his principal reason for postponing his claim fourteen years is the hope that the lawyer will then be dead. "*Literæ scriptæ manent*," responds Bagsby, and explains that the instrument reserves to his client the option of canceling whichever half of the eight and twenty years he pleases, and that of course he will cancel the first half, and will have no difficulty in sinning one second on the first year of the renewed claim, and double each succeeding year, especially as he will have the advantage of the clause in the original contract giving credit for extra sinning before or after, and will thus be credited with the sins of the latter half of the term. "So, altogether, if he makes proper use of the money yet remaining in his hands, what with interest and compound interest, I think you might almost as well be in chancery!" The Devil curses his imprudence in dealing without his own lawyer, but finally his admiration of the trick overcomes his anger, and he says: "I will do myself the pleasure of calling upon you at Lyon's Inn ere long. I admire your talents, and shall cultivate a more intimate acquaintance; for you have convinced me that, notwithstanding a considerable portion of self-conceit to which I plead guilty, I have yet much to learn. People say that I have a very extensive circle of friends among gentlemen of your profession, but I assure you that the report is not to be relied on. Indeed, considering the facilities of introduction which I possess, and the inducements I frequently have in my power to hold out, I am often surprised that I have not more on my list."

An appropriate tail-piece to this entertaining volume represents the gentleman in black hanged by his caudal member to a gallows.

The author of "The Gentleman in Black" was not the only one who thought that lawyers were a match for his Satanic Majesty, as the following song bears witness:

"A lawyer, quite famous for making a bill,
And who in good living delighted,
To dinner one day with hearty good will
Was by a rich client invited.
But he charged six and eight pence for going to dine,
Which the client he paid, tho' no ninny,
And in turn charged the lawyer, for dinner and wine,
One a crown and the other a guinea.
But gossips you know have a saying in store,
He who matches a lawyer has only one more.

"The lawyer he paid it and took a receipt,
While the client stared at him with wonder
With the produce he gave a magnificent treat,
But the lawyer soon made him knock under.
That his client sold wine, information he laid,
Without license, and spite of his storming,
The client a good thumping penalty paid,
And the lawyer got half for informing.
But gossips you know have a saying in store,
He who matches a lawyer has only one more."

"POOR ROBIN,"

whoever he may be, has his fling at the lawyers:

"This day the long vacation o'er,
And lawyers go to work once more;
With their materials all provided,
That they may have the cause decided.
The plaintiff he brings in his bill,
He'll have his cause, cost what it will;
Till afterward comes the defendant,
And is resolved to make an end on't;
And having got all things in fitness,
Supplied with money and with witness;
And makes a noble, bold defense,
Backed with material evidence.
The proverb is, one cause is good,
Until the other's understood.
They thunder out to little purpose,
With certiorari, habeas corpus,
Their replicandos, writs of error,
To fill the people's hearts with terror;
And if the lawyers do approve it,
To chancery they must remove it,
And then the two that were so warm
Must leave it to another term;
Till they go home and work for more,
To spend as they have done before."

CURRENT TOPICS.

We last week referred to the fact that a jury had been drawn in the territory of Wyoming, composed of eleven women and one man, to sit on the trial of a man indicted for murder. The latest report from that region states that they had then been out under lock and key four days and nights, and had so far failed to agree. It is added that "the women look pale and fatigued." But how about the man? How must *he* look after such a trying ordeal? after four days and nights locked in a jury-room with eleven strong-minded and disagreeing women? On the whole the behavior of this initial eleven is not flattering to the advocates of female jurors. The ruling passion seems to be as strong in the jury-room as anywhere else.

We print elsewhere the act just passed providing for a revision of the statutes of the State. It is to be regretted that a more numerous commission was not provided for, as it will be next to an impossibility for three men to do the work as thoroughly and well as it deserves to be done, within the time limited. But *ita lex scripta est*, and the momentous question now

is, who are to form the Commission? There is a cloud of applicants, but the number of men qualified to do justice to the subject is not large. It is to be hoped that Judge Edmonds, of New York, will be selected as one, though we are not aware that he would consent to act. His long experience on the Bench, his labors and researches in preparing his edition of the statutes, and his powers of arrangement and analysis as therein exemplified, eminently qualify him to act in such a capacity. We speak of Mr. Edmonds particularly, because we do not believe that there is another man in the State who combines so many qualifications to do the work in a satisfactory manner.

The Judiciary article of the Constitution lately adopted in this State provides that judges shall not hold office after reaching seventy years of age. It has been suggested in several of the daily newspapers that no person should be nominated for the judicial office who will reach that age before the term for which he may be chosen shall expire. If such a principle prevail with nominating conventions, we will hereafter be deprived of the services of those best qualified to occupy the bench. We believe it is generally admitted that the period of man's life intervening between the ages of fifty-five and seventy is the one peculiarly fitted for the exercise of judicial functions. When he enters upon that period he has acquired all the knowledge that can be gained from experience and from study; his character and habits are formed and understood; the ambitious hopes of earlier years are satisfied or abandoned, and those influences which tended formerly to bias and warp his judgment have lost their force. Most of the judges, whose productions have shed lustre upon American jurisprudence, have brought forth their best works after they had reached their sixtieth year; and, in some instances, like Chancellor Kent, after they had, on account of age, been debarred from the judicial office. There may be reasons why a man who has reached seventy years should not be chosen to this office; but to deprive the people of the services of an able and experienced judge because he will, in the course of ten or twelve years, reach that age, is not only foolish but wrong.

The chaotic condition of the law concerning the property rights and liabilities of married women is a source of constant annoyance to practicing lawyers, and of loss to business men. As the statutes stand to-day a married woman is possessed of all the rights of a *feme sole*, but incurs none of the liabilities. She may enter into such a contract as she sees fit, and compel the party with whom she deals to fulfill his part of the agreement, while she, after receiving all the benefit she desires, may herself repudiate the performance of her stipulations. In nine instances out of ten married women doing business act merely as covers for their husbands, who are insolvent. The man buys and sells and performs all the routine work of the business, and the wife is known therein only by name. We do not object to this, but we do object to a condition of the law, which, like the present, clothes a person of mature age with every privilege and still shields her from the consequences of her conduct in availing herself of those privileges. Let us, by all means, give to the married woman every right possessed by the unmarried, but we should at the same time make her personally responsible for her acts. Allow her to enter into contracts and bind herself by them, no matter whether she has separate property or not. A simple statute declaring that marriage shall in no manner affect the rights, capacities and liabilities of persons entering into it, will accomplish the end desired and relieve the courts of much vexatious litigation.

The list of pardons and reprieves, etc., recently furnished to the Legislature by Governor Hoffman, develops one fact that may be regarded as rather startling for the nineteenth century. It appears that a number of "felons" have been pardoned for the reason that they were *not guilty* of the crime for which they were convicted. Here are a couple of instances that may serve as specimens:

Feb. 26—Thomas Pleasants, convicted November 17, 1868, of grand larceny; Kings county; term two years.

The prisoner was convicted of the larceny of a horse and cart. His witnesses were not present, and he had no proper defense. His innocence is now established by undoubted evidence. The judge, district attorney, and complainant, have no doubt of his innocence.

Sept. 6—Levi Conger, convicted March 9, 1869, of burglary and larceny; Ontario County; term two years.

The judge and district attorney unite in stating that facts which have come to light since the trial, establish the innocence of Conger, of whose guilt they had some doubt at the time of his conviction.

The guilty party has since confessed, and stated that Conger had no connection with the crime.

To convict and punish the innocent does very well in works of fiction like "Foul Play," but in matter-of-fact, every-day life is a gross outrage. We had supposed that after a thousand years of endeavor, the rights of the accused had been so hedged about that it was almost an impossibility to err in that direction. The humane policy of the law is that it is better for ninety-nine guilty men to escape punishment, than for one innocent man to be punished; and yet in one State, in one year, almost a half score of men have been immured within the walls of a prison for crimes of which they know nothing. Surely we have fallen on perilous times, when men shall be thus ruthlessly robbed of their dearest rights, thrust into the company of convicts and disgraced for life. And after all this what relief have they? Only the executive clemency in the shape of a *pardon*. Pardon for what? for being falsely accused, wrongfully convicted and unjustly imprisoned. Is it not about time that a law should be enacted providing for a new trial, even after the sentence shall have become operative, that the accused may attest his innocence to the world, and be relieved of the infamy cast upon his name? Would it not also be a matter of justice to require the State to make some adequate compensation to one who has been immured within a prison, and whose innocence shall have been afterward established?

A movement was recently started in the Legislature of this State having for its object the remedying of existing evils in connection with the trial of cases before referees. It was proposed to require the clerks of the several counties in the State to report the amount of fees paid to referees during the year past, as

appeared from the bills of cost on file in their respective offices. The mover of the resolutions stated that it would be found that in some portions of the State the aggregate fees charged by referees would equal at least fifty per cent of the aggregate amounts recovered in actions tried before them. For reasons that we have heretofore alluded to the reference of cases has become quite the rule, and, indeed, it is very safe to say that two-thirds of all the actions tried are tried before referees. There are several advantages about this method of trying a case, provided the referee be well chosen and perform his duty diligently and faithfully. It secures the judgment of a single mind, and one accustomed to examine and weigh carefully questions of fact and questions of law; the trial takes place in the quiet of a private room and not amid the excitement and hurry of the circuit; adjournments from time to time and place to place may be had as the interests of justice may require; and the referee, unlike a jury, may frame his award in accordance with the real justice of the case without finding wholly for either party. These are some of the advantages, but the disadvantages are quite as obvious. The chief of these are the expense and the uncertainty and delay. Though the law provides for compensation at the rate of three dollars per day, yet there is almost invariably an understanding express or implied that the referee shall not be limited to this amount, and the fees usually range from ten to fifteen dollars per day. This would not be burdensome if the trial were to proceed *de die in diem*, but when there are, as is usually the case, several meetings where nothing is done but to adjourn, and each at the rate of a full day's work, the ultimate amount which the losing party has to pay is very large. The "law's delay," in trials before referees, is notorious. A case before a referee is proceeded with when none of the parties engaged can find any thing else to do. If the referee has any other engagement, or if the counsel on either side has any other business on hand, the case is postponed. It is to be hoped that the Legislature will not adjourn without endeavoring to lessen these evils. It will have a beneficial effect if they will provide a fair per diem compensation for the referee, with the proviso that a meeting for adjournment shall not be counted as a day's engagement.

A suit is now pending in the Supreme Court of this State, which, considering the grounds on which it is based, may be considered a novelty in its way. The action was brought by the Attorney-General in the name of the people to restrain Weare C. Little and Emerson W. Keyes from publishing and selling four volumes of decisions of cases decided in the Court of Appeals — known as Keyes' Reports — not previously reported, and which the State Reporter had decided not to report. The plaintiffs allege as the main ground of the action that such publication and sale will "confuse and mislead the people as to the law," "weaken their respect for the court, and impose upon the members of the bar." We believe it is not claimed that the cases are not truthfully reported, and the volumes in every respect as well made as volumes of reports usually are. It seems to us to be a most extraordinary proposition for the people of the State to put forth, that the publication of the most deliberate decisions of the highest judicial tribunal in the State will tend to "confuse and mislead the people as to the law," "weaken their respect for the courts, and impose upon the members of the bar." In that view of the case, how arduous and responsible must be the position of Court of Appeals Reporter. He is not only the guardian who is to protect the "people" and the "bar" from being mislead, confused and imposed upon, but he is made the repository of the dignity and "respect" of the court, and is bound to protect the court from itself. Job only wished for some one to defend him from his friends, but here is an august tribunal that has to be defended from its own folly. It would be interesting to know by what process of ratiocination this important conclusion is arrived at. If it should be sustained by the court before whom this action is pending, would it not be an act of wisdom to slightly change the order of things, and have all the opinions of the court submitted to the reporter, before they are pronounced, for his approval? Thus the people would escape the danger of being misled and confused, and the bar of being imposed upon, while the court itself would be freed from the awful peril that now hangs over it of being disgraced in the eyes of people by their opinions. Seriously, it is a sad thing that the Attorney-General of the State of New York should allow himself to be prevailed upon by interested parties to institute an action based on such foolish and frivolous ground. The defendants' counsel, Daniel Ketchum, thus sensibly puts the case in his "points:" "If the publication of these decisions in a fair and truthful manner will have the effect to weaken the respect of the people for the court, then it is most respectfully submitted that the plaintiffs should change their servants instead of seeking a decision that would cast greater reproach upon themselves and their courts than any ever made in the State."

BOOK NOTICES.

The Bible in the Public Schools. Arguments in the Case of *John D. Minor et al.* v. *The Board of Education of the City of Cincinnati et al.* Superior Court of Cincinnati, with the Opinions and Decision of the Court. Cincinnati: Robert Clarke & Co. 1870.

It is a well-known fact, that near the close of the year last past the board of education of the city of Cincinnati passed a resolution prohibiting religious instruction and the reading of religious books, including the Bible, in the public schools. Thereupon numerous citizens of that city instituted an action to restrain said board from putting in operation their resolution. The case was argued upon an agreed statement of fact at a general term of the Superior Court, before Judges STORER, TAFT, and HAGANS, and a decision rendered in favor of the plaintiffs, granting the injunction prayed in the petition. The arguments, of which there were three on a side, took a very wide range, and are remarkable specimens of research and erudition. The authority, authenticity, and inspiration of the Bible; the nature of religion; the effect of Christianity on civilization and human progress; the relations of Church and State and religion and government, and many other things, human and divine, were discussed in a most elaborate manner. Unhappily, the judges saw fit to pass only upon the power of the defendants to make the rule in question, and we are therefore deprived of an authoritative judicial exposition of several questions

which have puzzled mankind for several centuries. These arguments, together with the opinions of the judges, are given in full in the book before us, and are well worth reading by every one interested in the topic under discussion.

Reports of Cases in Law and Equity: delivered in the Supreme Court of the State of New York. By Oliver Barbour, LL. D. Vol. LIV. Albany, 1870: W. C. Little & Co.

It is nearly twenty-three years since the Supreme Court of New York as at present organized began its labors. During that period there has been no reporter other than Mr. Barbour, whose cases were confined to this Court. He has issued something more than two volumes in each year, and with the commencement of 1870 completes his fifty-fourth volume.

The character of these reports is best indicated by the fact that during the extended time embraced by them no competitor has appeared. Messrs. Howard and Abbott have reported only practice cases, and have not limited their selections to any particular Court. As is to be expected, they each sometimes report the same cases with Mr. Barbour, but such occurrences are comparatively rare.

The principal objection raised against this series of reports is that too many cases are reported, making the volumes too numerous. If, however, we compare Mr. Barbour's work with that of previous reporters of this Court, we will find that he does not much exceed any of them in the proportionate number of cases or of volumes. Johnson's Reports, extending from 1806 to 1823, number twenty volumes, more than a volume a year, principally made up of Supreme Court decisions. Wendell's Reports, of the same character, twenty-six in number, extend from 1828 to 1841, two volumes in each year. The other reporters do not differ greatly from Wendell in the comparative number of their volumes. It is true that a small portion of these volumes are taken up with cases decided in the Court of Errors, but the absence of equity cases of which the Supreme Court had then no jurisdiction, more than compensates for the limited space devoted to the court of last resort.

There are, however, many reasons why the present reports of the Supreme Court decisions should excel in bulk and number those of former times. The business of the Court in the days of the earlier reporters was trifling in comparison with its present immense magnitude. Single cases are not infrequent now in which the amount litigated is greater than the sum total involved in all the cases noticed in any volume of Johnson's Reports. Since the organization of the present Supreme Court, interests have grown up surpassing in magnitude and in novelty even the speculations of previous years. In 1846 the railway system of the country was made up of a few disconnected roads along the principal lines of travel, the coal mines were just being developed, the telegraph was an experiment, the insurance business was in its infancy, and oil and mining enterprises were unknown. The marvellous changes that the succeeding years have brought forth are familiar to us all, and with them has been built up a vast body of statute and judicial legislation. The Supreme Court has been the principal source of the latter, its decisions in most instances not being appealed from, and when appealed from being usually confirmed.

When we consider all these things, and in addition that with these reports was begun the practical operation of a new and unique system of judicature, the precise limits of whose action it has taken all these years to authoritatively determine, it cannot surprise us that so many volumes have been produced; but we are rather surprised that such a selection has been made as to comprise within the limits of a little more than two volumes a year the judicial reasoning involved in the settlement of so many questions. The Supreme Court has been fortunate in securing for so long a period the voluntary labors of such a man as Mr. Barbour in the position of reporter; and now that a new reporter is to be selected, it is to be hoped that he will receive the appointment for which his experience and ability so well qualify him. It is not necessary to speak of the volume under consideration with particularity. It is, like all its predecessors, well digested, well indexed, and well printed.

OBITER DICTA.

It is said that the celebrated Horace Binney, on being called to the bar, waited ten years for a fee.

Mr. L. B. Proctor, Esq., of Dansville, N. Y., is engaged in preparing a book to be entitled the Bench and the Bar, and to contain sketches of judges, members of the bar, incidents of trial, etc. A few of the sketches have been published in the papers of western New York and have elicited the highest commendations.

A well known judge, when first called to the bar, was a very blundering speaker. On one occasion, when he was arguing a case, involving a right to a lot of pigs, he said: "Gentlemen of the jury, there were just twenty-four pigs in that drove—just twenty-four, gentlemen—exactly twice as many as there are in that jury box."

At the recent Woman Suffrage meeting in New York, one of the apostles, in the course of an address, delivered herself of the following: "The late James T. Brady once said, that any one with brains enough to cross Broadway had capacity to be a justice of the peace; women can cross Broadway, *ergo* they can and should seek to fill such offices." Here's logic for you.

An amusing instance of "judicial ignorance" is related of a judge, who, after having been occupied six hours in trying an action on a policy of insurance upon goods known as "Russia duck," which had been damaged by water in transportation, charged the jury that the plaintiff could not recover, as he had failed to show how sea water could damage Russia *ducks*.

Length and verbosity have been from time immemorial charged upon the conveyancer, as well as pleaders and equity draftsmen. One of our legal antiquarians (Somner) in a kind of funeral eulogium on the Saxon simplicity, observed, that even in his time, "*an acre of land could not pass without almost an acre of parchment.*" So, in Donne's second satire—

> "In parchment, then, large as the fields, he draws
> Assurances."

Shakspeare makes Hamlet remark, "that the very conveyances of a man's lands would hardly lie in his coffin!"

"Somner might have observed at this day," says Wynne, "that a flock of sheep is often converted into a settlement."

TERMS OF SUPREME COURT FOR MARCH.

3d Monday, Circuit and Oyer and Terminer, Westchester, Tappen.
3d Monday, Circuit and Oyer and Terminer, Schenectady, Rosekrans.
3d Tuesday, Special Term, Jefferson, Mullin.
4th Monday, Special Term, White Plains, Tappen.
4th Monday, Circuit and Oyer and Terminer, Yates, J. C. Smith.
4th Monday, Circuit and Oyer and Terminer, Herkimer, Mullin.
4th Tuesday, Special Term, Erie, Talcott.
Last Monday, Special Term, Monroe, Dwight.
Last Monday, Circuit and Oyer and Terminer, Tompkins, Parker.
Last Tuesday, Special Term, Albany, Miller.
Last Tuesday, Special Term, Cortland, Murray.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.*

ACCORD AND SATISFACTION.

Where a debtor settles the amount due from him to his creditor upon notes and drafts, by giving him, in full satisfaction of the claim, a draft on a third person for 50 per cent of the amount, payable in gold, which is subsequently paid, and the creditor accepts such draft and surrenders and cancels the evidences of the indebtedness, this is a good accord and satisfaction. *Stagg* v. *Alexander.*

AGREEMENT.

Where each of the parties to an agreement had a claim, under it, against the other, contingent or conditioned to become due, upon the formation of a corporation; *held*, that this meant a *legal* corporation; and that each party was presumed to know what requisites the law demanded, in order to create a corporation. *Childs* v. *Smith.*

ATTACHMENT.

1. *What is a valid levy.* — In regard to real estate, it is not necessary that an officer holding an execution or an attachment go upon the property; it is not necessary that it should be even within his view. Though he must do some act, make some entry or memorandum indicative of his intention, yet, having done that, with such purpose in his mind, although he makes no vocal proclamation of the fact, he has made a legal levy. *Rodgers* v. *Bonner.*

2. A sheriff, having attachments against the property of the defendant, went to the home of the defendant, where he resided, with a view of levying upon the latter's property. He made no proclamation to the defendant that he should seize or levy on the house and lot; but he did, on the same day, make a pencil memorandum, on a loose piece of paper, of the house and lot, with the intention to seize the same on the attachments; and early the next morning, his clerk, by his direction, indorsed upon the attachments a memorandum of the seizure thereunder, but the same was not then fully completed, nor signed by the sheriff until some days thereafter. He subsequently put the house and lot into the inventory of the property seized under the attachments. *Held* a valid levy. *Ib.*

3. It is not necessary to the validity of a levy made under an attachment that the warrant be returned to the officer issuing it. *Ib.*

4. If there is any statutory provision touching the return of an attachment to the officer issuing it, the statute is merely directory to the sheriff; and his omission to do his duty cannot be availed of in a collateral action to defeat the remedy of the plaintiffs in the attachment suit. *Ib.*

5. *Notice of lis pendens.* — The omission to file a notice of *lis pendens*, in an attachment suit, until after another creditor has obtained a judgment against the defendant, has no effect to postpone the lien of the attachment to that of the judgment. *Ib.*

6. Such notice, or the want of it, only affects a subsequent purchaser or incumbrancer whose conveyance or incumbrance is afterward executed or recorded. As respects a mere judgment creditor, it is never necessary that he should have notice of a prior lien, in order to give it priority. *Ib.*

7. *Service of a copy.* — It is not necessary to the valid execution of an attachment against real estate that a copy of it should be served on the debtor. *Ib.*

BANKS.

1. *Rights of collecting bank.* — Where one bank receives from another a draft belonging to a customer for collection merely, without advancing any money or giving any credit thereon, it has no title to the draft which will authorize it to retain the moneys received thereon, as against the true owner, on account of overdrafts of the remitting bank. *Lindauer* v. *The Fourth National Bank of the City of New York.*

2. A bank, receiving from another bank negotiable paper for collection, obtains no better title to it, or the proceeds, than the remitting bank had; unless it becomes a purchaser for value, or makes new advances on the faith of it, without notice of any defect of title. *Ib.*

3. And it does not become such purchaser, or make such advances, by reason of its having a balance against the remitting bank, for which it had refrained from drawing, or from having made further advances after the receipt of the negotiable paper. *Ib.*

BILLS OF EXCHANGE.

1. *Forged draft: liability of drawee.* — Although the drawee of a draft is bound to know the handwriting of the drawer, and when he pays a draft on which the name of the drawer has been forged, he is bound to bear the loss to the same extent he would have been if the signature had been genuine, yet the liability extends no further. *The National Park Bank of New York* v. *The Ninth National Bank.*

2. *Altered draft.* — Where a genuine draft has been altered, not only in the name, but in the amount to be payable, the rule does not hold the drawee liable for any more than the amount of the original draft. The balance he may recover of the indorser from whom he received the draft. *Ib.*

BILL OF LADING.

1. *Conclusive as to agreement.* — Where a bill of lading is made out by the carrier and delivered to, and accepted by, the shipper, all previous parol agreements are merged in it, and the shipper, by such acceptance, becomes bound by its terms. *Bostwick* v. *The Baltimore & Ohio Railroad Co.*

2. Where, by a bill of lading, goods were to be transported from Cincinnati to New York over certain specified railroads to Belle Air, and there delivered to the agents of the next connecting *steamboat*, railroad company or forwarding line," etc.,—*Held*, that the bill of lading was conclusive evidence as to the contract which the carriers made; and that under it they were not bound to carry entirely by railroad. *Ib.*

3. If a carrier has acted under a bill of lading as delivered to the shipper and accepted by him, and a loss occurs from one of the perils mentioned in such bill, as exempting the carrier from liability, no recovery can be had therefor. *Ib.*

CORPORATIONS.

1. *Filing of certificate.* — Under the general act authorizing the formation of corporations for manufacturing, mining or mechanical purposes (Laws of 1848, chap. 40), which requires a certificate to be filed in the county clerk's office, and in the office of the Secretary of State, stating the name of the corporation to be formed, and the nature of its business, etc., and declares that "*when* such certificate shall have been filed," the persons who shall have signed the same, and their successors, shall be a body politic, etc., it is essential that such a certificate be filed in the offices specified. Until that is done, no corporation can be formed. *Childs* v. *Smith.*

2. *Creation of organization.* — However necessary or convenient a meeting of the persons intending to constitute themselves a corporation, the adoption of resolutions or by-laws, choice of officers, or any other proceedings may be, in securing a due organization, and to bind the action of its members to that object, whether performed before or after their incorporation, they are of themselves no part of the statutory requirement; and they confer no statutory power — no legal right to act as a corporation. *Ib.*

3. Such acts of the parties, without even an act of user, do not create either a corporation *de facto* or a corporation *de jure*, as between the parties themselves. *Ib.*

* From the Hon. O. L. Barbour; to appear in Vol. 55 of his Reports.

EVIDENCE.

1. *Of accomplice: verdict on: impeaching witness.* — It is not an inflexible rule of law that a jury may not, in a criminal case, convict a defendant upon the uncorroborated testimony of an accomplice; the fact of the witness being a confederate going to his or her credibility only. *The People* v. *Haynes.*

2. The statements of such a witness are to be received with great caution. If, however, they carry conviction to the mind of the jury, and they are fully convinced of its truth, they may convict upon it. *Ib.*

3. It is, however, the duty of a jury to scan the testimony of an accomplice with the utmost severity; and as verdicts rendered wholly on the uncorroborated evidence of confederates are of doubtful propriety, they will not, in general, be allowed to stand if the witness be otherwise impeached. In such cases a just regard to the rights of the accused demands an observance of the strictest rules in the admission or rejection of evidence. *Ib.*

4. The mere fact that evidence tends to prove the accomplice is truthful in some respects, is not sufficient to authorize its admission. It should be as to some fact, the truth or falsehood of which goes to prove or disprove the offense charged *against the prisoner*. It must tend to fix the guilt on the particular person charged, and the rights of the accused should not be prejudiced by confirmation on immaterial points, or as to facts which in no way connect him with the offense. *Ib.*

5. Where, on the trial of an indictment for arson, the alleged accomplice testified that the defendant promised her $400 to burn the building, and afterward paid her forty dollars upon it, thirty of which she paid to W:,—*Held*, it was improper to allow the district attorney to prove by W, in corroboration of such statement of the accomplice, that she paid him thirty dollars about the time stated by her. *Ib.*

6. Where witnesses were called to impeach the general character of the accomplice, and the district attorney called witnesses to sustain it, who testified that prior to the fire they would have believed her on oath,—*Held*, that although such testimony might be proper, the jury were to determine the credit of the accomplice *at the time she testified.* That the defendant was entitled to ask them, on cross-examination, whether they would believe her on oath *at the time of the trial*, and that the court erred in sustaining an objection to such question. *Ib.*

7. *Held*, also, that the fact that the court had limited the number of impeaching and sustaining witnesses to six, and the defendant had called that number, did not change the rule. Such restriction did not limit the right of putting questions; on cross-examination, of the sustaining witnesses with a view to test the value of their opinions as to the integrity of the accomplice as a witness *at the time of the trial. Ib.*

INSURANCE.

1. *Right to terminate risk.* — Under a condition, in a policy of insurance, reserving to the insurers the right to terminate the insurance at any time, on giving notice to that effect, and refunding a ratable proportion of the premium for the unexpired term, the return of the premium is the essential part of the condition to be performed, and a prerequisite to the right to terminate the risk. *Hathorn et al.* v. *The Germania Insurance Company.*

2. Notice, without a return of, or offer to return, the premium, amounted to nothing. Whatever negotiations may take place, until a return or tender of the premium is made, the policy still remains in force. *Ib.*

3. A promise, by the insured, to bring the policy to the office of the agent to be canceled, when he is to receive the return premium, neither amounts to a valid agreement that the policy shall be held and deemed canceled, without a return of the premium, nor to waiver of performance of the condition on which the right to terminate the risk depends. *Ib.*

4. Where the agent of the insurers informed the insured that he had been instructed to cancel the policy, under a condition therein reserving the right to do so, telling him that he would give him (the insured) a check for the return premium, and cancel the policy the next day at 12 o'clock, to which the assured assented; but the premium was not paid the next day, nor tendered, nor was any attempt made to cancel the policy, the company retaining the premium, and the insured the policy, until a loss occurred: *Held*, that the policy was still in force. *Ib.*

PLEDGE.

1. *Deposit of stocks with a broker as margin.* — Where certificates of stock are deposited with a broker, by a customer, as *margin* or additional security against loss to him while carrying other stock for the depositor, the transaction is, in law, a *pledge;* and being such, annexing to the scrip pledged a power of attorney from the owner, authorizing the transfer of the scrip, does not change the character of the transaction, but is merely a necessary act to put the pledge in a condition to be available as such, in case of the pledgor's default. *McNeil* v. *The Tenth National Bank in the City of New York.*

2. *Right of pledgee to sell the thing pledged.* — As between the pledgor and the pledgee, in such a case, the latter has no legal right, secretly or without the knowledge of, or notice to, the pledgor, to sell the stock pledged. *Ib.*

3. *Title of purchaser from the pledgee.* — A transfer of the certificates by the broker to a third person gives no title to the latter as purchaser, though he pays a valuable consideration therefor, and though the scrip has a blank power of attorney attached, and even though such purchaser believed he was dealing with a person who had authority to sell. *Ib.*

4. *Right of redemption.* — If the transaction is a *pledge*, then the pledgor has a right of redemption, and before a sale can be made by the pledgee, the pledgor is entitled to reasonable notice, and demand of payment of his liability; and there must be default of such payment on his part. *Ib.*

STATUTES.

Rule of construction. — When a statute which grants power or authority has expressly fixed, limited or declared the time when such authority shall begin to be exercised, all other time is excluded. *Expressio unius est exclusio alterius. Childs* v. *Smith.*

VENDOR AND PURCHASER.

Title from executors. — A purchaser from executors will get a good title if the will gives them a valid power of sale. *Hunnier* v. *Rogers.*

WILL.

Power of sale: validity of trusts. — A testator, after making various bequests, and giving "all the rest, residue, and remainder" of his estate, both real and personal, unto his children living at his decease, and to the issue of such of them as should then be dead, empowered his executors to sell his real estate, in these words: "And I authorize and empower my executors * * * to sell all or any part of my real estate, at any time, in his or their discretion, at public or private sale, and to execute valid deeds of conveyance for the same, to the purchaser or purchasers thereof." *Held*, that the will gave a clear power of sale to the executors, as to the testator's lands; that the power was a general power in trust under our statutes, and the trusts were authorized by the statute; and that a sale of the lands by the executors, under the power, was legal, and passed a good title to the purchaser. *Hunnier* v. *Rogers.*

The younger members of the Waterbury (Conn.) bar are quite exhilarated over the prospect of several breach of promise cases.

DIGEST OF RECENT ENGLISH DECISIONS.

(Q. B. refers to Queen's Bench; C. P. to Common Pleas; Ex. to Exchequer; P. and M. to Probate and Matrimonial; M. C. to Magistrate Cases, and L. J. R. to the Law Journal Reports.)

ARBITRATION.

Boat-race: jurisdiction of referee.—K. and S., two watermen, agreed to row a "right away sculler's race" upon the river Thames; the start to take place at half-past two P. M.; the rowing to be according to the recognized rules of boat-racing, and a referee to be chosen, "whose decision shall be final." In watermen's races it is the practice for the men to start themselves. A referee was appointed, and the race commenced, but a foul having taken place, the men were ordered by the referee to row over again. On the following day they came to the starting place. After several fruitless attempts to start, K. rowed up to the referee's steamboat, which had drifted out of sight of the men, and complained that S. would not start. The referee looked for S., but not seeing him, told K. to inform S. that he must start, and that if he would not, to row over without him. K. then rowed off, and the referee afterwards saw him row over the course, but did not hear him speak to S. The referee thereupon decided that K. was entitled to the stakes; and it was found by the jury in an action against the stakeholder, that the referee's order was not communicated to S., and that a fair opportunity of starting was not given to him:—*Held*, affirming the decision of the Court of Queen's Bench, that, under the agreement, it was necessary, to empower the referee to award the stakes, that there should be a race or a start, and that it was essential to a start that the referee's directions should be conveyed to S; that, in the absence of any such communication, there could have been no fair start, so that the referee's decision was without jurisdiction and void. Per WILLES, J.—That, if the referee had decided, though upon insufficient evidence, that the communication was duly made to S., his decision as to the person entitled to the stakes would have been final, but that he appeared to have neglected to decide, whether what he had imposed as a condition of the start had been fulfilled. *Sadler* v. *Smith* (Ex. Ch.), Q. B. 39, L. J. R. 17.

ATTORNEY AND SOLICITOR.

Personal liability to pay costs: attachment: affidavit sworn before agent of solicitor on the record.—The Court will not order the costs of proceedings to be paid personally by the solicitor conducting them, on account of any misconduct unconnected with those proceedings, or upon an application not giving him proper notice of the charges against him. *In re Gregg* and *in re Prance*, Ch. 30, L. J. R. 107.

BILL OF EXCHANGE.

Notice of dishonor.—The holder of a bill of exchange, which was dishonored on Friday, the 17th of September, gave notice to his immediate indorser on Saturday, the 18th. He did not then know the address of the prior indorser (who was also the drawer of the bill); but after ascertaining the address, he posted a notice to him on the evening of Saturday, the 18th, but so late, that the latter could not and did not receive it till Monday, the 20th. All parties resided in London; and if the last mentioned notice had been posted before 6 P. M. on the 18th, the drawer would have received it the same evening:—*Held*, that the drawer could not, under the circumstances, set up as a defence to an action by the holder of the bill, that he had not received due notice of dishonor; and that the verdict which the jury found for the plaintiff ought not to be disturbed. *Gladwell* v. *Turner*, Ex. 39, L. J. R. 31.

COMPANY.

Power to accept bills.—A company, the nature of whose business required that it should accept bills of exchange, entered into an arrangement to make an advance to L. upon the security of certain specified shares and other similar securities. The regulations of the company provided that the directors might accept and indorse bills, and the number of directors necessary for the transaction of business was left to the discretion of the board. A resolution of the board empowered the chairman to accept on behalf of the company, and in favor of L., bills to the amount of the agreed loan upon L., depositing the securities to the amount agreed upon. The chairman professing to act under the authority of this resolution, accepted the bills and gave them to L., who deposited the securities, but to an amount considerably below the agreed amount. No one in fact examined the securities deposited on behalf of the company. The board afterward confirmed the transaction, but apparently in ignorance that the securities had not been duly deposited:—*Held*, affirming the *Master of the Rolls*, that the bills in the hands of a *bona fide* holder for valuable consideration were valid against the company. *In re Land Credit Co. of Ireland* (*Lim.*); *Exparte*, *Overend*, *Gurney & Co.*, Ch. 39, L. J. R. 27.

COVENANT.

1. *In restraint of trade: restrictive covenant by assignor against carrying on business in Europe so as to interfere with assignees.* All restraints upon trade are bad as being in violation of public policy, unless they are natural and not unreasonable for the protection of the parties legally dealing with some subject matter of contract. Public policy requires, on the one hand, that a man should not be at liberty by any contract to deprive himself or the State of his labor and skill, but on the other hand, that a man having a commodity to sell should be permitted to sell it most advantageously by precluding himself by any not unreasonable agreement from entering into competition with the purchaser. *The Leather Cloth Co.* (*Lim.*) v. *Lorsont*, Ch. 39, L. J. R. 86.

2. Upon sale to plaintiffs of certain patents for the manufacture of an article of commerce, the vendors agreed with plaintiffs not to carry on or allow to be carried on in any part of Europe any manufacture or sale of productions similar to those which were the subject of the patents, and not to communicate to any person the processes of such manufacture so as to interfere with the exclusive enjoyment by plaintiffs of the benefits purchased:—*Held*, that this was a valid covenant capable of being enforced. *Ib.*

DIVORCE.

Undue exercise of marital authority.—The wife, being seriously ill, was advised by her medical attendant to leave home for a time. The husband refused. Having become worse, she left home without his consent, and staid away some months, which she passed with her relations. On her return home she was deposed by her husband from her natural position as mistress of his house; she was deprived of the use of money entirely; all that she required had to be put down on paper, and her husband provided it if he thought proper. Having refused to tell her husband on one occasion of going into town everywhere that she had been, an interdict was placed on her going out at all; those whom she desired to see were forbidden the house, and she was prohibited from writing any letters unless the husband saw them before they were posted. Under this treatment her health again broke down:—*Held*, an undue exercise of marital authority, and to constitute legal cruelty. *Kelly* v. *Kelly*, P. and M. 39, L. J. R. 9.

EVIDENCE.

Oral contemporaneous agreement limiting operation of written contract: bill of exchange.—In an action by payee against drawer of a bill of exchange, payable twelve months after date, defendant pleaded that the bill was drawn for the accommodation of the acceptor and as surety for him, and at the time of the drawing and delivery of the bill to plaintiff, it was agreed between plaintiff, defendant, and the acceptor, that the latter should deposit

with plaintiff certain securities, viz.: a lease and dock warrants, and that in case the bill should not be duly paid plaintiff should sell such securities, and apply such proceeds in payment of the bill, and that until so sold defendant should not be liable for the bill. The plea alleged the deposit by the acceptor of such securities on the above terms, and that plaintiff had not sold them, but still held them. *Held* (*Willes, J.*, dubitante), that, as the agreement stated in the plea varied the terms of the written contract on the bill, oral evidence of it was not admissible. *Abrey* v. *Crux*, C. P. 39, L. J. R. 9.

FIXTURES.

Machinery: what passes by mortgage of the freehold. — The doctrine in *Hellawell* v. *Eastwood* is inapplicable to the question whether machines fixed by an owner of the soil pass to a mortgagee of the freehold; all machines which are fixed in a *quasi* permanent manner, viz., by screws or bolts, or soldered with lead to the floor, roof or side-walls, pass to the mortgagee by mortgage of the freehold, while all those which are merely movable articles do not so pass. *Longbottom* v. *Berry*, Q. B. 39, L. J. R. 37.

FORGERY.

Antedating one's own deed. — A, by deed bearing date on the 7th of May, 1868, conveyed on that date certain lands to B in fee. Subsequently, on the 26th of April, 1869, C produced a deed, bearing date the 12th of March, 1868, purporting to be a demise of the same land for a long term of years, as from the 25th of March, 1868, from A to C. It was found by the jury that the alleged lease was executed after A's conveyance to B, and antedated for the purpose of defrauding B. *Held*, that A and C were guilty of forgery. *Regina* v. *Ritson*, M. C. 39, L. J. R. 10.

INJUNCTION.

Restrictive covenant: beerhouse: sale of beer not to be drunk on premises. — Upon a purchase of land from plaintiffs, defendant by the deed of conveyance covenanted with plaintiffs that the land conveyed and the buildings thereon should not be used as a "beerhouse, inn or public house for the sale of spirituous liquors." Subsequently defendant obtained a license for the sale of beer not to be drunk on the premises, and commenced the sale of beer by retail in pursuance of such license in a house erected on the land. *Held*, on a motion for injunction, that the sale of beer by retail not to be drunk on the premises was not a breach of defendant's covenant. *The London and Northwestern Rail. Co.* v. *Garnett.* Ch. 39, L. J. R. 25.

LARCENY.

Taking: mock auction: influence of threat. — Prosecutrix entered a sale-room, where a mock auction was being held. Prisoner was auctioneer, and knocked down a piece of cloth to prosecutrix for twenty-six shillings, for which she had not bid, as he knew. Prosecutrix denied that she had bid; prisoner asserted that she had, and must pay for it before she could leave. Prosecutrix tried to go out of the room, when a confederate standing between her and the door also said that she had bid, and prevented her leaving. She then in fear paid the money, and took away the cloth which was given her. *Held*, that these facts constituted a larceny, as they sufficiently shewed that the money was obtained from the prosecutrix against her will. *Regina* v. *Macgrath*, M. C. 39, L. J. R. 7.

MALICIOUS PROSECUTION.

Reasonable and probable cause: onus probandi. — In an action for malicious prosecution it appeared that defendant's traveler applied to one P. for payment; that P. shewed him a receipt of plaintiff (who had formerly been defendant's traveler) for 20*l.*, which he had never accounted for; that defendant, on learning this, communicated with P., who sent the receipt and reaffirmed the payment; that defendant then consulted his attorney, and charged plaintiff with embezzlement before the magistrates, who dismissed the charge. It also appeared that there were other cases which if known to defendant would clearly have justified him in making the charge, but it was not shewn whether he knew of them when he made it. *Held*, that plaintiff had failed to shew the absence of reasonable and probable cause because (*per Bovill, C. J.*) the facts of P.'s case shewed reasonable and probable cause, or because at all events (*per Byles, J., and Brett, J.*) as plaintiff did not shew the contrary, defendant was to be assumed to have known of the other matters. *Brooks* v. *Blain*, C. P. 39, L. J. R. 1.

MARINE INSURANCE.

Policy on freight: inception of risk: insurance at and from port. — A ship, described as "lying in the harbor of Bombay," was chartered in August, 1866, to take a cargo from Howland's Island to Great Britain; the ship to be at Howland's Island on or before the 1st of June, 1867. The shipowners in September, 1866, effected a policy on the vessel "at and from Bombay to Howland's Island, whilst there, and thence to any port or ports, place or places of call and discharge in the United Kingdom." The insurance was on freight "chartered or otherwise." The ship left Bombay for Howland's Island, in October, 1866, in ballast, but before arriving there, sustained such injury from perils of the sea that it became necessary to abandon the voyage under the charter-party. *Held*, that the assured were entitled to recover as for a total loss of the freight, for the ship, though not actually bound to do so, had left Bombay for the purpose of fulfilling the charter-party, and had thereby taken a step and incurred an expense in earning the chartered freight, so as to give the assured a sufficient inchoate interest in the subject matter of insurance. *Barber* v. *Fleming*, Q. B. 39, L. J. R. 25.

NEGLIGENCE.

1. *Sale of special article manufactured by vendor: injury to wife arising out of contract with husband.* — The vendor of an article manufactured by himself of ingredients known only to himself, is liable to the person for whose use he knows it is bought, if damage results to that person in consequence of the article being, through the vendor's negligence, unfit for the purpose for which he professed to sell it. *George* v. *Skivington*, Ex. 39, L. J. R. 8.

2. A declaration by husband and wife alleged that the defendant was a chemist, and sold to the husband, to be used by the wife, a compound, the ingredients of which were known only to himself, and which he professed was fit for washing the hair, and could be used without personal injury; but that the defendant had acted so unskillfully, negligently, and improperly, in and about making the compound, that it was not fit to be used for the said purpose, and through his negligence, etc., the wife's hair was destroyed. *Held*, that the wife had a cause of action, and that the declaration was good. *Ib.*

PLEADING.

1. *New assignment: trespass.* — To a declaration for breaking and entering land of the plaintiff (described by abuttals), and breaking the plaintiff's gates, standing and being upon the land of the plaintiff and destroying the grass and herbage thereof, defendant pleaded that there was a public foot-path over the land of the plaintiff; and that defendant, having occasion to use the way, then entered upon the land of the plaintiff, and along the foot-path there; and because the gates had been erected, and then were wrongfully in and across the way, and obstructing the same, and preventing the convenient use thereof, defendant necessarily pulled down and destroyed them for the purpose of using the foot-path, doing no unnecessary damage. The plaintiff joined issue. At the trial, defendant proposed to give evidence of a public footpath, running east and west over the land of the plaintiff mentioned in the declaration. The plaintiff admitted the public foot-path, but offered to prove that the trespasses complained of were committed elsewhere, and that there

were no gates erected across the admitted foot-path, or obstructing it, but that there were such gates on the plaintiff's land across the track by which defendant passed, and that some of the gates were pulled down by defendant. The judge, however, ruled, that defendant, without further evidence, was entitled to a verdict, and directed a verdict accordingly: *Held*, by the Court of Exchequer Chamber (dubitante, WILLES, J.) that this ruling was right, for the gist of the action was the trespass upon the land, and the breaking of the gates only matter of aggravation; so that the plea was supported by proof of a public way in any part of the plaintiff's land; that if the plaintiff had wished to show that the trespass was on a part of the land other than the foot way, he ought to have new assigned, and in the absence of a new assignment, the plea was proved and the defendant entitled to the verdict. *Huddart* v. *Rigby* (Ex. Ch.), Q. B. 39, L. J. R. 19.

2. *Estoppel: plea in bar: reference and award: res judicata.* — To a declaration containing the common money counts defendant pleaded, except as to 145*l.* 3*s.* 1*d.*, parcel of the money claimed, that plaintiff ought not to be admitted to allege that at the commencement of the suit any more than the sum of 115*l.* 3*s.* 1*d.* was due in respect of the causes of action in the declaration mentioned, because that after the accruing of the causes of action in the declaration mentioned, and before suit, a dispute arose between plaintiff and defendant as to how much was due from defendant to plaintiff in respect of the causes of action, and thereupon by agreement between them before suit, they referred the question of how much was due to the award of W. H., and agreed to be bound by his award as to such amount; and that W. H. before suit made his award in writing of and concerning the premises so referred to him, and thereby awarded that the amount due in respect of the causes of action was 145*l.* 3*s.* 1*d.* *Held*, a good plea. *Cummings* v. *Heard*, Q. B. 39, L. J. R. 9.

PRIVILEGED COMMUNICATION.

Litigant: unprofessional agent. — Communications between a litigant and an unprofessional agent are privileged, if such communications were made, in contemplation of and relate to the subject matter of the litigation. *Ross* v. *Gibbs; Gibbs* v. *Ross*, Ch. 39, L. J. R. 61.

SPECIFIC PERFORMANCE.

Agreement by railway company to make and maintain a road and wharf. — A railway company entered into an agreement with the plaintiffs, who were owners of land near to the railway, whereby the company, in case they obtained a release from certain obligations imposed upon them by their Act of Incorporation, to construct a drawbridge and viaduct, as mentioned in their act, and in case certain land was conveyed to them, agreed with the plaintiffs to construct a road between certain specified points, and to pay a certain annual sum toward the maintenance of it, and also to construct and maintain a wharf, as therein specified. About six years after the date of the agreement the plaintiffs filed their bill for the specific performance of this agreement, alleging that the company had been released from their obligations, and the land mentioned in the agreement had been conveyed to them, but they had only commenced, and never finished, the road, and had not commenced the wharf. *Held*, upon demurer, that the court would enforce the performance of this agreement, and since the company had obtained the benefit of it they would not be suffered to evade it by any difficulties there might be in the way of the court superintending the work. If necessary, the court might permit the plaintiffs themselves to do the work at the company's expense. *Wilson* v. *The Furness Rail. Co.*, Ch. 39, L. J. R. 19.

TRADE MARK.

1. *Name of patentee used as name of machine: meaning of "agent:" misrepresentation: costs.* — Where articles of a particular kind have become generally known in commerce under the name of the original manufacturer (or patentee as the case may be), any person has a right, after the expiration of the patent, to manufacture such articles and sell them under that name; but he may not, by inscribing the name, as a proper name, on his shop-front, or otherwise, lead the public to believe that he is selling as the agent for the original manufacturer. *The Wheeler & Wilson Manufacturing Co.* v. *Shakespear*, Ch. 39, L. J. R. 36.

2. *Title of publication: Punch: Punch and Judy.* — The proprietors of a long-established weekly comic periodical called "Punch" moved to restrain the publication of "Punch and Judy," a rival periodical of like character and of the same size as and somewhat similar appearance to "Punch," but with a different illustration on the cover, and sold at a less price. It was in evidence that another well-known comic periodical was published weekly under the name of "Judy." *Held*, that the adoption of the whole title, "Punch and Judy," was no infringement of the plaintiff's right to use, and property in, the name "Punch;" and that the general public were not likely to be misled into purchasing defendant's publication by mistake for that of plaintiff's. Injunction refused. *Bradbury* v. *Beeton*, Ch. 39, L. J. R. 57.

3. *Sale of business and good-will by assignees of trader: right to name.* — In substance, there is no distinction between the sale of a business and good-will by a trader himself and a sale by his assignees in bankruptcy. *Hudson* v. *Osborne*, Ch. 39, L. J. R. 79.

WILL.

1. *Execution: signature not seen by witness: acknowledgment.* — A asked B to witness his will. He subsequently asked C if he would sign a paper (not mentioning its character) for him, and said he should wish B to be also present at the same time. A few weeks after they met by appointment. A produced a paper from his pocket and (alluding to the death of his wife) observed: "They were aware that there had been a change in his circumstances which involved an alteration in his affairs." He then so folded the paper that they could not see his signature or any other writing upon it, but they believed that they were signing his will. *Held*, that the circumstances warranted the presumption that the signature of the testator was on the paper when the witnesses signed, and that there was a sufficient acknowledgment of it. *Beckett* v. *Howe*, P. and M. 39, L. J. R. 1.

2. A asked B, in the presence of C, to witness her will, which lay open on the table. B signed the will, but did not observe A's signature. B then handed the pen to C, but did not see him sign his name. The will was prepared by C. The attestation clause stated that it was signed by the witnesses in the presence of each other, and C had also prepared other wills. *Held*, a good execution; the circumstances warranting the presumption that A's signature was on the paper when B signed, and that C, who was aware of the requirements of a will, signed before B left the room. *Olver* v. *Johns*, P. and M. 39, L. J. R. 7.

3. *Effect of reference to "written directions affixed to will:" where none affixed.* — A executed, in 1866, a will which referred to written directions, which he intended to form part of the will. This paper, which began, "To my executors, — I have written the following directions for your guidance with respect to many things and goods not mentioned in my will, which said will very probably will be found at William Weedon's, Esq., solicitor," was further subsequently executed by him according to the provisions of the Wills Act. In 1868 he executed a second will, which revoked all previous wills, and contained the following clause: "All my books, pictures, sketches, guns, rods, goods and chattels in and about the rooms I shall occupy at the time of my decease, I wish my executors to dispose of faithfully and conscientiously according to the written directions left by me, and affixed to this my will, trusting, as I unhesitatingly do, in their honor and integrity." Nothing was affixed to the will, which remained in the

possession of Mr. Weedon, the solicitor who prepared it, and the only paper of written directions forthcoming was that which the testator intended to form part of the will of 1868. *Held*, that it was not incorporated by the reference in the will of 1868, and that as an executed testamentary paper it was revoked by such will. *In the goods of Gill.*, P. and M. 39, L. J. R. 5.

AMERICAN JUDGES.

Few things are full of uglier omen for the future of the United States than that growing disrespect for the judicial body, which seems to be spreading itself through the country. The stories which now reach us are widely different from any thing heard before of American judges. The worst we formerly knew of the bench, even in the wildest frontier States, was that its occupants did not wear precisely the same awful costume, and practice the same dignified usages, as the judges and barons of Westminster Hall; but it was probable that they knew a great deal more of law than anybody about them, and that they did not flinch from applying what they knew. Even the functionary who decided the celebrated case of Silas Fixings was probably right in his conclusions, and certainly he was not afraid to back them. But now almost every mail brings us proof, that in the largest and not the least civilized of the older States, charges of flagrant corruption against judges are of every-day circulation; and though it is every now and then urged that the character of such or such a gentleman is beyond suspicion, or that the evidence is not thought in such or such a case to warrant the accusation, nobody dreams of asserting that the corrupt taking of money or money's worth for justice by a judge is inconceivable or impossible, or even uncommon. If Americans were in the habit of comparing the facts which fall under their immediate notice with the experience and history of other communities, they would see that this phenomenon of judicial corruption, generally believed, but acquiesced in without much very serious complaint, has no parallel or example since the beginning of civilization. Some of its mischievous consequences are beginning to be felt, not only by simple Erie bondholders, but by the English legal profession. The two branches of the English race knew, curiously, little of one another till the War of Secession, but there was an exception to this ignorance in the steady exchange of judicial precedents. There were certain American names which were appealed to here, with scarcely less confidence than Coke or Mansfield. But, quite recently, English judges have been known to shrink from recognizing the authority of American cases, and, very possibly, not quite fairly distinguishing between one man and another or between one State and another, have significantly inquired what these charges of corruption meant.

When an English gentleman, deputed by some railway bondholders, addressed the New York Chamber of Commerce, the other day, on the effect of the action of the New York judges upon the interests which he represented, the chamber broadly admitted the corrupt origin of this judicial intervention, but attributed it to the ignorance of alien constituencies. This merely meant that the judges of the State of New York are elective, and that the Irish vote is very powerful in New York. If, however, the purification of the American judicature is not to be expected until Irishmen are debarred from voting, or until the people give up the direct appointment of public servants, it may be long before the reputation of American judges recovers itself.

It is satisfactory, therefore, to find one of the most thoughtful of American newspapers finding the source of the evil less in the mode of appointing judges than in the mode of admitting legal practitioners. It is, in fact, quite clear, from English experience, that the best security for learning and purity in the Bench is learning and a feeling of honor among the bar. The most powerful of all forms of public opinion is professional opinion, and if the professional feeling of the New York practitioners revolted against ignorance and corruption as mortal sins in a judge, the machinery for creating judges would lose most of its importance. The mere discomfort of sitting in a court full of men of greater knowledge and higher honor than himself would keep the incapable party back from desiring a seat on the Bench; and, beyond this, the experience of several communities shows that a popular constituency charged with the selection of functionaries for whom professional qualifications are required, is influenced in the strongest way by professional opinion. But the American legislatures have, we are told, adopted of late the policy of nearly open admission to the legal profession, the advocates of the measure defending it on the extraordinarily fallacious ground that there is no more reason why special conditions should be demanded for the calling of a legal practitioner than for the calling of a grocer or a butcher. As one would have thought it enough to reply that the only callings which it is best for the public interest to leave quite open are those to which the maxim *caveat emptor* applies, and that no client can possibly tell whether a given lawyer can construe a legislative enactment correctly, the only inference which can be drawn from such an argument is an inference as to the class to whom it was considered worth while to address it. But the fact seems to be that in most American States persons are now admitted to the mixed profession of barrister and attorney with the least possible inquiry into their knowledge and character. The result, we need scarcely say, is very unlike that of a lax system of admission to the English bar. In this country the moral effects of all-powerful traditions have to be allowed for, and the effect of an undoubtedly unsatisfactory system of previous preparation is not that English barristers are unlearned, but that they are narrow. Even here, however, it is worth while noticing that the experience of the American States shows that, under a system of unchecked competition, the race is in the long run to the ignorant and the unscrupulous. Everybody of course would suppose, and we are carefully informed, that even in New York city there are many skillful and honorable practitioners, but they seem to consider it their chief duty to their clients to keep their business out of court, and hence little moral influence is brought to bear on the Bench by men of this class.

It is very difficult for an Englishman to judge to how many American States, and even to what parts of the State of New York, the suspicion of judicial corruption justly extends. Yet there are many signs that the sacredness of the judicial office is passing away everywhere. Nobody has ventured to breathe a word against the character of the judges of the United States, but yet there is evidently no scruple in packing for party purposes the Supreme Court, probably, in some respects, the most august tribunal in the world. The party now all-powerful evidently intends not merely to keep Democrats and Southern partisans out of it (which, under existing circumstances, would be scarcely wonderful), but to deny entrance into it to all but the extreme fanatics of its own opinions. The other day President Grant, having two vacancies in the court to fill up, proposed for them Mr. Stanton, the late Secretary of War, and Mr. Hoar, the present Attorney-General. Mr. Stanton, who was thought to be dying, was a very great administrator, but one of the bitterest of partisans. Mr. Hoar, though a Republican, is thought to be wedded to a high standard of judicial purity and independence. The Senate instantly confirmed the appointment of Mr. Stanton with almost indecent haste, but suspended its approval of Mr. Hoar's nomination. This plain intimation to the President that none but the extremest party appointments would be palatable to that branch of the American legislature, which is all but omnipotent, is nearly as disastrous a symptom of one sort as the New York stories are of another.—*Saturday Review.*

LAWYERS IN COUNCIL.

The following are some of the remarks made at the recent meeting of the Bar of New York city for the purpose of forming an Association, having for its object the improvement and elevation of the profession:

REMARKS OF MR. JAMES EMOTT.

MR. CHAIRMAN—I am not prepared to say anything which will really add to what has been already said. But I am ready to express my concurrence in the spirit of the remarks which have been made, and my strong sense of the importance of the object for which we have been called together. I think, however, that this is not the time for us to consider, or at least to discuss, what are to be the ultimate results of such an association as we propose to form. It is not to be concealed that there is a deep undercurrent of feeling among the lawyers who have signed this call, and who make up this significant meeting, upon certain subjects. There is an undertone in what has been said which it would require but little to bring into distinct utterance. We as lawyers feel deeply the complaints which are rife of abuses in the practice of lawyers and in the administration of the law. But I do not think that we are ready now and here to give utterance to our wishes. There may be differences of opinion whether our course should be defensive or aggressive, whether we are to be passive or active. But this assemblage indicates our agreement that we ought to associate, to organize, in order to obtain power—the power which comes from organizations. Power is the thing we are first to aim at. The use of it we are to determine afterwards. I think I can express the idea of this association, and the purposes for which it is to be formed, by saying that we shall aim to make ourselves once more a *profession*. [Applause.] Twenty-five years ago a series of changes were brought in, or at least begun, by the constitution of 1846, of which my friend, Mr. Nicoll, speaks feelingly, because he was one of its fathers.

Mr. Henry Nicoll—Spare me that. [Laughter.]

Mr. Emott—That constitution gave us the elective judiciary, of which I am not even to speak. But it brought another change quite as serious. It broke down the bar, and destroyed in effect, so far as the courts and the laws were concerned, what was then the profession of the law. We have become simply a multitude of individuals, engaged in the same business. And the objects and the methods of those engaged in that business are very much dictated by those who employ them. It is not altogether just to hold lawyers responsible for the evils in the administration of law of which the public complain. They are and do simply what their employers desire, and they will rise

no higher if they have no higher standard. So the judges are and will be just what those who really make them wish them to be. [Applause.] How great a power this power to make the judges of a country is, whether in responsible or irresponsible hands, no man who has thought at all upon the history of the past, or the conditions of the present, is ignorant. In this country there are three great questions looming up with fearful importance. One is the government of municipalities. Another is the question of popular education. With these we have only the concern of all citizens. But the third is the judicial administration of the country. That is a subject in respect to which we shall be expected and required, from our training and our pursuits, to think and to act. How, as well as for what, we are to act, are matters to come up hereafter. I think we are not ready to discuss them now. There is one reason, to which I will refer, why this present time is very opportune and proper for the organization of the bar. The people have recently adopted a modification or amendment of the judicial system of the State. Of the wisdom of this partial change it is too late to speak. It has been made, and under it questions are rapidly arising, not merely as to the selection of men for the important offices to be filled, but in respect to the organization and working of the system itself. Upon these questions, we not only have a right, but we shall be expected to be heard. In order to speak, to exert proper influence, we need to be organized. We want power at this juncture, and we can only have it by association. As a profession we may make ourselves felt even now in the settlement of the question which this crisis brings upon us, and upon the State. I do not mean that we are prepared this evening to enter upon any discussion of any proposed reforms of reconstruction. It will be time for that, so far as we personally are concerned, when an organization has been completed and our association has assumed its permanent form. When we have an organized society representing the profession of the law, affording advantages and possessing a character, which will make it desirable, if not necessary, for every worthy lawyer in this city to belong to it, we shall possess a power which I trust will be felt, and not a tithe of which can be wielded by the same number of separate individuals. It will not involve very long delay to await such an organization, for I am confident that the gentlemen who have conducted this movement so successfully to its present point, will speedily develop its completion in outline, if not in details. That will enable us to do our duty and contribute our aid to the settlement of great public questions, not only as men and citizens, but as members of a profession which we all delight to forward and to advance. [Applause.]

REMARKS OF SAMUEL J. TILDEN, ESQ.

My friend, Mr. Nicoll, has just come across to me to insist that I should say something here to-night. I presume his object is that I should say something in defense of that judicial article of the constitution of 1846. He probably thinks that I have, with him, a common interest and a common duty in that respect; but, sir, I disclaim every interest and every duty in that connection. I remember, with the utmost satisfaction, that, section by section, in every part and in the aggregate, I recorded myself against the whole thing. [Applause.]

Mr. Nicoll—Do me the same justice.

Mr. Tilden—I don't remember what my friend did; I presume he did what was right. He asks me to do him the same justice, which I most cheerfully do. Sir, I came here to-night, simply because when this call was tendered to me I signed it, and thought it a duty, humble as I am, to testify by my presence here my sympathy and my approval of the general objects for which we have assembled. I do not quite concur, however, in some of the suggestions that have been made here. I do not, I mean, quite concur in them in this—that they do not quite express the ideas of their authors, or of any of us. Sir, I should be not unwilling that the bar should combine to restore any power or influence which it had lost, except such power and influence as it may have deservedly lost. As a class, as a portion of a community, I do not desire to see the bar combined, except for two objects. The one is to elevate itself—to elevate its own standards; the other object is for the common and public good. [Applause.] For itself, nothing; for that noble and generous and elevated profession of which it is the representative, everything. [Great applause.] Sir, it cannot be doubted—we can none of us shut our eyes to the fact—that there has been, in the last quarter of a century, a serious decline in the character, in the training, in the education, and in the morality of our bar; and the first work for this association to do is to elevate the profession to a higher and a better standard. [Applause.] If the bar is to become merely a method of making money—making it in the most convenient way possible, but making it at all hazards—then the bar is degraded. [Applause.] If the bar is to be merely an institution that seeks to win causes and to win them by back-door access to the judiciary, then it is not only degraded, but it is corrupt. [Great applause.] Sir, I am as peaceable a man as my friend Nicoll, yet I confess that his words of peace sounded a little too strongly in my ears. The bar, if it is to continue to exist—if it would restore itself to the dignity and honor which it once possessed—must be bold in defence, and, if it need be, bold in aggression. [Great applause.] If it will do its duty to itself—if it will do its duty to the profession which it follows, and to which it is devoted, the bar can do everything else. It can have reformed constitutions; it can have a reformed judiciary; it can have the administration of justice made pure and honorable, and can restore both the judiciary and the bar, until it shall be once more, as it formerly was, an honorable and an elevated calling. [Applause.] I do not know, sir, in what form this is to be done. I do not know in what form this institution, which you are now initiating, is to establish itself. I have had no part in any preliminary consultation, but I am sure that you are right in taking the first step to-night, which is, to organize yourselves into a body, and then—without passion, without preconception, with deliberation, with fixed purpose, with settled design—I believe that you may go forward, step by step, through the days and years that are in the future, and become a blessing to this great community of which you are a part. [Applause.] Sir, the city of New York is the commercial and monetary capital of this continent. If it would remain so, it must establish an elevated character for its bar, and a reputation throughout the whole country for purity in the administration of justice. [Applause.] I had lately occasion to express the opinion in private which I now repeat here to-night, that it is impossible for New York to remain the center of commerce and capital for this continent, unless it has an independent bar and an honest judiciary. [Great applause.] I do not mean by this observation to allude to any particular individuals; still less do I mean to cast any reflection upon the general character of the judiciary of this State. But I felt, in 1846, when we embarked in that great revolutionary change in the judidial system, which was made by the constitution of that year, that it was extremely likely that the system itself would develop evils under which human society could not well get along. I had great doubt last year about what ought to be done in regard to the judicial amendment that was adopted. Considering it a decided and valuable improvement as to the constitution of the Court of Appeals, I yet reflected that it not only left most of the practical evils and abuses of the judicial system untouched, but, perhaps, to some extent confirmed them in existence, and that there was great danger in the adoption of it, that the public sentiment, especially of the rural districts, would be satisfied to such an extent that we should be compelled to live under this judicial system another quarter of a century, which, for you, Mr. Chairman, and me, will probably be the most part of the residue of our lives. *Sir, I believe that this country is to-night at about the lowest point in the great circle which we have occasionally to traverse. I believe that there will come a sounder and a better public sentiment, in which speculation and gambling, and jobbing and corruption will lose their power, and in which free government will vindicate its right to the confidence of mankind.* If I did not believe this, I should think that a very great part of my own life was lost, and all the traditions I have derived from my ancestors. Sir, I hope that the society which you organize to-night will be an institution that shall do much valuable service toward hastening this consummation, *so far as the bar is concerned.* [Renewed applause.]

REMARKS OF HENRY NICOLL, ESQ.

MR. CHAIRMAN AND GENTLEMEN: I desire to address a few words to this meeting in explanation of the motives and objects which have influenced those of us who set on foot the movement for this organization, which it is proposed this night to establish.

It will not be denied that there is a common belief, not only among ourselves but among all classes of our citizens, that the bar of this city fails to exercise that influence which is justly due to it. This is a melancholy fact. We look for the causes of this decline; where are they to be found? Some of us who, perhaps, are of a despondent nature, may be inclined to attribute this decline of the profession to a general demoralization which is permeating, as they fancy, the very vitals of society. But I do not belong to that class. I believe that the causes of this decline are nearer to the surface. In my opinion they are to be found among ourselves. I believe that if the bar should be animated by proper sentiment it would soon regain that influence which, it is painful to acknowledge, has been lost. [Applause.] This decline, gentlemen, has been insidious; it has been steadily going on for more than twenty years; it has at last become so marked that we cannot become indifferent to it. The best evidence that the time has arrived when an effort should be made to arrest the disease, is the fact that there is such an assembly as this here to-night. [Applause.]

The most prominent of the causes of this decline is to be found in the revolutionary changes made in our condition by the Constitution of 1846. That Constitution, under which we still live, gave almost a death-blow to the legal profession. Disastrous effects could not but flow from the organic changes made by that instrument. It is true they were not at first realized. We went along submitting to the inevitable tendency of things without, perhaps, appreciating how rapidly we were drifting down the current. But, gentlemen, when the gates of the bar were thrown entirely open; when those honorable distinctions which formerly existed in the profession were abolished; when the name of counselor ceased to be heard in the land, and when every man—from the merest tyro to the greatest and most renowned amongst us—was put upon the same footing, it became a necessary result that without some link which should connect and bind the more worthy of the profession together, it must accept its destiny and be eventually destroyed. [Applause.]

The diminished influence of the bar, it is true, may be due also in some measure to the radical change which has been made in our judicial system: but it is unnecessary and it may be improper to speak of that now.

We are here simply concerned with onrselves, and not with the judiciary. The more you reflect on this subject, the more will you have reason to believe that the great evil exists in the fact that this bar has been reduced to a mere collection of individuals without class or rank—a dull dreary level of enforced equality. Perhaps it may sound strange in a democratic community to talk in this way; but I apprehend that, outside of political rights and relations, distinctions must exist everywhere—they are necessary for the very welfare of society. [Applause.]

We have come together to-night to endeavor to correct this

evil, and to form an association by which a freer interchange of ideas and more intimate relations with each other may be promoted among the members of this bar, and to supply, to some extent at least, the great defect in our system of which I have spoken. It is in that spirit that the gentlemen who have undertaken to organize this association are here, and they rely upon your active co-operation and assistance in the business. [Applause.]

Need I say to you that one of the most important features of this remarkable age is the power attained and the great results effected by association. You have only to look at our telegraph across the ocean and at our great railroads which span the continent, to see what may be accomplished by combination. You will find that the great law which originated the organizations which have effected such astounding results is the principle of association.

All classes, all professions, save that of the lawyer, have their associations. The humblest artisan in the land falls back upon his trades-union, and too often is enabled for the time to bid defiance to capital. Why is it that we, the most important class in the community, conservators as we are of justice, sworn officers of the courts — why is it that we are as incohesive as the shifting sands of the ocean beach? Shall this be permitted to continue? Can we not in some way infuse among our members a better idea of their high and lofty calling? Can we not create an organization through which the profession may be educated up to a fitting sense of its grave and elevating responsibilities, and of the position which it ought to occupy in this community? I need not dwell upon the importance and dignity of the legal profession. We all know that there can be no more responsible office than that of a lawyer; and that if you have not a bar, and let me say, an independent bar, that will stand up against oppression and can protect the weak and the defenceless, society will dissolve itself.

Now, gentlemen, I know that there may be much difference of opinion as to the special objects of this association; I fancy that there are not a few who will perhaps think it is formed in a spirit of hostility — that its object is attack. I hasten, for myself and every other gentleman associated with me, to deprecate any such idea and to disavow any such intent. This association is in an embryonic state. We are weak. We associate for mutual protection and assistance; we are not in a position to assume offensive operations. What we want is to create a spirit of professional brotherhood, to create in the members of the profession a regard for the profession. [Applause.] When we shall have done that we shall have accomplished everything. When we shall have brought within our ranks, as I confidently hope we shall do, all that is intelligent, all that is honest, all that is honorable in this profession, when we shall number our members by thousands, do you think we shall need to concern ourselves about the influence which this association must inevitably acquire? Fancy all the intellect and respectability of the bar enrolled, united and actuated by a common purpose. Who can limit its influence — who will dare to say what it may not accomplish? Let me tell you that this profession, when thus united, thus animated, will be able at least to protect itself from aggression, come from what quarter it may. [Applause.] The time will assuredly arrive when this will be so; but we are not here to-night to speak of what may hereafter be done; we are simply making a beginning. If we can but induce our brethren to enter this organization and to co-operate zealously in building it up, the future will take care of itself.

Gentlemen, it is singular that there never should have been any association of this bar within the memory of its living members. Even in the days when Kent and Spencer and the other illustrious men who adorned our bench were living; when the great names of Welch and Emmet, and Ogden and Slosson, and the many others which will readily occur to you, shone as the brilliant lights of this bar, there was no organized association of its members; but we know that in those days the bar in this state stood as high as the bar of any other state or country. And why? Because the individual lustre of its leaders gave it a power which was irresistible. Perhaps, if an institution like this which we now propose to form had existed at an earlier day, it might have done much in arresting the decline which we all see and which we have so much cause to deplore.

It is a curious fact, and it may not be known to you all, that more than a century and a quarter ago there was a bar association existing in full vigor in this city of New York. We have no trace of the nature of that organization. History has not busied itself with what was perhaps then considered a little thing. We know not who were the members of that association, or what was its constitution; but one thing we do know — we know what it did.

In the year 1763, when Lieutenant-Governor Colden was administering the affairs of this colony, being ambitious of extending the prerogatives of the crown, he fancied that under the instructions he had received from the home government, a right was given him, with his council, to review upon appeal the findings of a jury upon questions of fact. Before that time the same rule prevailed here which obtained in the parent country, that is, that a writ of error was the only way of reviewing a common law judgment, and that upon that writ no questions but those of law could be brought up. But the governor, ambitious of exercising this control, determined to issue a writ of appeal upon a common law judgment, for the purpose of reviewing the decision of a jury. The writ was sealed by him; but, gentlemen, to the credit of the legal profession of that day, not one solitary lawyer could be found who would argue that appeal! [Applause.] The colonial governor, as you may suppose, denounced the New York bar, and in a letter to the home government he speaks of this bar association, which, as he said, had been formed about 1747, as exercising a most dangerous control and influence in the city of New York. That was the New York bar of a hundred and twenty-five years ago! Gentlemen, have we lost all the spirit of our forefathers? Now come down with me three years further. In the year 1766, as you all know, the British government commenced its course of tyranny over this country by its first stamp act. You know, as a matter of history, that the passage of that act was received with a storm of indignation in every one of these thirteen colonies; but, gentlemen, do you know that there was no place in the whole country where the resistance to this odious measure was more determined and effectual than in this city of New York? When the vessel, which brought the stamped paper here, arrived, such was the excitement of the people that her officers were obliged to anchor her under the guns of a frigate; when the packages of stamped paper were taken from the vessel, the demonstrations of hostility were so great that the governor was forced to consent that he would not put the law in operation, and he deemed it prudent to surrender the stamped paper to the mayor and corporation of this city. Now, gentlemen, who was it who organized and marshaled this resistance? I am proud to say it was this same bar association. The governor had denounced it in vain three years before, but now on a vastly larger theater of action, it proved itself to be equal to the emergency. You know, as matter of history, that the crown was foiled in this its first attempt, and reluctantly repealed the stamp law, but the governor, disheartened by failure, demanded of the home government that measures should be at once taken to diminish the influence of the lawyers in the affairs of this colony. What comfort should this be to all of us in looking back upon what our forefathers did; and when any of my friends — as too many of them do — shrug their shoulders in the very bitterness of despair, and say that nothing can be done but turn on our backs and die, I ask them to remember what the bar of these early days achieved. What they did, we, too, may do. And when this organization, which we are now seeking to form, shall grow in strength, — when it shall become a body all compact, when its muscles, and sinews, and nerves shall have attained their full vigor, — it will be able to do great things for the profession and for the community.

Now, gentlemen, I have perhaps detained you too long with these general remarks. You will be more interested to hear something from me of what we, who have cheerfully undertaken the business of bringing you together, have considered the objects to be attained by this organization.

We desire to make this organization such that every lawyer in this city of respectability, who desires to do so, may join its ranks. We propose to open rooms in some convenient locality, and to supply them with as good a library as our funds will allow, so that there the elder and younger members of the profession may meet during the evenings, and at other times, to take counsel together and talk over the wants of the profession, and where, if they have occasion to study their causes, they shall find a convenient working library. Beyond that, we have not yet ventured to advance a step. Doubtless many of you here have your views on the subject. You will be able to aid us greatly by the expression of your ideas as to the manner in which the institution should be established and carried on. For myself, however, I confess that I think the great object that overrides every other is *to get our organization*. I am for organization; convinced, that with that once achieved, we may safely trust that all that we hope to accomplish will be fulfilled in the not distant future. [Great applause.]

REMARKS OF WILLIAM M. EVARTS, ESQ.

I suppose, Mr. Chairman, that every one of the gentlemen here to-night is as much a mover in this effort to combine the Bar for useful purposes of interest as any other. So far as I have made the subject a matter of conversation with my brethren of the Bar, with more or less of point in the conversation, during the last seven or eight years, I have found no difference of feeling and none of purpose; and I believe all that has been needed has been that some should take the responsibility and labor of collecting the sentiment of their brethren, as has been done by those who have signed the call for this meeting, to ensure an honest, a sincere, a brave, a considerate, a determined, a persistent and an absolutely fearless organization of the Bar of New York. [Applause.] I think there is nowhere in this matter to be seen, feared or suspected a sinister, a selfish, a personal object, either in respect to protection, defense, elevation or attack; it is all public, all general, all noble and useful. Now, there have been felt, I think, to be several considerations which should induce the Bar, as scholars, as gentlemen in a common pursuit of life, to combine their influence and the contributions of their resources in a way which will afford us opportunities for the research and study which our profession requires, and for the consultation and communion with each other so important to it. I think we have all felt that to be a great, a numerous, a wealthy Bar, without a library adequate to our name and suitable to our credit, without the means of association in the ordinary forms of intercourse on common grounds, during the hours of the day when we have any leisure or opportunity for such intercourse, was not only a reproach to us, but an injury to us. Without any special moral occasion, or any particular incentive of public duty in the public need, I think that in the minds of many there has been a purpose, whenever opportunity should serve or attention could be commanded, to induce a combination of the profession with such an object. I hope, sir, that this committee will consider these objects as a part of the organization proposed, and which must have sufficient of a substantial and acceptable interest to its members to keep us closely and permanently connected. [Applause.] With this general object and motive for combination, there is a more powerful and deeper, a more responsible and a more active sentiment, growing out of the condition of our profession and of

the judiciary, and of the sentiments of this community toward both. Careless we have been, careless almost all the interests of society have been, of the great and perpetual trust which rests upon every generation in a free and equal community to see that they bear their share ever, not only in the enjoyment of the noble heritage that has come to us, but in its maintenance, its protection and its defense, and that they shall transmit it ever, not only unimpaired, but amplified—not only unpolluted, but ever brighter and fairer, to every succeeding generation. [Applause.] And we must not lose sight of this fact, that just in proportion as a society is free and equal in its constitution, just as there are no artificial and no permanent gradations in it, just as there are no rulers and no captains, just so is it the more incumbent upon all in the only rank there is—the common rank—to see that they do not become selfish and isolated and envious and injurious, but that they cultivate sentiments of common purpose for the common interests. In institutions framed in this spirit must ever be the only form of power that an equal and free community can tolerate; and every institution must take care of itself, and not leave to the enterprise of its competitors and rivals the building up of itself.

Now, with these general observations, let us see how much the Bar can do for its own credit, its own power and the service of the community, and how much it can do toward maintaining the credit and character of the Judiciary—that weakest portion of our political system, that portion that has, or should have, no patronage or influence and no political authority, which is dependent upon its integrity, its learning, its capacity, its public spirit, and which must ever rest upon the Bar as the chief interpreters to the people at large of its relation to the community, and as the principal means and agency by which it discharges its judicial duties in all its obligations to that community, for the Judiciary is not a spontaneous agency in the administration of justice. It never does any thing solemn or *ex parte* except by the invitation—the instigation, if it be evil—of a lawyer. [Laughter and applause.] Now, is it fair that the Judiciary of this State should stand in the general doubt, or general discontent, or general disregard of the community? that it should be subject to aspersion and to suspicion, and not feel, or be permitted to plead, that some lawyer was the first mover in every wrongful act of that Judiciary that brought it thus into contempt? Who does not reverence the Judiciary? Who does not, in the midst of the pressure, the excitement, the credit, the honor, the emoluments—opened so richly to prosperous lawyers here—respect every man who takes a place upon the Bench, and foregoes these bright and alluring invitations to fame and wealth? And who but feels struck, in his own sense of manhood and of dignity, when the Judiciary, which is the crown and honor of his profession, is brought into disrepute? And who, when he reflects that his own profession are the moving parties in everything that is done by a Judge, good or ill, but feels that it is time for him to collect the honorable and upright and worthy men of his profession together, that they may put their finger upon the unworthy who take the lead, under whatever motives, in these injurious and weakening courses or proceedings? [Applause.] Why, Mr. Chairman, you and I can remember perfectly well (and we are not very old men) when, for a lawyer to come out from the chambers of a Judge with an *ex parte* writ that he could not defend before the public, before the profession and before the Court, would have occasioned the same sentiment toward him as if he came out with a stolen pocket-book. [Great applause.] Our knowledge of the profession and of the affairs of life teach us that from the other side we get new light and new wisdom, and then comes the solemn action of the Court, and we meet our adversaries, our brethren face to face before the Judge; but as to what passes between the Judge and us *ex parte*, it is upon honor. [Applause.]

Sir Jonah Barrington, in his Recollections of the Irish Bar, tells us, that this sense of honor and right, so far as it depended upon the personal knowledge and skill of the lawyers engaged in any cause, was carried to such an extreme, that if a man demurred to a pleading at that bar, it was considered a good ground for a challenge, as being an imputation upon the ability or integrity of the pleader, and he says that many duels were fought upon that ground. But, without sharing this extravagance, really, Mr. Chairman, I think I have not exaggerated this matter of the duty and responsibility of the bar in its dealings with the bench.

Now, perhaps, I have said enough, but I will add that the situation is an extremely serious one. It is very difficult to make people believe, but still it is true, that if an institution contains corruption, and the line is not drawn closely to sever it at once from the sound body, however honest, however earnest may be the purpose of the worthy members, the plague-spot is in the body, and the *whole is sick*. The disease is not local. It may be cured; but while the plague-spot lasts, the whole body suffers. The institution is suspected, the distinction between the members is not and cannot be known. I speak not of the bar quite as much as I do of the judiciary, and it is only when you attempt to make a rally of the powers left, to make the issue, that there shall be *no* disease, *no* corruption and *no* base aspersions without foundation, and that it shall not be permitted for men to scoff without cause at the administration of justice, either through the bench or by the bar, and make it plain, one way or the other, that the institutions are pure and strong, or that they are vicious and corrupt—it is only by that rally, that we can restore health, and strength, and confidence. And that is the purpose of this rally to-night. [Applause.] It is aimed at no other object than the evil itself—to ascertain it, to measure it, to correct it, and restore the honor, integrity and fame of the profession in its two manifestations of the bench and of the bar. [Prolonged applause.]

NOTARIES APPOINTED.

List of Notaries Public, appointed by the Governor and confirmed by the Senate, March 10, 1870:

COUNTY OF KINGS.—*Re-appointments.*—J. Joseph Ammenwerth, Brooklyn; John A. Armstrong, Norman Andrews, Samuel J. Allaire, Williamsburgh; John F. Baker, Frederick W. Burke, Charles S. Barker, A. P. Bates, Thomas C. Bowen, E. Wilson Bloom, J. Kent Boyd, Stephen C. Betts, Jacob J. Bergen, Cyprian S. Brainerd, Jr., John Brainerd, Caleb F. Buckley, George N. Birdsall, Silvester H. Clarke, Stephen J. Colahan, John Curtin, Brooklyn; Samuel Cockcroft, Williamsburgh; R. Ormiston Currie, New Utrecht; Asher P. Cole, Brooklyn; John Currie, New Utrecht; A. B. Capwell, John E. Carpers, S. B. Chittenden, Jr., John H. Colahan, Chas. Domm, Julius Davenport, George R. Dutton, Thomas T. De Witt, John W. Dyer, Edward F. Davenport, Albert Eckert, James Fairbairn, Daniel E. Foley, Alonzo C. Farnham, David G. Fanning, Maurice Fitzgerald, Charles E. Frost, E. Gates, Isaac B. Gregg, Alfred Greenleaf, James Goudge, Herman L. Guck, Edward L. Greenwood, Hubbard Hendrickson, Brooklyn; Melville Hayward, Wm. E. Horwill, Williamsburgh; Rudolph Herr, Theodore Ainesdale, Patrick Hogan, George C. Harward, Amzie Hill, John T. Heydinger, Jr., Bernard Hughes, John F. Hennessey, Hiram Holmes, Daniel L. Jones, Jr., George L. Kilborn, Horatio C. King, Chas. W. Knowlton, James H. Kidder, Pardon W. Kenyon, Chas. B. Loomis, E. E. Lombard, L. L. Laidlaw, Wm. H. Lawrence, Peter J. Leyendecker, John Z. Lott, John Linsky, John A. Lockwood, James A. Murtha, Thomas C. Moore, James W. Monk, Dennis McNaman, Edward J. Maxwell, Joseph Mackie, John H. Mott, Paul Miller, Wilbur B. Mahen, Walter Nichols, John K. Oakley, John Oakey, John J. Perry, Brooklyn; Matthias J. Petry, Williamsburgh; Wm. Poole, George W. Pearsall, Andrew J. Percy, James H. Pratt, John Patterson, Francis G. Quevedo, Francis C. Roche, Jacob Rosengarden, Charles J. Ryberg, Sidney L. Rowland, Brooklyn; John H. Rogers, Williamsburgh, Wm. Savage, Chas. H. Smith, J. Milton Stearns, Jr., N. McGregor Steele, Levi Solomon, Brooklyn; Leavitt L. Stockbridge, Williamsburgh; Wm. F. Sebert, Elnathan L. Sanderson, Edward Simpson, Jr,, Abia B. Thorn, Samuel J. Thomas, Brooklyn; Eliphalet A. Thurston, Greenpoint; Benjamin K. True, Wm. Taylor, Chas. C. Talbot, Brooklyn, George K. Tyler, Williamsburgh; Reuben H. Underhill, Wm. M. Van Anden, Benjamin G. Woortman, Sidney Williams, R. Stewart Willer, Wm. T. Woodruff, Wm. L. Whitney, F. William Walker, Matthew B. Whittlesey, Charles Wagner, J. N. Wyckoff, Jr., Abel C. Willmarth, Henry J. Willis, Geo. P. Willey, Brooklyn.

New Appointments.—Wm. E. Austin, John Atkin, B. D. Allen, Henry H. Adams, A. J. Berrian, Thomas Burk, Benjamin Banks, Chas. H. Burtis, James B. Bach, Wm. Blair, Edward Brookhoot, Jr., Wm. N. Bennern, Brooklyn; John F. Buckmaster, Greenpoint; John H. Bergan, Flatbush; Wm. H. Ballantyne, Henderson Benedict, Henry Beam, Lyman W. Bates, John J. Blair, Robert G. Blood, Martin Brennan, Henry C. Bogert, Smith C. Balis, Eugene M. Cammeyer, Brooklyn; Patrick Callahan, Greenpoint; Victor Chequvine, Patrick H. Colgan, John Cassidy, John E. Cafet, Geo. H. Crans, Howard C. Conraddy, Adrian V. Cortelyou, Jr., Frederick Cobb, Edward W. Candee, J. A. Christadoro, Thomas M. Clark, Joseph Cunningham, Frank Crooke, Brooklyn; Chas. W. Cheshire, Williamsburgh; Wm. Palmer Dixon, Brooklyn; John Dowling, Williamsburgh; Thos. W. Davis, Anthony R. Dyett, Henry Davison, Jr., Wm. H. Delaney, Brooklyn; Edward E. Daily, Williamsburgh; Peter Eireman, Thos. H. Elliott, Joseph Kingleton, Cornelius V. Finehout, George L. Fox, Edward H. Flavin, Henry Ferris, Adolph Getting, Daniel J. Gillen, Samuel Godwin, G. F. Goltmar, Joseph E. Gay, Joseph C. Hughes, Edward T. Howard, Geo. W. Hunt, Brooklyn; Frank W. Hannaford, Greenpoint; Geo. W. Hall, Ferdinand Hagendorf, Brooklyn; Chas. J. Hobe, East New York; G. C. Himer, Brooklyn; Alexander H. Henry, Williamsburgh; Francis J. Humbert, James Johnston, David H. James, Greenville T. Jenks, Ira A. Kimball, Armand Koerfer, George Kingsley, William Kent, George J. Landon, Richard B. Leech, August Loehwing, James P. Lancaster, Washington Lackmann, William H. Langley, James M. McNamara, James D. McConochie, Marquis L. Mann, John B. Meyenborg, Thomas J. Marvin, John Madden, George J. Murphy, Joseph Sprague Meeker, Isaac Morley, Jr., Charles T. Middlebrook, John C. McGuire, Wm. H. Merrifield, Thomas Martin, Augustus Merkel, James W. McAvoy, James H. McKinney, Daniel W. Northrup, John H. Neimyer, De Witt C. Northrup, C. J. O'Donnell, Daniel Phelan, Jr., Samuel W. Patchen, Orestes P. Quintard, J. B. Reynolds, J. Pryor Rorke, James W. Riggs, Claude Rice, Jaques Sandmeyer, S. A. Smith, Jr., Brooklyn; Charles Smith, East New York; J. Henry Storey, James B. Staats, Nathaniel S. Simkins, Jr., Aaron Stone, William O. Sumner, Angus C. Tate, William J. Tate, Edward Fusch, Joseph Treloar, William H. Thompson, Brooklyn; Albert H. W. Van Sicler, New Lots; May Vetter, David Van Wart, Frederick B. Van Vleck, E. K. Winship, Octave Whittaker, Brooklyn; Tunis B. Woolse, Flatlands; Charles W. Wert, Anthony Walters, Sidney Ward, John Whitford, Wm. H. Whitlock, James Younie, Charles F. Young, Brooklyn;

George Zallenkofer, Thomas S. Moore, Williamsburgh — all of whose terms will begin March 30, 1870.

ONEIDA COUNTY.—*Re-appointments.*—J. Prescott, M. L. Case, J. Lee Tinker, Clarke Dodge, James G. French, Henry Farnam, L. L. Lewis, M. M. Burlison, J. B. Cushman, J. Milton Butler, Charles L. Symonds, William Knight, H. G. Utley, Zacchary Hill, W. B. Goodwin, Everett Case, John A. Goodall, R. S. Williams, George R. Thomas, T. O. Grannis, and Eugene Stearns.

New Appointments.—Echabod C. McIntosh, William H. Fisher, James Merriman, William O. Shelley, Silas L. Snyder, C. L. Phelps, Charles F. Bissell, N. D. Brown, M. Delos Barnett, Alfred C. Coxe, John H. Sheehan, Charles Simpkins, William P. Quin, Sidney A. Bunce, Charles J. Cole, Aaron H. Thomson, John H. Knox, William A. Donaldson, Lewis H. Shattuck, and Arthur Fuller.

MONROE COUNTY.—*Re-appointments.*—Lewis Allyn, Mortimer H. Green, Samuel D. Cornwell, Julian Shelton, Levi F. Ward, George C. Mauser, Frederick A. Hatch, Theobold W. Tone, William M. Colvin, Alonz L. Mabbett, Charles L. Fredenburgh, Peter W. Handy, Daniel W. Burk, Henry F. Huntington, Alvin L. Barton, Edward J. Reed, Harrison S. Fairchild, J. D. Decker, William G. Barker, John H. Kingsbury, and Joseph A. Steell.

New Appointments.—George M. Elwood, P. M. Crandall, Charles P. Achilles, Wm. P. Chase, John V. Effner, George T. Hanning, Daniel L. Johnston, De Lancey Crittenden, Alfred T. Braman, Henry Benedict, Maximillian Lowenthal, Menzo Van Voorhis, Richard H. Warfield, C. P. Wolcott, Frank H. Honey, and Edward W. Gaskin.

CHENANGO COUNTY.—*New Appointments.*—Robert L. Brougham, Eneas Fenton, George H. Winson, Stanton D. Donaghe, S. L. Rhodes, Ranson Clark, William A. Martin, Daniel W. Redmond, Cyrus A. Bacon, Horace Packer, George W. Ray, and Francis E. Diminick.

Re-appointments.—Charles T. Ackley, Joseph E. Juliand, Warren Newton, and James W. Clark.

GREENE COUNTY.—*Re-appointments.*—Sidney A. Dwight, Addison C. Griswold, Manley B. Mattice, Charles H. Teal, George R. Olney, and Hiland Hill.

New Appointments.—Edwin Russ, William W. Pettit, and Abner Barney.

DUTCHESS COUNTY.—*Re-appointments.*—Wm. R. Woodin, Henry D. Myers, John T. Hull, Reuben North, John S. Crouse, John Nelson, William M. Sayre, Robert N. Palmer, William A. Van Wagner, Milton E. Curtice, Charles B. Herrick, Jackson W. Bowdish, Philip Wells, Zebulon Rudd, and George H. Shift.

New Appointments.—C. W. Hignell, John H. Otis, George W. Ingraham and Hiram S. Haviland.

ULSTER COUNTY.—*Re-appointments.*—Benj. M. Freligh, Joseph Smith, Benjamin M. Coon, Howard Chipp, Charles D. Bruyn, John E. Van Etten, Cornelius H. Van Grasbeck, Friend Hoar, Jr., James R. Foland, Jacob Freileach, Anthony Benson, Charles Bray, George G. Keeler, John Lyon and Macdonald Van Wagener.

New Appointments.—Henry Pitts, Thomas B. Keeney, John J. Schoonmaker, James M. Van Wagener, Henry Griffiths, Herman Winans, Arthur J. Melion, William Reiser, Jesse F. Bookstaver, William Queensbury, Isaac Becker and Peter M. Gillespie.

Re-appointments.—Abijah Bowen, Simon P. Kester, Thaddeus Hait, Solomon G. Young, Abraham D. Deyo, Edmund Eltinge, Robert J. Dickey and James M. Cooper.

Notaries Public confirmed March 11, 1870:

STEUBEN COUNTY.—*Re-appointed.*—John M. Finch, D. L. Benton, Wm. S. Hubbell, Henry Faucett, Wm. W. Allen, Ellsworth D. Mills, John N. Hungerford, George W. Patterson.

New Appointments.—Hiram Bennett, Andrew S. Charles, Harris C. Higman, De Witt Bender, Francis H. Holmes, Wm. H. Young, Timothy M. Younglove, Robert L. Browdage.

GENESEE COUNTY.—C. A. Hull, Asa A. Woodruff, Benj. F. Ballard, Abner Hull, Charles Spencer, James S. Stewart, David E. E. Mix, Orlando Croff, Lawrence L. Crosby.

NIAGARA COUNTY.—Erastus Bowen, John E. Pound, John H. Buck, Benjamin J. Hunting, Job W. Vail, A. Ford, James F. Baldwin, John H. Goodman, Geo. A. Torrance, James G. Porter, S. Park Baker, Henry Luth, Henry Corner, William B. Lewis, John H. Schmeck.

LEGAL NEWS.

A Pittsburg judge recently fined a young man $50 for kissing a lady in the street.

A Tennessee jury has thought it worth $10 to call a man unjustly a Kuklux in that State.

The Junior Law Class of Washington University numbers among its members two females.

The law expenses of the United States Government during the past year amounted to $375,990.

A Tennessee court is listening to 300 love letters which are being read in a breach of promise case.

R. Collier, one of the ablest lawyers of Virginia, died in Petersburg on the 3d inst., aged 65 years.

An English justice has sent a man to prison because he persisted in calling himself the Prophet Jeremiah.

The Pennsylvania Legislature has been petitioned by the Philadelphia bar to increase the judiciary, both local and State.

Hon. Geo. Arnold, of Cleveland, a prominent lawyer and a justice of the peace of that city, fell dead in the street a few days ago.

Two Chicago "divorce lawyers" and their client have been sent to jail for sixty days for conspiring to obtain a divorce without publication.

An enterprising lawyer has improved upon Mr. Brady's invention, and proposes to clear a murderer by proving that his father was once insane.

It has been judicially decided that death caused by apoplexy, created by intemperance, is not a bar to the recovery of a life policy of insurance.

A San Francisco judge lately tempered justice with mercy by fining a half-starved girl twenty-five cents for stealing a pitcher of milk, and then raising twenty dollars for her among the lawyers and others who were in court.

The death at Jacksonville, Fla., of I. M. Frazier, a prominent member of the Baltimore bar, is announced. He was Speaker of the Maryland House of Delegates in 1867, and was a steadfast Union man throughout the war.

The German lawyers of New York city have formed themselves into a Legal Aid Society, the object of which is to aid poor Germans lacking the necessary knowledge of the language and laws of this country in law cases.

Senator James Nye, of Maine, is to appear in court in April to answer to a charge brought by a diamond broker of Constantinople, whom he refused to pay for a diamond ring worth £75 which he purchased while Minister to Turkey.

Mrs. E. Morris, the female occupant of the judicial bench in Wyoming, is described as married; about sixty years of age; more fat than fair, and a believer in Spiritualism, and a different organization of our social as well as our political system.

A London shopkeeper lately lost a bill for £665 against a woman, the judges ruling that the plaintiff could not recover because he knew that the defendant was a person of immoral character, and that the articles supplied to her were to help her pursue her immoral calling.

Judge Blatchford, of New York, has denied the motion to discharge the attachment in the case of John N. Cushing, and others, against property in this country of John Laird, builder of the Alabama, and looking to the recovery of damages for the destruction of the ship Sonora.

The people of Portsmouth, Va., complain that even-handed justice is not meted out in that region. Recently a servant, who designedly poisoned a family for whom she worked, was sentenced to five years' imprisonment, whilst a man who stole a horse received a sentence of fifteen years' imprisonment.

A western judge has decided that the authority of fashion-plates and journals is not to be recognized in law as of more weight than the decision of any private person. This was in a suit brought by a modiste against a young woman who had declared the dress sent home to be a "perfect fright," and threw it into the fire.

A Dogberry in Mississippi has made a funny decision. Two negroes, near Rolling Fork, in Issaquena county, had a difficulty, and it resulted in their attendance before a magistrate in the neighborhood. After a hearing, the justice decided that both men were in fault, and that each should pay a fine of twenty-five dollars and costs, making forty-eight dollars each. But both were unable to pay. The embarrassed squire finally hit upon a plan to get even with them. He put both to work on his forty-acre cotton patch, and they picked eighteen hundred pounds each to square the bill.

NEW YORK STATUTES AT LARGE.

CHAP. 3.

AN ACT prescribing the jurisdiction of courts of sessions, and to provide for filling vacancies in the offices of justices of sessions.

PASSED January 25, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Until otherwise provided by law, courts of sessions shall possess the same criminal jurisdiction which they had on the first day of November, eighteen hundred and sixty-nine.

§ 2. When the justices of sessions, or either of them, shall fail to attend at any court of oyer and terminer or court of sessions, or if a vacancy or vacancies shall exist in such office in any county in this State, the presiding judge of the court may designate by order, which shall be entered in the minutes of the court, any justice of the peace of the county in which such court is appointed to be held, to serve as justice of sessions during said term. If such order is made by reason of the non-attendance of any justice of sessions, it shall be in force until such justice shall attend, but only during the term at which it was made.

§ 3. This act shall take effect immediately.

CHAP. 19.

AN ACT in relation to employers and persons employed, and to amend subdivision six of section eight, of title six, chapter one, part four of the Revised Statutes.

PASSED February 17, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The provisions of subdivision six of section eight, of chapter one, title six, part four of the Revised Statutes, shall not be construed in any court of this State to restrict or prohibit the orderly and peaceable assembling or co-operation of persons employed in any profession, trade or handicraft, for the purpose of securing an advance in the rate of wages or compensation, or for the maintenance of such rate.

§ 2. This act shall take effect immediately.

CHAP. 20.

AN ACT to amend an act entitled "An act in relation to the surrogate of the county of Wyoming and for other purposes," passed April eighteenth, eighteen hundred and forty-three, and to declare said act a general act.

PASSED Feb. 18, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The fourth section of the act entitled "An act in relation to the surrogate of the county of Wyoming and for other purposes," passed April eighteen, eighteen hundred and forty-three, is hereby amended so as to read as follows: "In all cases of the erection of a new county hereafter, the surrogate of such county may take proof of the wills and grant letters testamentary and of administration, in cases where the deceased, at the time of his death, resided within the territory embraced within such county; and where, before the erection of such new county any will of such deceased person shall have been proven, or letters testamentary or of administration shall have been granted by any surrogate, but no final settlement of the accounts of the executors or administrators of the last will and testament or of the estate of such deceased person, has been had, then and in that case the surrogate of such new county shall have jurisdiction, exclusive of any other surrogate, of all questions thereafter arising upon any such will or estate, including all necessary proceedings in the final settlement thereof."

§ 2. The surrogate of any county in which such will shall have been admitted to probate or letters of administration granted, shall, on the demand of any party interested, make or cause to be made, for the use of such party, certified copies, under his hand and official seal, of any and all papers, records, and proceedings on file or of record in such surrogate's office, and the same shall, on being filed in the surrogate's office of such new county, have the same validity and effect in all subsequent proceedings in such estates as the original.

§ 3. This act shall take effect immediately.

CHAP. 33.

AN ACT to provide for the revision of the Statutes of the State of New York.

PASSED March 2, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The Governor, by and with the advice and consent of the Senate, is authorized to appoint three persons, learned in the law, as Commissioners, to revise, simplify, arrange and consolidate all statutes of the State of New York, general and permanent in their nature, which shall be in force at the time such commissioners shall make their final report, and in the execution of their duties, said commissioners shall have free access to any public records or papers of this State, and be permitted to examine the same without fee or reward.

§ 2. In performing this duty, the Commissioners shall bring together all statutes and parts of statutes which, from similarity of subject, ought to be brought together, omitting redundant or obsolete enactments, and making such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text, and they shall arrange the same under titles, chapters and sections, or other suitable divisions and subdivisions, with head-notes briefly expressive of the matter contained in such divisions; also with side-notes, so drawn as to point to the contents of the text, and with reference to the original text from which each section is compiled, and, as far as practicable, to the decisions of the State courts explaining or expounding the same; and they shall also provide by a temporary index, or some other convenient means, for an easy reference to every portion of their report.

§ 3. When the Commissioners shall have completed the revision and consolidation of the statutes as aforesaid, they shall cause a copy of the same, in print, to be submitted to the Legislature, that the statutes so revised and consolidated may be re-enacted if the Legislature shall so determine; and at the same time they shall also suggest to the Legislature such contradictions, omissions and imperfections as may appear in the original text, with the mode in which they have reconciled, supplied and amended the same; and they may also designate such statutes or parts of statutes as in their judgment ought to be repealed, with their reasons for such repeal; and may also recommend the passage of new acts or parts of acts, as such repeal may in their judgment render necessary.

§ 4. The Commissioners shall be authorized to cause their work to be printed in parts, so fast as it may be ready for the press, and to distribute copies of the same to members of the Legislature, judges of the State courts, and to such other persons in limited numbers as they may see fit, for the purpose of obtaining their suggestions; and they shall from time to time report to the Legislature their progress and doings.

§ 5. The statutes so revised and consolidated shall be reported to the Legislature as soon as practicable, and the whole work completed within three years.

§ 6. The Commissioners shall each receive, as compensation for his services, at the rate of five thousand dollars a year for the time actually employed by him, not to exceed three years. The reasonable expenses of clerical service and other incidental matters, not to exceed three thousand dollars annually, shall also be paid them.

§ 7. In case the said Commissioners, or either of them, shall refuse to act in the premises, or shall die, resign or remove from the State before the completion of the duties assigned to them, it shall be the duty of the Governor, by and with the advice and consent of the Senate, to appoint others or another in their or his stead, who shall have the like powers as aforesaid, and be entitled to a compensation which shall be proportionally equal to that which is allowed by this act to said Commissioners.

§ 8. This act shall take effect immediately.

The Albany Law Journal.

Albany, March 26, 1870.

THE LIABILITIES OF MARRIED WOMEN AS SURETIES.

Legislative tinkering and judicial construction have placed the law relating to the property rights and liabilities of a married woman in a very anomalous condition. While it has absolved her from the disabilities imposed upon her by the common law, it has also absolved her from those liabilities which her acts ought naturally to entail.

The statutes of 1848 and 1849 provided that the real and personal property of any female thereafter married should continue her sole and separate property as if she were a single female; and that any married female might take by inheritance, or by gift, grant, devise or bequest, from any person other than her husband, and hold to her sole and separate use, and convey and devise, real and personal property, and any interest or estate therein, and the rents, etc., thereof, in the same manner, and with like effect, as if she were unmarried.

The leading case under this statute is that of *Yale* v. *Dederer*, (18 N. Y. R., 265, and 22 id., 450). This was an action to charge the separate estate of Mrs. Dederer, a married woman, with the payment of a promissory note which she had signed with her husband. The consideration of the note was the purchase price of some cows purchased by Mrs. Dederer's husband of the plaintiff. At the time of the sale and of the giving of the note, Mrs. Dederer owned separate real and personal property, while her husband was insolvent. When the case first came before the Court of Appeals, which was in 1858, that court held — Justices Comstock and Harris delivering the opinions — that the acts of 1848 and 1849 did not remove the general disability of married women to bind themselves by their contracts, but that the powers conferred by those statutes to hold to their separate use, and to convey and devise, all their real and personal estate, as if unmarried, carries with it the power to charge such estates substantially in the manner and to the extent previously authorized by the rules of equity in respect to separate estates, and that therefore the bare execution of a promissory note was not sufficient to effect such charge.

"I think it is plain, however," says Judge Comstock in his opinion, "that the statute does not remove the incapacity which prevents her from contracting debts. She may convey and devise her real and personal estate, but her promissory note or other personal engagement is void, as it always was by the rules of the common law. This legal incapacity is a far higher protection to married women than the wisest scheme of legislation can be, and we should hardly expect to find it removed in a statute intended for 'the more effectual protection of her rights.' It is quite another question, however, whether she may not charge her legal estate, held under this statute, in the cases and to the extent recognized by courts of equity in respect to estates held under a trust for her separate use. The right to charge her separate estate, in equity, resulted from the *jus disponendi* which courts of equity regarded her as having, and it was a necessary incident of the full enjoyment of her property. It would seem, for reasons quite similar, that she should have the power to charge an estate acquired and held under the statute referred to. The estate, it is true, is a legal one, but the disability of coverture which, as we have seen, prevented her from disposing of or charging such estates in equity, no longer exists. That disability, as we have also seen, was overcome when she acted under a power of disposition conferred by the instrument conveying the estate. But that power is given in the broadest terms by the statute, and I see no reason why a power thus bestowed should not be equal in its results to one conferred by a private instrument. My conclusion, therefore, is, that, although the legal disability to contract remains as at common law, a married woman may, as incidental to the perfect right of property and power of disposition which she takes under this statute, charge her estate for the purposes and to the extent which the rule in equity has heretofore sanctioned in reference to separate estates."

When the case again came before the Court of Appeals in 1860, there was the finding — not in the case before — that the defendant had, in giving the note, intended to charge her separate estate with its payment, though no mention of that fact appeared in the note itself. It became necessary, therefore, to determine whether the additional fact that the wife, at the time of making the note, intended to charge her separate estate, changed the rule as before laid down. The gist of the decision of the court is stated in the *addenda* to the opinion, which is in the following words: "A majority concurred in the opinion that the intention to charge the separate estate must be stated in the contract itself, or the consideration must be one going to the direct benefit of the estate." In other words, to make the debt of a married woman a charge upon her separate estate, it must be connected by agreement, either express or implied, with the estate. If contracted for the direct benefit of the estate itself, it would, of course, become a lien upon an implied agreement in analogy to the doctrine of equitable mortgages for purchase money; but if not so contracted for the direct benefit of the estate itself, it can only be made a charge by some affirmative act of the married woman evincing that intention. "All agree," says Selden, J., "that when the wife has expressly charged the payment of a debt upon her separate estate, whether it be her own debt or the debt of another, such charge is valid and will be enforced." What should be sufficient evidence of such express charge was not decided?

In 1860 an act was passed, and amended in 1862, which provides that a married woman may bargain, sell, assign, and transfer her separate personal property, and carry on any trade or business, and perform any labor or service, on her sole and separate account, and her earnings shall be her sole and separate property, and may be used or invested in her own name; also, that any married woman possessed of real estate as her separate property may bargain, sell, and convey such property, *and enter into any contract in reference*

to the same, with the like effect in all respects as if she were not married; that she may sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole; that she may be sued in any of the courts of this State; and whenever a judgment shall be recovered against her, the same may be enforced by execution against her sole and separate estate in the same manner as if she were sole.

In 1863, the Supreme Court at General Term, in the first district, held, that a note given by a married woman as surety for her husband, which read: "Thirty days after date, I promise to pay to the order of M. Lechtenstein one hundred and fifty-two dollars seventeen cents, at 359 Canal street, value received, for the benefit of my separate real and personal estate, and the said sum is hereby declared to be a charge thereupon and payable therefrom," was a charge upon her separate estate. A specific description of the estate intended to be charged was held to be unnecessary. INGRAHAM, J., dissenting, insisted that the mere declaration in the note that she intended thereby to charge her real estate was insufficient to create a valid obligation, and that such charge could only be effected by a mortgage or other proper charge of specific property.

In 1867 the fourth district General Term held — the opinion being delivered by Mr. Justice POTTER — that a promissory note made by a married woman having a separate estate, as surety for her husband, is not binding upon her at law, although it is expressly stated in the note, "and she hereby charges her separate estate with the payment of this note." *Kelso* v. *Tabor*, 52 Barb. 125. Subsequently the General Term in the third district decided, in the case of *The Corn Exchange Insurance Co.* v. *Babcock*, which will be found in another column, that where a married woman had indorsed notes as surety for her husband, such notes were not a charge upon her separate estate, although the indorsement was as follows:

"For value received I hereby charge my individual property with the payment of this note.

"ARMINA BABCOCK."

It is clearly intimated in the opinion, that, in order to charge the separate estate of a married woman when the consideration does not go to the benefit of that estate, the intent so to charge must be made apparent by an instrument executed with the formalities of a mortgage and containing a specific description of the property to be charged. This case is now in the Court of Appeals, and we may hope soon to have a final determination of the question as to the essential requisites of an instrument to create a charge upon the separate property of a married woman.

Mr. Justice POTTER remarked in the case of *Kelso* v. *Tabor*, before cited, "Of what use or practical benefit would be a separate estate to a married woman, possessing a true woman's sympathies, having a gambling, idle, intemperate or spendthrift husband, if his creditors could first involve the husband in embarrassment or ruin, and then appeal to the wife with the argument that her signature would save him from disgrace, dishonor or punishment?"

Very good, but would she not be as readily induced for the same purpose to execute an instrument having all the requisites necessary to charge her estate? If she really desired to save her husband from "disgrace, dishonor or punishment," would she not as quickly sign a note drawn in the form of a mortgage charging her separate estate as she would sign a note drawn in the ordinary form? If it be the purpose of the law to protect a woman from the folly, extravagance or misfortune of her husband and from her own womanly sympathies, it could be better done by providing that she should in no case and in no manner become his surety. It seems to us, however, that the true policy is to make the married woman her own protector; to give to her the same *status* as an unmarried woman in respect to her separate property and to the execution or enforcement of contracts.

METHOD AND OBJECTS OF LAW READING,

WITH REFERENCE TO APPREHENSION — MEMORY — JUDGMENT.*

Whatever may be the course of reading adopted by the student, however few or numerous his opportunities of so doing, let him always bear in mind that his object is, or ought to be, two-fold: not only to acquire and retain legal knowledge, but in doing this to *discipline his mind* — to engender legal habitudes of thought. An eager but short-sighted student is apt to read only for the momentary satisfaction of his curiosity — or, at most, in order to recollect what he has read; but a judicious student will take care, in addition to this, constantly and vigorously to exercise those great faculties of his understanding — apprehension, memory and judgment.

"Perception," says a judicious author, "is to the mind what the eye is to the body: if the sight be dim or imperfect, the ideas communicated will be also dim and imperfect. The near-sighted man must have the object brought close to his eyes; for that reason he can see but little of it at once, and requires much time and leisure to view all the parts successively before he can pronounce concerning its due symmetry and proportions. In the same manner the man of slow capacity must have the question long before him — revolve it over and over in his mind, and consider and weigh each circumstance singly, in order to form a judgment of the whole; but the sharp-sighted man — such an one was Lord Mansfield — takes in the object with all its relations and consequences at a glance; and so quick is his distinguishing faculty, that the act of conception and judgment seems almost to be formed and executed at the same instant. * * Those endowed with this faculty are in the fairest way of becoming eminent in any science or profession. With it, a man *may* fail, but, without it, he cannot ever be considerable." "Without this," says Phillips, "none of the particular cases can be thoroughly sifted, or sufficiently set forth. For, considering the depth of knowledge reposed in the laws of this land, and that cases of much conformity and resemblance daily happen, sharpness of apprehension is necessary, not only for the understanding of one, but also upon circumstances of matter to espy a difference in the other,

* From the new edition of Warren's "Law Studies," now in the press of Mr. John D. Parsons, Jr.

and upon any sudden occasion to be able to reply to an adversary's unexpected objections — to understand his client's case at first opening, the drift of his adversary's reasons at the first urging, and likewise readily to invent and fitly to apply his provided arguments. If this faculty of apprehension faileth — saith Hippocrates — all other diligences are lost, for it is the inlet of knowledge." These are judicious observations; but it should be borne in mind, that as there is no faculty of more importance than this in the study of the law, so is there none which requires such vigorous control and management, lest it should, in a manner, defeat itself. *Nihil sapientæ odiosius acumine nimio.* The youthful possessor of a quick apprehension is too apt to rely upon it unduly — if not exclusively. Accustomed to penetrate in an instant, with little or no effort, to the meaning of what he reads, he is satisfied with such momentary success, and incurs the risk of forming a hasty, superficial habit of reading and thought, calculated soon to unfit him for competition with men who are very greatly his inferiors in natural ability. What is the use of acquiring legal knowledge without the power of retaining and of using it? It is but vapor, disappearing from the polished surface of the mirror the moment after having been breathed upon it! Let the student, then, who is conscious of possessing this "sharpness of wit," watch it with the utmost jealousy, if he wish to render it his greatest friend instead of his greatest enemy — let him prevent its encroachments upon the province of its less showy and active sister quality — the judgment. Let him check it when it would hurry him on from page to page — from topic to topic — each little more than glanced at! Let him resolutely pause, and take a survey of his recent and rapid acquisitions; for if he look not well after them, they will prove — to adopt the beautiful comparison of Locke — "like fairy money, which, though it were gold in the hand from which he received it, will be but leaves and dust when it comes to use." How often will a few moments' such retrospection convince the self-satisfied student that what he had imagined himself to have thoroughly understood, he has only half-understood, or, perhaps, even altogether *mis*understood! Has what he read a day, a week, or month or two ago passed away —

"as flits the shade across the summer field?"

If so, he has, indeed, read to no purpose, but has wholly misspent his time. Whatever, then, such an one reads, let him read with moderate slowness, "abiding," as South says, "and dwelling upon it, if he would not be always a stranger to the inside of things." But *has* the student, after all, this quick apprehension for which he is here given credit? Or does he only suppose he has, deluded by his friends and flattered by self-love? How often is a *lively fancy* confounded with an acute perception — fancy, which is, in legal studies, but as the brilliant poppy-flower in the corn-field!"

It would be well if every law student, whatever be his quickness, would liken himself, for a while, to the near-sighted man described in a preceding page, and make similar efforts to obtain a clear and complete view of his subject. If he wish to become really and permanently bright, let him imagine himself for a while to be *dull* — and take his measures accordingly. It may be safely asserted that, *cæteris paribus*, the slow is always preferable to the quick legal reader, at the commencement of his studies. Slow work at first makes quick work ever after. Let the pupil consider how comparatively short an interval must elapse between the acquisition of legal knowledge and habits, and their use; and that it rests only with himself whether or not he shall be hereafter "fit for the occasion sudden," or be numbered throughout life among those who are "*ever learning and never able to come to the knowledge of the truth.*"

There are few things so captivating to young lawyers of the kind now describing — of "lively parts," as Phillips hath it — nothing more calculated to mislead them, than those *general principles* which have been already alluded to — general principles, which, to be at all serviceable, must be applied with prompt exactitude to the innumerable and ever-varying combinations of circumstances presented to the attention of the lawyer. Nothing will ever enable them to appreciate and apply those principles justly but patient study and experience. It may be laid down, perhaps, that, with the young lawyer, principles should be rather the results than the precursors of study and practice. "*The tenant shall not dispute his landlord's title,*" — is, for instance, a well-settled rule of law; it is, apparently, a very simple one, and its policy obvious, perhaps at a glance. The student, therefore, passes on, yielding full and instant assent. Presently a case arises which he confidently considers to be exactly governed by this maxim — apparently a mere instance of its application: and yet he will find, when perhaps too late, that it is *not* applicable — that in his hasty, superficial examination, he has committed a fatal blunder, and deeply injured at once the interests of his client and his own reputation. And so of a hundred other maxims. It requires indeed the nicest discrimination to ascertain whether a particular case falls within the general rule, or is governed by some of its endless limitations and exceptions; and this discrimination must be the result of calm, leisurely, and extensive study and practical experience. General principles are edge-tools in the hands of the legal tyro; and he must take care how he handles them.

While, however, the student is warned against falling into a hasty, slovenly, superficial habit of mind, let him not fall into the opposite extreme — that of sluggishness and vacillation. Careful and thoughtful reading does not imply a continual poring over the same page or subject. The student might in such a case justly compare himself to the pilgrim stuck in the Slough of Despond. Because he is required to look closely at each individual part, in order thoroughly to comprehend the whole, let him not suppose that he is to scrutinize it as with a microscope. What is required is, simply, *attentive reading.* If he cannot, after reasonable efforts, master a particular passage, let him mark it as a difficulty, and pass on. He will by and by return, in happier mood — with increased intellectual power and knowledge — and find his difficulty vanished. The student's reading, however, must not only be thus attentive — it must be *steadily pursued.* "Without a solid, settled, and constant mind, it is impossible to make any progress in this

study; for the cases being so intricate, and the reasons thereof so deep and weighty, a wavering and unsettled mind cannot attain to the apprehension thereof—being herein like the mathematics—wherein, if the mind be caught away but for a moment, he is to begin anew. One of such an unsettled mind is not capable of meditating and ruminating upon those things that it hath with difficulty apprehended, so as to fix it, and make them its own. *Qui ex aliis*, saith Seneca, *in alia transiliunt, aut ne transiliunt, quidem, sed casu quodam transmittuntur, quomodo habere quicquam certum mansurumve possunt, suspensi et vagi?* And this unsettledness and inconstancy is *signum vacillantis animi et nondum tenentis tenorem suum;* in Seneca's style — it produceth divers and contrary thoughts, *aliis alio nitentibus*, which, like divers and contrary diet, hinder digestion, one thought smothering the other, not suffering him to have the least benefit of any. His body is among his books, but not his mind; or, if reading, doth not show himself attentive and diligent, but doth either number the tiles of the house, or build castles in the air — or doth nothing less than what he should do — his thoughts being much like good women's talk at a gossipping; whereof Seneca tells us — *varius nobis fuit sermo ut in convivio, nullam rem usque, ad exitum adducens, sed aliunde transiliens.*"

One of the most frequent but unperceived sources of hindrance, to one who wishes to pursue a systematic course of legal reading, is *the undue prosecution of particular topics.* In perusing, for instance, a treatise, the student will stumble on a difficult — an obscure passage; which, as it ought, excites his attention. He begins to examine the chief case cited — that refers to others — which again lead to others, and he follows. In doing this, he accidentally lights upon a point that occupied his attention some time before; here he finds the law so invitingly stated that he cannot think of quitting it. *This* he follows up, as he *was* following up another topic, and so he goes on, hour after hour, perhaps, till he finds that he has drifted out of sight of the point from which he originally started, and has quite lost the connection between his previous readings. Now, if he does not check this erratic tendency, he will never get through any book, or pursuit, satisfactorily; he will gradually incapacitate himself for fixed and continuous mental exertion. "A cursory and tumultuary reading," says Lord Coke, in the preface to the sixth part of his reports, "doth ever make a confused memory, a troubled utterance, and an uncertain judgment." The acquisition of learning, however, will serve but little purpose unless it be permanently and serviceably *retained.* This will depend much on the natural powers of the memory, but more on the manner in which it is exercised and cultivated.

"For my own part," says Dugald Stewart, "I am inclined to suppose it essential to memory, that the perception, or the idea that we would wish to remember, should remain in the mind for a certain space of time, and should be contemplated by it exclusively of every thing else; and that attention consists partly, perhaps entirely, in the effort of the mind to detain the idea or the perception, and to exclude the other objects that solicit its notice."

"When we first enter on any new literary pursuit," says the same distinguished writer, in another part of his work, "we commonly find our efforts of attention painful and unsatisfactory. We have no discrimination in our curiosity, and, by grasping at every thing fail in making those moderate acquisitions which are suited to our limited faculties. As our knowledge extends, we learn to know what particulars are likely to be of use to us; and acquire a habit of directing our examination to those, without distracting the attention with others. It is partly owing to a similar circumstance, that most readers complain of a defect of memory when they first enter on the study of history. They cannot separate important from trifling facts, and find themselves unable to retain any thing, from their anxiety to secure the whole."

It is a trite remark that no power of the mind is susceptible of such rapid and sensible improvement as the memory, provided proper means be resorted to. It is, also, a common observation that the imperfection of their memory is one of the earliest and loudest complaints of legal students. And is not the reason obvious, at least in the generality of cases? The "variety almost infinite" of objects to which their attention is called, they are anxious to recollect — at once; to fix them indiscriminately in their memory; and their vain efforts to do so insure but intense chagrin, and fruitless exhaustion both of body and mind.

"As the great purpose to which this faculty is subservient," says Dugald Stewart, "is to enable us to collect, and to retain, for the future regulation of our conduct, the results of our past experience, it is evident that the degree of perfection which it attains, in the case of different persons, must vary: first, with the facility of making the original acquisition; secondly, with the permanence of the acquisition; and, thirdly, with the quickness or readiness with which the individual is able, on particular occasions, to apply it to use. The qualities, therefore, of a good memory are, in the first place, to be susceptible; secondly, to be retentive; and, thirdly, to be ready."

The law-student, then, having distinctly comprehended what he has been reading, should reflect upon it, and so — as it were — work it into his mind, if he wishes to retain it for future use. But he must make a prudent *selection* of his topics — not bestow equal attention upon things of moment, and of insignificance — upon principles and details. If he does this, his mind, he may rely upon it, will be soon choked up with rubbish. It is puerile to attempt to remember every thing. The memory is, undoubtedly, a most valuable repository — but it may be, and too often is, made not a store-house, but a lumber-room. In vain do we flatter ourselves that we have a memory of those ideas which we cannot recollect — or which, if we do recollect, are so confused that they perplex or embarrass, instead of explaining and illustrating a question. Not only must the powers of the memory be thus directed to proper objects, but the student must form the habit of reading with a constant reference to subsequent practical utility. He must read to remember. "Not only the *inclination* to recollect," justly observes Mr. Raithby, "but the very powers themselves of recollection are impaired, and at length lost by disuse."

The following observations are so full of practical importance to the young lawyer, that it has been thought fit to quote them at length from the work of that distinguished writer, to whom such frequent reference has already been made — Dugald Stewart: —

"Every person must have remarked, in entering on any new species of study, the difficulty of treasuring up in the memory its elementary principles; and the growing facility which he acquires in this respect, as his knowledge becomes more extensive. By analyzing the different causes which concur in producing this facility, we may, perhaps, be led to some conclusions which may admit of a practical application.

"1. In every science, the ideas about which it is peculiarly conversant are connected together by some particular associating principle; in one science, for example, by associations founded on the relations of cause and effect; in another by associations founded on the relations of mathematical truths; in a third, on associations formed on antiquity of time and place. Hence, one cause of the gradual improvement of memory with respect to the familiar objects of our knowledge; for, whatever be the prevailing associating principle among the ideas about which we are habitually occupied, it must necessarily acquire additional strength from our favorite study.

"2. In proportion as a science becomes more familiar to us, we acquire a greater command of attention with respect to the objects about which it is conversant; for the information which we already possess gives us an interest in every new truth, and every new fact, which have any relation to it. In most cases, our habits of inattention may be traced to a want of curiosity; and, therefore, such habits are to be corrected, not by endeavoring to force the attention in particular instances, but by gradually learning to place the ideas which we wish to remember in an interesting point of view.

"3. When we enter on any new literary pursuit, we are unable to make a proper discrimination on point of utility and importance, among the ideas which are presented to us; and by attempting to grasp at every thing, we fail in making those moderate acquisitions which are suited to the limited powers of the human mind. As our information extends, our selection becomes more judicious and more confined; and our knowledge of useful and connected truths advances rapidly, from our ceasing to distract the attention with such as are detached and insignificant.

"4. Every object of our knowledge is related to a variety of others; and may be presented to the thoughts, sometimes by one principle of association, and sometimes by another. In proportion, therefore, to the multiplication of mutual relations among our ideas (which is the natural result of growing information, and, in particular, of habits of philosophical study) the greater will be the number of occasions on which they will occur to the recollection, and the firmer will be the root which each idea, in particular, will take in the memory. It follows, too, from this observation, that the facility of retaining a new fact, or a new idea, will depend on the number of relations which it bears to the former objects of our knowledge; and on the other hand, that every acquisition, so far from loading the memory, gives us a firmer hold of all that part of our previous information, with which it was in any degree connected.

"5. In the last place, the natural powers of memory are, in the case of the philosopher, greatly aided by his peculiar habits of classification and arrangement — the most important improvement of which memory is susceptible."

Influenced by such reflections as these, let the student approach his task with a well directed and well regulated energy — and he will soon find that his memory is sufficient for the duties imposed upon it. A patient, perspicacious intellect, adopting and adhering to a methodical plan of study, will very soon feel conscious of a memory gradually adapting itself to its office — forming daily innumerable secret sources of association, at once facilitating the acquisition, retention and use of legal learning. Attention and method are, indeed, the foundation and support of memory. Frequent reflection on what has been read — perpetual recurrence to leading principles, and application of it to the actual occurrences of business, will be the readiest way of making what is read — *our own*. It cannot, indeed, be too frequently impressed upon the student, that with METHOD he may do every thing, without it he can do nothing, in legal studies. "The law is a labyrinth; and certainly, if there *be* any, *method* is that Ariadne's clew that must lead us out of it." "I must, in general, say thus much to the legal student," says Sir Matthew Hale; "it is very necessary for him to observe a method in his reading and study. Let him assure himself, though his memory be never so good, that he will never be able to carry on a *distinct serviceable memory* of all, or the greatest part of what he reads, to the end of seven years, or much shorter time, without the help of method: nay, what he hath read, seven years since will, without the aid of method, or reiterated use, be as new to him as if he had scarcely read it." This great man then proceeds to recommend the student's copying into a *common-place-book* "the substance of whatever he reads;" but, it may be suggested — why not rather imprint it in his memory? Why beget the habit of reliance rather on a common-place-book, than on the memory? This subject, however, will be discussed hereafter. One of the profoundest and most versatile scholars in England, and, perhaps, in Europe — in many respects one of the most eccentric — has a prodigious memory, which the author once told him was a magazine stored with wealth from every department of knowledge. "I am not surprised at it," he added, "nor would you be, or any one, that knew the pains I have taken in *selecting* and *depositing* what you call my 'wealth.' I take care always to ascertain the *value* of what I look at — and if satisfied on that score, I most carefully stow it away. I pay, besides, frequent visits to my 'magazine,' and keep an inventory of at least every thing important, which I frequently compare with my stores. It is, however, *the systematic disposition and arrangement* I adopt which lightens the labors of memory. I was by no means remarkable for memory, when young; on the contrary, I was considered rather defective on that score."

In conclusion, a little familiarity with legal studies

and practice, will convince the young reader of the truth of one of the observations already quoted from Dugald Stewart — of the practicability of acquiring a sort of technical dexterity in remembering both facts and principles. But of what avail are quick and accurate acquisitions, and tenacious retention of knowledge, without the power of turning it to practical account? Of what use is the finest supply of drugs and chemicals, never so beautifully arranged, if their owner cannot *compound* them? In other words, what are apprehensions and memory without JUDGMENT?

"The faculty of examination or judgment," as Sir John Doddridge saith, "is almost alone sufficient to make a ready and able lawyer. This solidity of judgment teacheth to weigh and try the particulars apprehended, and to sever for us the precious from the vile. * * * Nothing is more prejudicial to it than precipitancy and impatience of delay or attendance on the determination of right reason, which makes us commonly run away with half or a broken judgment; in which respect Aristotle in his Ethics very elegantly compares it to a hasty servant that goes away posting without his errand. Without this faculty of judgment, though a man were furnished with every thing else, he hath no more sufficiency to judge or plead than the code or digest — as one saith — which, compassing within them all the laws and rules of reason, for all that, cannot write one letter."

Let the student, it is once more entreated, bear in mind, in all his readings, that he is reading not for speculative but *practical* purposes; that the period will soon arrive when he must *use* his acquisitions — often in very arduous circumstances; that he can appear in public but as he shall have qualified himself beforehand by private study. If he do not thus reflect and act; if considerations of this kind do not constantly *influence* his mind, he may shut up his books. Quickly as he may acquire, firmly as he may retain, it will be all lost upon him; all his faculties and acquisitions will fail him when the day of trial shall have arrived.

Whatever be the subject of the student's reading — either a treatise, or a report—let him imagine himself doing so in preparation for the next day's business. This reflection is calculated, more than any thing else, to set an edge upon his attention — to put all his powers on the *qui vive* — to throw an air of intense and vivid interest over the driest studies. Is he reading an intricate case, full of elaborate and profound argumentation? Let him, after considering each side of the question, draw upon *his own* ingenuity — imagining himself to be one of the counsel engaged. Does he differ on any points from the reasoning which lies before him? Let him note down the grounds of such difference — let him, in short, carefully and calmly weigh each in the balance of his own understanding: endeavor to put a particular argument in a more striking point of view — in more cogent terms — to develop some latent objection — in short, to realize the case and make it his own. His reasoning powers cannot fail to improve very rapidly under this sharp and constant exercise, which transforms a reporter into a learned and ingenious and friendly personal opponent. If, instead of this, he rests satisfied with what he considers a rapid conception of an author's meaning — with a sort of general notion of the scope and drift of a particular argumentation — and make no effort to enter into it as a matter of personal investigation — he will receive but little real practical benefit from the best course of reading that could be devised; he will become one of those already alluded to, who are "*ever learning, and never able to come to the knowledge of the truth.*"

Thus, then, let the student make a prudent selection of a course of reading, and steadily adhere to it, but in doing so sedulously and perseveringly labor in the discipline of his mind; keeping in view this contemporaneous exercise, never caring how severely, of his apprehension, his memory, and his judgment; fixing his mind's eye upon a splendid instance of the advantages conferred by early discipline upon a naturally fine intellect — Lord Mansfield, — of whom it is eloquently said, that "he apprehended the facts with such clearness, retained every circumstance with such ease, and weighed the ingredients of equity in so just a balance, that one is at a loss whether to admire most the quickness of his apprehension, the strength of his memory, or the soundness of his judgment."

There occurs in an excellent work on legal studies such a vivid picture of the advocate destitute of a "clear and settled judgment," as is calculated to form an instructive finale to this chapter:

"How would that advocate appear, who should stand up in a court of judicature, without having acquired a clear comprehension of the nature of his case, and of its various parts and circumstances; wandering from this to that part of his subject, unable to discern what part to produce and what part to retain; fixing, by chance, upon some weak or disjointed member, and then, with an unmeaning solemnity, dragging it forth as the main support of his cause; discovering his mistake only by the impatience of his auditors, and covered with confusion at a sense of his inability to rectify it! Unwilling, however, to terminate his efforts abruptly, he has recourse to his imagination — and this serves only to make his weakness the more conspicuous; his uncertainty increases; he continues to heap words upon words without meaning or end; now, in all the violence of anger, he declaims upon the injustice — but *of what*, he cannot tell; now he would argue — but, like a man talking in his sleep, he has no single certain position on which to found his argument: now he would complain, now remonstrate, now entreat, till at length his speech becomes a chaos, and nothing but his silence can restore him, and those whom he addresses, to regularity and the light."

The abolition of the cumbrous Common Law practice, and the adoption of a Code similar to that in force in New York, is likely to be one of the results of the Constitutional Convention now in session in Illinois. Mr. Tincher introduced a resolution providing for the appointment of a commission to revise, simplify and abridge the rules of practice; to abolish the distinctions between law and equity, etc., but afterward withdrew it, to be again presented on the coming in of the report of the Judiciary Committee. Illinois is, in most things, a wide-awake, progressive State, and the wonder is that it has so long adhered to the practice of the ancients in law matters.

LAW AND LAWYERS IN LITERATURE.*

XI.

CURIOUS IMAGINARY TRIALS.

"The Arraigning and Indicting of Sir John Barleycorn, Knt., printed for Timothy Tosspot," is a whimsical little tract, in which the knight is put upon his trial at the sign of the Three Loggerheads, before "Oliver, and Old Nick, his holy father," as judges. The witnesses for the prosecution were cited under the hands and seals of the said judges, sitting "at the sign of the Three Merry Companions in Bedlam; that is to say, Poor Robin, Merry Tom, and Jack Lackwit." The prisoner pleaded not guilty, and Lawyer Noisy thus opened the cause: "May it please your lordship and gentlemen of the jury, I am counsel for the king against the prisoner at the bar, who stands indicted of many heinous and wicked crimes, in that the said prisoner, with malice prepense and several wicked ways, has conspired and brought about the death of several of his majesty's loving subjects, to the great loss of several poor families, who by this means have been brought to ruin and beggary, which, before the wicked designs and contrivances of the prisoner, lived in a flourishing and reputable way, but now are reduced to low circumstances and great misery, to the great loss of their own families and the nation in general. We shall call our evidence, and if we make the facts appear, I do not doubt but you will find him guilty, and your lordship will award such punishment as the nature of his crimes deserves." Vulcan, the Blacksmith, then testified that the prisoner had quarreled with him, thrown him down, picked his purse, and set his wife a-scolding. Will, the Weaver, that the prisoner had bound him hand and foot, thrown him in a ditch, and dislocated his shoulder. Stitch, the Tailor, to the same effect. Wheatley, the Baker, that the prisoner had spoiled his business. The prisoner, being called on for his defense, urged that he was a friend to his accusers until they abused him, and that if any one was to blame, it was his brother Malt, who, being called, urged the same arguments. Thomas, the Ploughman, Bunch, the Brewer, and Mistress Hostess, gave the prisoner an excellent character, insisting that he was indispensable to them, and that "if you put him to death, all England is undone, for there is not another in the land can do as he can do, and hath done; for he can make a cripple go, a coward fight, and a soldier neither feel hunger nor cold." The court then charge the jury: "You have now heard what has been offered against Sir John Barleycorn, and the evidence that has been produced in his defense. If you are of opinion that he is guilty of those wicked crimes laid to his charge, and has with malice prepense conspired and brought about the death of several of his majesty's loving subjects, you are then to find him guilty; but if, on the contrary, you are of opinion that he had no real intention of wickedness, and was not the immediate, but only the accidental, cause of these evils laid to his charge," — that is, I suppose, if the complainant's negligence contributed to produce the injury — "then, according to the statute law of this kingdom, you ought to acquit him." Verdict: not guilty. It is to be noted that the prisoner, according to the common law usage, had no counsel; and it may well be, that if all prisoners were as influential with courts and juries as Sir John, their rights would be safe without counsel in these days.

Another curious trial is that of Flora, in "Funebria Floræ, the Downfall of May-games," a tract published in 1661 by Thomas Hall. The arraignment is as follows: "Flora, hold up thy hand. Thou art here indicted by the name of Flora, of the city of Rome, in the county of Babylon, for that thou, contrary to the peace of our sovereign lord, his crown and dignity, hast brought in a pack of practical fanatics, viz.: ignorants, atheists, papists, drunkards, swearers, swash bucklers, maid marians, morrice dancers, maskers, mummers, May-pole stealers, health-drinkers, together with a rascallion rout of fiddlers, fools, fighters, gamesters, lewd women, light women, contemners of magistracy, affronters of ministry, rebellious to masters, disobedient to parents, misspenders of time, and abusers of the creature," &c. "*Judge:* What sayest thou, guilty or not guilty? *Prisoner:* Not guilty, my lord. *Judge:* By whom wilt thou be tried? *Prisoner:* By the pope's holiness, my lord. *Judge:* He is thy patron and protector, and so unfit to be a judge in this case. *Prisoner:* Then I appeal to the prelates and lord bishops, my lord. *Judge:* This is but a tiffany put off, for though some of that rank did let loose the rein to such profaneness in causing the book of sports, for the profanation of God's holy day, to be read in churches, yet 'tis well known that the gravest and most pious of that order have abhorred such profaneness and misrule. *Prisoner:* Then I appeal to the rout and rabble of the world. *Judge:* These are thy followers and thy favorites, and unfit to be judges in their own case. *Prisoner:* My lord, if there be no remedy I am content to be tried by a jury. *Judge:* Thou hast well said; thou shalt have a full, a fair, and a free hearing. Crier, call the jury. *Crier:* O yes! O yes! All manner of persons that can give evidence against the prisoner at the bar, let them come into court, and they shall be freely heard. *Judge:* Call in the *Holy Scriptures*. *Crier:* Make room for the *Holy Scriptures* to come in." Not only the *Holy Scriptures*, but Pliny, Lactautius, Synodus Francica, Charles the Second, Ordinance of Parliament, Solemn League and Covenant, Order of the Council of State, Mr. Elton, Dr. Ames, Bishops Babington and Andrews, and finally Ovid, give testimony against the unfortunate goddess. No one appeared to testify in her behalf, and she was adjudged to perpetual banishment, the judge pronouncing sentence without any verdict from the jury or summing up in the prisoner's behalf. It is evident that these trials, like parables, "do not go on all fours."

About the beginning of the eighteenth century, in England, the "Royal Oak Lottery," as the rival, if not the parent, of the various other demoralizing schemes of the same sort, obtained the largest share of public odium. The evils it had created are popularly set forth in a tract, entitled "The Arraignment, Trial, and Condemnation of Squire Lottery, *alias* Royal Oak Lottery," London, 1699. The following jurors were impaneled: Mr. Positive, a draper in

Covent Garden; Mr. Squander, an oilman in Fleet street; Mr. Pert, a tobacconist, ditto; Mr. Captious, a milliner in Paternoster Row; Mr. Feeble, a coffee man near the Change; Mr. Altrick, a merchant in Grace Church street; Mr. Haughty, a vintner, by Gray's Inn, Holborn; Mr. Jealous, a cutler, at Charing Cross; Mr. Peevish, a bookseller, in St. Paul's Churchyard; Mr. Spilbook, near Fleet bridge; Mr. Noysie, a silkman upon Ludgate hill; Mr. Finical, a barber in Cheapside. The indictment and arraignment are as follows: "You stand indicted by the name of Squire Lottery, *alias* Royal Oak Lottery, for that you, the said Squire Lottery, not having the fear of God in your heart, nor weighing the Regard and Duty you owe, and of right ought to pay to the Interest, Safety, and Satisfaction of your Fellow-Subjects, have from time to time, and at several times, and in several places, contrary to the known Laws of this Kingdom, under the shadow and coverture of a Royal Oak, propagated, continued, and carried on a most unequal, intricate, and insinuating Game, to the utter ruin and destruction of many thousand Families; and that you, the said Squire Lottery, *alias* Royal Oak Lottery, as a common Enemy to all young People, and an inveterate Hater of all good Conversation and Diversion, have for many years last, and do still continue, by certain cunning Tricks and Stratagems, insidiously, falsely, and impiously, to trepan, cheat, deceive, decoy, and entice divers Ladies, Gentlemen, Citizens, Apprentices, and others, to play away their Money at manifest Odds and Disadvantage. And that you, the said Squire Lottery, *alias* Royal Oak Lottery, the more secretly and effectually to carry on and propagate your base, malicious, and covetous Designs and Practices, did and do still encourage several lewd and disorderly Persons, to meet, propose, treat, consult, consent, and agree upon several unjust and illegal methods, how to ensnare and entangle People into your delusive Game; by which means, you have for many years past, utterly, entirely, and irrecoverably, contrary to all manner of Justice, Humanity, or good Nature, despoiled, depraved, and defrauded, an incredible number of Persons of every Rank, Age, Sex, and condition, of all their Lands, Goods, and Effects; and from the Ruins of multitudes built fine Houses, and purchased large Estates, to the great Scandal and reflection on the Wisdom of the Nation, for suffering such an intolerable Imposter to pass so long unpunished. What say'st thou, Squire Lottery, art thou guilty of the aforesaid Crimes, Cheats, Tricks, and Misdemeanors, thou stand'st Indicted of, or not Guilty? *Lottery:* Not Guilty. But before I proceed to make my Defense, I beg I may be permitted the assistance of three or four learned Sharpers to plead for me, in case any Matter of Law arise." The managers for the prosecution then call as witnesses Captain Pasthope and Counsellor Frivolous, who testified as to the means used by the accused to ruin themselves and others. The prisoner called Captain Quondam and Mr. Scamper, who spoke to his good character. The jury found against the prisoner, who, with Mr. Auction and Dr. Sandbank, also tried and convicted, was then sentenced. The prisoner, in the course of his argument, uttered the following, which, however true it may have been of his country, certainly can have no application to this nation and these days: "If all the Knaves and Cheats of the Nation were called to the Bar and executed, there would only be a few Fools left to defend the Commonwealth."

Under the present heading may properly be cited some extracts from "Le Revenant," a paper published in Blackwood for April, 1827, purporting to be the relation of one who had been hanged and was still alive. The account of the trial is terribly powerful and lifelike:

"The whole business of my trial and sentence passed over as coolly and formally as I would have calculated a question of interest or summed up an underwriting account. I had never, though I lived in London, witnessed the proceedings of a criminal court before, and I could hardly believe the composure and indifference, and yet civility — for there was no show of anger or ill temper — with which I was treated; together with the apparent perfect insensibility of all the parties round me, while I was rolling on with a speed which nothing could check, and which increased every moment, to my ruin. I was called suddenly up from the dock, when my turn for trial came, and placed at the bar; and the judge asked, in a tone which had neither severity nor compassion about it, nor carelessness nor anxiety, nor any character or expression whatever that could be distinguished, 'If there was any counsel appeared for the prosecution?' A barrister then, who seemed to have some consideration — a middle-aged, gentlemanly-looking man — stated the case against me, as he said he would do, 'very fairly and forbearingly;' but as soon as he read the facts from his brief, 'that only,' I heard an officer of the gaol who stood behind me say, 'put the rope about my neck.' My master then was called to give his evidence, which he did very temperately, but it was conclusive. A young gentleman, who was my counsel, asked a few questions in cross-examination, after he had carefully looked over the indictment, but there was nothing to cross-examine upon. I knew that well enough, though I was thankful for the interest he seemed to take in my case. The judge then told me I thought more gravely than he had spoken before; 'that it was time for me to speak in my defence if I had any thing to say.' I had nothing to say. I thought one moment to drop down on my knees and beg for mercy, but again I thought it would only make me look ridiculous, and I only answered as well as I could, 'That I would not trouble the court with any defense.' Upon this the judge turned round, with a more serious air still, to the jury, who all stood up to listen to him as he spoke. And I listened too — or tried to listen attentively — as hard as I could, and yet with all I could do I could not keep my thoughts from wandering. For the sight of the court — all so orderly, and regular, and composed, and formal, and well satisfied — spectators and all — while I was running on with the speed of wheels on smooth soil down hill to destruction, seemed as if the whole trial were a dream and not a thing in earnest. The barristers sat round the table silent, but utterly unconcerned, and two were looking over their briefs and another was reading a newspaper, and the spectators in the gallery looked on and listened as pleasantly as though it were a matter not of death, going

on, but of pastime or amusement; and one very fat man, who seemed to be the clerk of the court, stopped his writing when the judge began, but leaned back in his chair with his hands in his breeches pockets, except once or twice that he took snuff, and not one living soul seemed to take notice — they did not seem to know the fact — that there was a poor, desperate, helpless creature, whose days were fast running out, whose hours of life were even with the last grains in the bottom of the sand glass, among them! I lost the whole of the judge's charge, thinking of I know not what — in a sort of dream — unable to steady my mind to any thing, and only biting the stalk of a piece of rosemary that lay by me. But I heard the low distinct whisper of the foreman of the jury as he brought in the verdict, 'GUILTY,' and the last words of the judge, saying 'that I should be hanged by the neck until I was dead,' and bidding me 'prepare myself for the next life, for my crime was one that admitted of no mercy in this.' As the door of the court closed behind us, I saw the judge fold up his papers, and the jury being sworn in the next case."

To pass "from grave to gay;" I had hesitated for a moment whether to include the following under the head of imaginary trials, for it seems as true as Robinson Crusoe; but as a justice of the peace could scarcely have had jurisdiction of an action of damages for breach of promise of marriage, and parties at the time indicated were not competent to testify on their own behalf, I have concluded that it must fall under my province.

"*Phillis Schoonmaker* v. *Cuff Hogeboom*. This was an action for a breach of the marriage promise, tried before Squire DeWitt, justice of the peace and quorum, at New Paltz, N. Y. The parties, as their names indicate, were black, or, as philanthropists would say, colored folk. Counselor Van Schaaick appeared on behalf of the lady. He recapitulated the many verdicts which had been given of late in favor of injured innocence, much to the honor and gallantry of an American jury. It was time to put an end to these faithless professions, to these cold-hearted delusions; it was time to put a curb upon the false tongues and false hearts of pretended lovers, who, with honied accents, only woo'd to ruin, and only professed to deceive. The worthy counselor trusted that no injurious impression would be made on the minds of the jury by the color of his client:

> 'Tis not a set of features,
> This tincture of the skin, that we admire.'

"She was black, it was true; so was the honored wife of Moses, the most illustrious and inspired of prophets. Othello, the celebrated Moor of Venice, and the victorious general of her armies, was black, yet the lovely Desdemona saw 'Othello's visage in his mind.' In modern times, we might quote his sable majesty of Hayti, or, since that country had become a republic, the gallant Boyer. He could also refer to Rhio Rhio, king of the Sandwich Islands, his copper-colored queen, and Madam Poki, so hospitably received and fed to death by their colleague, the King of England — nay, the counselor was well advised that the brave general Sucre, the hero of Ayachucho, was a dark mulatto. What then is color in estimating the griefs of a forsaken and ill-treated female? She was poor, it was true, and in a humble sphere of life; but love levels all distinctions; the blind god was no judge and no respecter of colors; his darts penetrated deep, not skin deep; his client, though black, was flesh and blood, and possessed affections, passions, resentments and sensibilities; and in this case she confidently threw herself upon a jury of freemen — of men of the north, as the friends of the northern President would say, of men who did not live in Missouri, and on sugar plantations; and from such his client expected just and liberal damages.

"Phillis then advanced to the bar to give her testimony. She was, as her counsel represented, truly made up of flesh and blood, being what is called a strapping wench, as black as the ace of spades. She was dressed in the low Dutch fashion, which has not varied for a century, linsey-woolsey petticoats, very short, blue worsted stockings, leather shoes, with a massive pair of silver buckles, bead ear-rings, her woolly hair combed, and face sleek and greasy. There was no 'dejected 'haviour of visage;' no broken heart visible in her face; she looked fat and comfortable, as if she had sustained no damage by the perfidy of her swain. Before she was sworn, the court called the defendant, who came from among the crowd, and stood respectfully before the bench. Cuff was a good-looking young fellow, with a tolerably smartish dress, and appeared as if he had been in the metropolis, taking lessons of perfidious lovers; he cast one or two cutting looks at Phillis, accompanied by a significant turn up of the nose, and now and then a contemptuous ejaculation of Eh! — Umph! — Ough! — which did not disconcert the fair one in the least, she returning the compliment by placing her arms a-kimbo, and surveying her lover from head to foot. The court inquired of Cuff whether he had counsel? 'No, massa,' he replied, 'I tell my own 'tory; you see, Massa Squire, I know de gentlemen of de jury berry vell; dere is Massa Teerpenning, of Little 'Sophus, know him berry vell; I plough for him; den dere is Massa Traphagan, of our town — how he do, massa? — ah, dere Massa Topper, dat prints de paper at Big 'Sophus — know him, too; dere is Massa Peet Steenberg — know him, too; he owe me little money; — I know 'em all, Massa Squire; I did go to get Massa Lucas to plead for me, but he gone to the Court of Error at Albany; Massa Sam Free and Massa Cockburn said they come to gib me good character, but I no see 'em here.'

"Cuff was ordered to stand aside, and Phillis was sworn. Plaintiff said she did not know how old she was; believed she was sixteen: she looked nearer twenty-six; she lived with Hons Schoonmaker; was brought up in the family. She told her case as pathetically as possible: 'Massa Squire,' said she, 'I was gone up to Massa Schoonmaker's lot, on Shaungum mountain, to pile brush; den Cuff, he vat stands dare, cum by vid de team, he top his horses and say, "How do do, Phillis?" or, as she gave it probably in Dutch, 'How gaud it mit you?' "Hail goot," said I; den massa he look at me berry hard and say, "Phillis, pose you meet me in the nite, ven de moon is up, near de barn, I got sumting to say,"—den I say, "berry well, Cuff, I vill;" he vent up de mountain, and I vent home; ven I eat my supper and milk de cows, I say

to myself, Phillis, pose you go down to de barn, and hear what Cuff has to say. Vell, Massa Squire, I go. Dare was Cuff, sure enough. He told me heaps of tings all about love; called me Weenus, and Jewpeter, and oder tings vat he got out of de play-house ven he vent down in de slope to New York, and he ax'd me if I'd marry him before de Dominie, Osterhaut, he vat preached in Milton, down 'pon Marlbro'. I say, Cuff, you make fun on me; he say, "No, by mine zeal. I vil marry you, Phillis;" den he gib me dis here as earnest.' Phillis here drew from her huge pocket an immense pair of scissors, a jack-knife, and a wooden pipe curiously carved, which she offered as a testimony of the promise, and which was sworn to as the property of Cuff, who subsequently had refused to fulfill the contract.

"Cuff admitted that he had made her a kind of promise, but that it was conditional. 'I told her, Massa Squire, that she was a slave and a nigger, and she must wait till the year 27, then all would be free, 'cording to the new constitution; den she said, berry vell, I vill vait.'

"Phillis utterly denied the period of probation; it was to take place, she said, 'ven he got de new corduroy breeches from Crippleley Coon, de tailor; he owe three and sixpence, and Massa Coon won't let him hab dem vidout de money; den Cuff he run away to Varsing; I send Coon Crook, de constable, and he find um at Shandakin, and he bring him before you, massa.'

"The testimony here closed. The court charged the jury, that although the testimony was not conclusive, yet the court was not warranted in taking the case out of the hands of the jury. A promise had evidently been made and had been broken; some difference existed as to the period when the matrimonial contract was to have been fulfilled, and it was equally true and honorable that in the year 1827 slavery was to cease in the State, and that fact might have warranted the defendant in the postponement; but of this there was no positive proof; and as the parties could neither read nor write, the presents might be construed into a marriage promise. The court could see no reason why these humble Africans should not, in imitation of their betters, in such cases, appeal to a jury for damages; but it was advisable not to make those damages more enormous than circumstances warranted, yet sufficient to act as a lesson to those colored gentry in their attempts to imitate fashionable infidelity.

"The jury brought in a verdict of ten dollars and costs for the plaintiff. The defendant, not being able to pay, was committed to Kingston jail, a martyr to his own folly and an example to all in like cases offending."

The lawyers employed to defend David Phillips, of Wood county, Ohio, who was charged with murder, but recently acquitted of the same through the "insanity dodge," threaten to go back on him. It seems that David (who has become sane again), mortgaged, during his "insanity," his farm to the attorneys. He now repudiates the mortgage because of the insanity that the lawyers themselves had established, hence the difficulty.

CURRENT TOPICS.

Judge William Strong, of Philadelphia, has qualified and taken his seat as Associate Justice of the United States Supreme Court. He is a jurist of undoubted ability, and will do honor to his high position. But, unfortunately, the declarations of some of the Senators previous to his confirmation have given rise to the impression in some very respectable quarters that he may have forestalled his opinions on the legal-tender question.

The confirmation of Joseph Bradley, of New Jersey, as Associate Justice of the Supreme Court of the United States, which took place on the 21st inst., is a very conclusive demonstration of what we have always supposed was the fact—that the pretense of rejecting Judge Hoar, on the ground of locality, was all moonshine. The real ground was that he had offended the Senators by his independent discharge of his duties, and that method of avenging their injured dignity, and of displaying their petty spite, was resorted to. Judge Hoar has a very high reputation as a jurist, and his appointment was hailed as a good omen by every one desirous of maintaining the judicial reputation of the Supreme Bench; but the Senators had their little axe to grind, and he was cast overboard.

The Legislature of Pennsylvania, like most other legislatures, exhibits a remarkable degree of caution and reluctance in enacting any measure demanded by and likely to benefit the people. The citizens and bar of Philadelphia are making strenuous efforts to procure an increase of the judiciary in that city—a measure clearly demanded by the condition of affairs—but the Legislature seems inclined either not to grant their request at all, or to do it only half way. The petitioners asked for the appointment of two additional judges for the District Court, and of one for the Common Pleas. The Legislature proposes to add two judges to the Common Pleas without adding any to the District Court. Owing to the limited jurisdiction of the Court of Common Pleas, nine-tenths of the litigation is in the District Court. That court was established, with three judges, about sixty years ago, when Philadelphia was a comparatively small city, and is notoriously inadequate to the vastly increased business of the present day. The evils that this state of things entails upon litigants are grievous, and it is to be hoped that the legislators will be induced to leave their hobbies long enough to provide a remedy.

Hercules had not a more difficult task to perform in cleansing the Augean stables, than have the Revising Commission in simplifying and systematizing the statute laws of this State. It would be quite difficult to conceive of a collection of statutes more chaotic, more loosely drawn, or more botched, than those that grace or deface our statute books. To reduce these, or rather the law, to a comprehensive and organized science—to re-draft, re-model, re-cast and revise nearly every act of the last half century—is what ought to be done; but, unfortunately, what cannot and will not be done. Such a task would require the ability of a Solon

and the days of the planet Jupiter; and, besides, it is not contemplated by the act for revision. All that we can hope for is a tinkering up of the worst statutes, and a systematic arrangement of the whole. We expect this much at the hands of the Commissioners. We expect them to prune and reform to the full extent of their power, and to give us an arrangement which shall not be like the present one—"past finding out." To do this it will be essential for them to devote themselves personally to the task before them, and not to leave it to their clerks, nor to be led away by the syren voice of clients.

A jest is out of place in a criminal trial, although when unpremeditated and arising naturally out of incidents connected with the trial, it is sometimes tolerated. But what shall we say when, by design, premeditated and arranged several days previously, the proceedings at a trial for felony are converted into a burlesque for the entertainment of court, jury and spectators? Such a scene was witnessed on the 17th of the present month at the Rensselaer Court of Sessions. An ignorant black man who had been indicted for assault with intent to kill, was persuaded by some persons desirous of fun, to solicit the assignment as counsel of an individual of his own color, who had been hanging about the court for some time previously, who was perfectly incompetent and unfit to take any part in the management of any litigation whatsoever, and who had never been admitted to the bar. The prisoner's request was yielded to, although a little thought would have reminded the Court of the utter injustice of such a course. The farce (of a trial) was subsequently performed on the day we have mentioned, to a crowded house, causing much amusement to those witnessing it, also the conviction of the prisoner, who was sentenced to the State prison.

Governor Hoffman has appointed Francis Kernan, of Utica; Amasa J. Parker, of Albany, and Montgomery H. Throop, of New York, commissioners to revise the statute laws of the State, under the recent act for that purpose. These gentlemen are eminently qualified to do the work well. Mr. Kernan was for some years reporter of the Court of Appeals, and has filled other public positions of trust and honor. Judge Parker is a lawyer of acknowledged ability, and of extensive practice. He was one of the editors of the Fifth Edition of the Revised Statutes, which, however, did we regard him responsible for the plan and execution of that work, we should hardly urge as an argument in his favor. Mr. Throop, though probably less known to the public than the other gentlemen of the Commission, has equal capacity for the position. He is a careful and thorough student of the law, and a gentleman not given to the profitless pursuit of the will-o'-the-wisps of public life. He has recently prepared—what we have reason to believe is—a very masterly treatise on the "Validity of Verbal Agreements," which is shortly to be issued from the press of John D. Parsons, Jr. No member of this Commission will do his work more ably or more thoroughly than will Mr. Throop.

The apprehensions of a conflict of authority, between the State and Federal courts, in the *Bininger* case, have been dissipated by the decision of Judge Blatchford. One of two partners had brought an action in the State court to wind up the partnership affairs, and had procured the appointment of a receiver. Subsequently, an alleged creditor commenced proceedings in bankruptcy against the firm, and an assignee was appointed. An application was thereupon made to the State court to have the receiver turn over the property to the United States Marshal, which was denied. (1 LAW JOURNAL, 23.) Thereupon the assignee applied to the United States District Court for an order directing the Marshal to take the property from the possession of the receiver, and to enjoin the receiver from any further interference therewith. Judge Blatchford has just rendered his decision, holding that when property is lawfully placed in the custody of a receiver, by the court which appoints such receiver, it is in the custody and under the protection and control of such court for the time being, and no other court has a right to interfere with such possession, unless it be some court which has a direct supervisory control over the court whose process has first taken possession, or some superior jurisdiction in the premises. And that it does not appear that the United States court has such superior jurisdiction in the premises, or such supervisory control over the State court, in respect to the property in question, as to authorize it to take from the State court the possession of such property, or to enjoin the receiver from further interfering with such property.

We give elsewhere a letter from Mr. Wallace, Reporter of the United States Supreme Court, relative to the decision of the legal tender case. He claims that the Court stood five to three, instead of four to three as has been alleged. We are not clear that such was the fact. The decision was pronounced on the seventh of February, and at that time the Court numbered but seven judges. Mr. Justice Grier had resigned, and his resignation had taken effect. But the question is only important as it bears upon the probabilities of a future reversal of that decision. Even on that question we fail to discover that it has much weight. Nor do we believe that any argument against reversal can be drawn from the past custom of the court. The situation of the present question is unlike that of any former one. Two new judges have been added to the court, and it is the manifest intention of the Senate to *pack* that tribunal in favor of the legal tender act. Judge Strong—a man confessedly opposed to the decision in the Hepburn case—has taken his seat, and the Court to-day stands a tie—four to four—on the question. When the ninth judge (Judge Bradley) shall have qualified, the Court will, beyond peradventure, stand five to four in opposition to the former decision of the Court. How much regard the majority will have for the maxim, *stare decisis*, we shall see. Nor is the *Ledger* correct in supposing that the question cannot again be brought before the Court within two or three years. We understand that there are now cases on the present calendar involving the very same question, which

are ready for argument, and which will be argued as soon as there shall be a full bench of nine judges.

The *Tribune* announces that "one of the great political discoveries of the age is, that it does not require lawyers to make laws." So much the worse for the "age." It will not be very surprising if it shall shortly be announced that "one of the discoveries of the age is, that it does not require a physician to cure disease or a surgeon to amputate a limb." It has become quite the fashion to send men to perform the most capital operations in law, and to administer the most potent legislative medicines, who have never devoted a moment's thought to the plainest principles of State pathology or surgery. Our statute books are lasting monuments to the folly of this sort of thing. It would be of far less moment to set a farmer, or a merchant, or an editor, even, loose in a hospital full of patients, with a full stock of medicines and surgical instruments, with general instructions to dose and cut *ad libitum*, than to set him at work to enact the laws of the State without a lawyer to guide and direct him. For almost every other business and vocation of life a preparatory education is deemed absolutely essential; but for legislation — the noblest and most important of them all — no discipline is thought necessary. Every man thinks himself a born legislator, and destined by a special providence to shed luster on the jurisprudence of his country. In the light of these latter days how old fogyish are the words of Tully, who, two thousand years, wrote: "It is necessary for a Senator to be thoroughly acquainted with the Constitution; and this is a knowledge of the most extensive nature; a matter of science, of diligence, of reflection; without which no Senator can possibly be fitted for his office." How foolish the opinion of that very worthy gentleman, Mr. Blackstone, when he said: "How unbecoming must it appear in a member of the Legislature to vote for a new law, who is utterly ignorant of the old! What kind of interpretation can he be enabled to give, who is a stranger to the text upon which he comments?"

We have had occasion several times to express our conviction that trial by jury in civil cases was not as a rule the most satisfactory way of arriving at the truth of an issue. The English "Judicature Commission," some time since, made a report in which is contained the following proposed method of trial, with which in the main we concur:

"It seems to us that it is the duty of the country to provide tribunals adapted to the trial of all classes of cases, and capable of adjusting the rights of litigant parties in the manner most suitable to the nature of the questions to be tried. We, therefore, recommend that great discretion should be given to the Supreme Court as to the mode of trial, and that any questions to be tried should be capable of being tried in any division of the court:

"1. By a judge.

"2. By a jury.

"3. By a referee.

"The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the judge to appoint any other mode. When the trial is to be by a jury or by referee, a judge, on application by either party, if he think the questions to be tried are not sufficiently ascertained upon the pleadings, should have the power to order that issues be prepared by the parties, and, if necessary, settled by himself. The judge should also, on the application of either party, have power to direct that any question of law should be first argued, that different questions of fact arising in the same suit should be tried by different modes of trial, and that one or more questions of fact should be tried before the others.

"The system which, in all the divisions of the Supreme Court to which it can be conveniently applied, we would suggest for the trial of matters suitable for trial by referees, is as follows:

"We think that there should be attached to the Supreme Court officers to be called official referees, and that a judge should have power, at any time after the writ of summons, and with or without pleadings, and generally upon such terms as he may think fit, to order a cause, or any matter arising therein, to be tried by a referee; and that whenever a cause is to be tried by a referee, such trial should be by one of these official referees, unless a judge otherwise order. We think, however, that a judge should have power to order such trial to be by some person not an official referee of the court, but who on being so appointed should *pro hac vice* be deemed to be, and should act as if he were an official referee. The judge should have power to direct when a trial shall take place, and the referee should be at liberty, subject to any directions which may from time to time be given by the judge, to adjourn the trial to any place which he may deem to be more convenient.

"The referee should, unless the judge otherwise direct, proceed with the trial in open court, *de die in diem*, with power, however, to adjourn the further hearing for any cause which he may deem sufficient, to be certified under his hand to the court

"The referee should be at liberty, by writing under his hand, to reserve, or pending the reference to submit, any question to the decision of the court, or to state any facts specially, with power to the court to draw inferences; and the verdict should in such case be entered as the court may direct. In some other respects the decision of the referee should have the effect of a verdict at *nisi prius*, subject to the power of the court to require any explanation or reasons from the referee, and to remit the cause, or any part thereof, for reconsideration to the same or any other referee. The referee should, subject to the control of the court, have full discretionary power over the whole or any part of the costs of the proceedings before him.

A delicate and important duty is imposed upon the present Legislature, in the enactment of laws required to carry into effect the judiciary article of the Constitution, reorganizing the Supreme Court. In order to mitigate as far as possible the evils resulting from numerous tribunals of equal authority, and in many instances of last resort, the amended judiciary article provided for a reduction of the number of general terms, designating four as the limit, but permitting the Legislature, if they saw fit, to fix upon a smaller number.

Several bills were, during the early part of the winter, introduced into the Senate, for the purpose of carrying out the intention of the Constitution. In each of these bills there are excellent features, and, it seems to us, radical defects. In one thing they agree, namely, in the division of the State into three departments, in each of which a general term is to be held. The bill introduced by Senator Wood provides for an additional general term for the whole State, to be held at Albany, and to hear appeals upon non-enumerated

motions and upon motions relating to practice. In their details the several bills differ extensively, as will be seen by referring to the *Law Journal* of January 29th, in which each bill is given in full.

The object had in view by the Constitutional Convention, in reducing the number of general terms, was to produce uniformity or an approximation to it in the decisions of the Supreme Court. In many matters it is of very little importance what the law is, if it be only certain. Many minor points are now left to the discretion of the court in each particular case. On these points there is no law, and oftentimes, by an arbitrary exercise of discretion, the intent of the law is defeated. The erroneous decision is reported, becomes a precedent, is followed and accepted as settled law until some fearless and independent judge overrules it. On matters of practice this frequently occurs, and causes uncertainty and contradiction in the law. To secure perfect uniformity it would be necessary to submit all questions to the decision of one court. The vast amount of business continually arising prevents this, however, and some expedient must be devised whereby the end desired may be approximated without incumbering the court of last resort with too many cases. Senator Wood proposes to do this by dividing Appeals into two classes. One class, involving the law concerning the subject matters in litigation, must be appealed to the general term of the department in which the trial is had. Here there is a chance that a variance may arise among the decisions in the different districts, but the Court of Appeals will settle much of this variance. In the other class in which the merits of the causes litigated do not come in question, but simply matters of practice, the appeal must be made to one tribunal from every part of the State. Here the decisions will be uniform; and, although a right of appeal may exist, this court will, in most instances, be the court of last resort. In a little time its experience will give it such a familiarity with the matters intrusted to its jurisdiction, that the Appellate Court will refuse to overrule its decisions, and an appeal therefrom will be useless. Mr. Wood's bill, in this manner, meets a difficulty that seemed to be without remedy. In other respects, such as in the abolition of the Code of Procedure, it will hardly find favor with the profession.

Senator Hardenbergh proposes to make the general term consist of four justices, one of whom shall be a "presiding justice;" and in this respect his bill has an advantage over the others. If Mr. Wood's provision, organizing a fourth general term, with an additional clause directing the sittings of this term to be held alternately in New York, Albany and Rochester, could be incorporated into Mr. Hardenberg's bill, we believe a law would be framed which would be satisfactory to the profession, and do much to simplify and harmonize the decisions of the Supreme Court.

There will be very few lawyers in the next New Hampshire legislature. Manchester, Concord, Nashua and Keene send but one each, and there is a much smaller number than usual from other portions of the State.

OBITER DICTA.

Somebody wants to know in whose reign were Shower's Reports published?

King James said of Bacon's *Novam Organum*, that it was "like the peace of God which passeth all understanding."

"An intelligent witness, your Honor!" "Intelligent? Why he hasn't intelligence enough to comprehend a dog fight."

On an examination of candidates for admission to the bar in New York city, not long since, an applicant was asked to define "curtesy:" "Oh, sir," was the reply, "that's a kind of *he dower!*"

The instance is well known of the young lawyer who went out west, where he had nothing to do the first year, and all he could do the second — defending himself against tradesmen's suits.

It has been claimed that the North American Indians had only a usufruct, and not a fee in the land, when this continent was first discovered. How could an Indian hold in fee simple when he didn't know what a fee was?

"What do paupers in your part of the State live on?" inquired some one of Judge S., of New Hampshire, who had an extra number of town pauper cases to try, at a jury term? "On the provisions of the statute, I rather think," was the answer.

The other day we heard of a practitioner who, when asked how he was getting along, replied, "Oh I have all I can do," and then quietly added, after a pause, "to keep out of the work house." He subsequently claimed that he did a large collecting business. It seems that he passes a contribution box around regularly every Sunday.

Hunting up records is sometimes prosy work enough, yet professional conveyancers like nothing better. It is not often that a gleam of humor shines in the pages of the record office. We remember once, however, in the *in testimonium* clause of a deed, coming across the recital: "I A B, being unmarried, blessed be God for the same," etc.

A schoolmaster, who afterwards studied law, by some strange fortune managed to get on the bench, where fortunately he did not stay a great while. A member of the bar, who had been one of his pupils in former days, used to say: "He swung that ferule of his pretty lively, I can tell you, but I could stand his rulings then a great deal better than I can now!"

"The judgment in that case, your Honor, was *respondeat ouster*," remarked a counsel citing a case before a justice of the peace.

"How's that?" inquired the dignitary.

The counsel repeated his remarks.

"Ah, yes," said the justice with a gleam of satisfaction, "*respondeat oustee*. Exactly. Let the respondent be ousted. Proceed."

COURT OF APPEALS ABSTRACT.

Polly Smith, Adm'x, etc., v. *The Erie Railroad Co.*

In an action against a railroad company, for causing the death of the plaintiff's intestate, the defendants alleged that the deceased negligently undertook to cross its track about the appointed time for the train at a place not usually used or prepared for crossing with teams. Several witnesses testified that the place had been used for a crossing by them. *Held*, that the evidence was sufficient to require the question of deceased's negligence to be submitted to the jury. Opinion by MURRAY, J.

John Cope, Adm'r, etc., and Elizabeth McCraney, v. *Julius T. Alden, et al.*

Where money has been received which in equity belongs to another, an action for money had and received

will lie for its recovery under the Code, and any defense, legal or equitable, may be interposed by the defendant.

This action was brought to recover surplus moneys arising from the statutory foreclosure of a mortgage given by the plaintiffs to the defendant. The defendant sought to retain the money by virtue of another mortgage on the same premises from the plaintiffs to him. The plaintiffs, in reply, claimed that the latter mortgage was void for usury, because a portion of the consideration thereof was a bond and mortgage given by the plaintiff, Elizabeth, to the defendant on lands in Wisconsin, made and executed in this State, with no place of payment specified, and for a loan of money received here at a greater rate of interest than is allowed by the laws of this State. *Held:*

1st. That the bond and mortgage, so given by Elizabeth, was governed by the laws of this State, and was therefore void for usury.

2d. That that mortgage, being usurious and having entered into and formed a part of the consideration for the mortgage on which the defendant sought to apply the surplus money in his hands, the latter was also tainted with usury, and was void for the whole amount.

3d. That the fact that Elizabeth had sold the Wisconsin lands, subject to the usurious mortgage, was no waiver of the usury as to herself, although the purchaser of such lands could not set up the defense of usury against such mortgage. Opinion by JAMES, J.

John T. Parmelee v. *Delos W. Cameron.*

A legacy that has, by the death of the testator, become absolute and fixed—its amount and day of payment certain—is as capable of being assigned and transferred as a bond and mortgage; and therefore, in the absence of fraud or undue influence, the sale of such property at an inadequate price, is not a case within the equity rule which enables this Court to relieve expectant heirs and reversioners from disadvantageous bargains. Opinion by JAMES, J.

Hulton, survivor of Benkard, v. *Babcock et al.*

In an action for rent, by a lessor against a lessee, where the defendant sought set-off damages, sustained by him for a breach of the lessor's covenant, that the cellar should at all times be dry,—*Held*, that the question put to a witness, "What, in your judgment, were the premises you occupied worth loss per annum from May, 1862, to December, 1862, in consequence of the state of that cellar?" was proper. *Held*, also, that a witness who testified that he had been in the dry-goods business for twenty-five years and had occupied stores, and was acquainted with their value, was competent to testify to the above question. The question as to the effect of the dampness of the cellar on the health of the occupants of the store, was objected to on the ground that nothing beyond the rental value was admissible. *Held*, that the objection was not well taken; that damage to the cellar was damage to the whole store. Opinion by MURRAY, J.

GENERAL TERM ABSTRACT.

SEVENTH DISTRICT.—MARCH TERM,* 1870.

ACTION.

By guardian for injuries to infant.—An action for personal injuries to an infant, caused by the negligence of a physician employed by the father of the infant to attend him professionally, is well brought in the name of the infant by guardian. *Baird* v. *Gillett.* Opinion by JAMES C. SMITH, J.

CONSTRUCTIVE NOTICE.

To subsequent purchaser.—*Held*, that the actual possession of real estate by a vendee in an executory contract of purchase and sale, is constructive notice to a subsequent purchaser of the interest of the vendee in the land, notwithstanding the person in possession was a tenant of the vendee, and not the vendee himself, (the vendee having put the tenant in possession subsequently to his purchase), and notwithstanding the subsequent purchaser had not actual knowledge of the fact of such possession. *Royce, resp't,* v. *Flint and Another, appl's.* Opinion by JAMES C. SMITH, J.

DIVISION FENCE.

Liability of adjoining owners.—The plaintiff's farm adjoined that of the defendant, and each party maintained a separate portion of the division fence. The defendant's sheep escaped from his pasture into the plaintiff's wheat field, through a breach in the defendant's part of the fence, and injured the growing crop. That part of the fence had been recently built, of good and suitable material, and was in good order up to the day before the escape, but during the night of that day one length of the fence was broken down by a log being thrown upon it by some person unknown, and the sheep escaped through the breach thus made. *Held*, that the defendant was liable. *Krom* v. *Kirkendall.* Opinion by JAMES C. SMITH, J.

EVIDENCE.

Of market value—Interest.—Action by the vendor for the breach of an agreement to purchase and pay for a quantity of barley malt. The malt was to be delivered at the defendant's brewery in Auburn, in lots as the defendant wanted to use it, and to be paid for as fast as delivered. It having appeared on the trial that there was no market price of barley malt at Auburn, at or about the time of the breach, the plaintiff was permitted to give evidence of the market value at New York and Albany, and to show that the prices in those cities governed the price at Auburn, and on motion for a new trial this was held to be unobjectionable. But it was held erroneous to permit him to introduce, for that purpose, the testimony of dealers in malt at Auburn, as to the contents of market quotations read by them in newspapers published in New York and Albany, and of telegraphic dispatches from those cities printed in newspapers published at Auburn. Such testimony is mere hearsay. Whether, in such case, interest is allowable, as matter of law, or only in the discretion of the jury, *quere. Ferris* v. *Sutcliff.* Opinion by JAMES C. SMITH, J.

INSURANCE.

Against accident—liability of company.—The defendants insured the plaintiff's intestate against personal injury "caused by any accident while traveling by public or private conveyances provided for the transportation of passengers," &c. The intestate procured the insurance at Rathbun, Steuben county, with the intention of setting out, on the same day, to travel by public conveyance to Madison county, and she immediately entered upon the journey in company with her husband and others. The party traveled by cars to Watkins, at the head of Seneca lake, and from that point by steamboat to Geneva, where they arrived about eight o'clock in the evening. On landing at the steamboat wharf, the party started on foot to go to the station of the New York Central Railroad Company, about seventy rods from the wharf, in further prosecution of their journey; and on the way, the plaintiff's intestate slipped and fell upon the sidewalk, and received injuries of which she died in a few days. It appeared that it was usual for persons arriving on the steamboat to pass from the wharf to the railroad station on foot. It also appeared that upon the arrival of the boat, on the occasion in question, there were public hacks, for hire, at the wharf, for the purpose of carrying passengers, if hired to do so, to any part of the village, or to the railroad station. *Held*, on a case submitted without action, that the accident was not within the terms of the insurance, and that the plaintiff is not entitled to recover. The case distinguished from *Theobald* v. *Railway Passengers' Assurance Company* (26 Eng. L. & Eq. R. 432), cited by plaintiff's counsel. *Northrup, Adm.,* v. *The Railway Passengers' Assurance Company.* Opinion by JAMES C. SMITH, J.

Insurable interest.—The defendants agreed to insure the plaintiff against loss or damage by fire to the amount of $1,500 on his woolen factory, and the machinery therein. Before effecting the insurance, the plaintiff agreed to sell and convey the premises, including a saw-mill thereon, to one Campbell for $4,415.63, to be paid by the vendee; and Campbell was also to pay the expense of insuring the property to the amount of $2,000 till the purchase money unpaid should be reduced to that sum, to pay all taxes and to rebuild the saw-mill; and in case of default he was to forfeit all payments and improvements made by him. Campbell was in possession under the contract at the time of the insurance, but did not know of the insurance. He continued in possession until the factory and machinery were destroyed by fire. Campbell failed to perform his contract; he did not rebuild the saw-mill; his payments had not reduced the principal more than $500 at the time of the fire, and after the fire he declined to go on, and requested the plaintiff to take the property back, which he did. *Held*, that the plaintiff had an insurable interest; and there being no evidence that the insurance was intended merely as a collateral security to the debt owing by the vendee, and not to cover the whole estate in the property insured, *held*, that the plaintiff was entitled to recover the entire amount of the loss covered by the policy. *Wood* v. *The Northwestern Ins. Co.* Opinion by JAMES C. SMITH, J.

INTEREST.—See *Evidence.*

JUROR.

Affidavit of, to impeach verdict.—The affidavit of a juror is incompetent to impeach the verdict, on the ground that the jury misapprehended and rejected the testimony of one of the witnesses. *Briant* v. *Trimmer.* Opinion by JAMES C. SMITH, J.

MANDAMUS.

To compel the Oyer and Terminer to settle and sign bill of exceptions.—The relator was tried in the Oyer and Terminer of Yates county, and convicted of rape. His counsel took several exceptions, but no bill of exceptions was signed by the court, or tendered to the court to be signed, nor was any order made, or asked for, at the trial term, giving time to make and serve a bill of exceptions. At a subsequent term, the court made an order granting leave to the relator to prepare and serve a bill of exceptions, to be settled by the judge who presided at the trial. A bill of exceptions was made and noticed for settlement within the time fixed by the order, but the settlement was pre-

*We have received, too late for publication this week, abstracts of other decisions rendered at this term. They will be given in our next number.

vented by the death of the judge. Subsequently, the relator moved in the Oyer and Terminer for an order that the bill of exceptions be settled by the court, but the motion was denied. The relator, on an affidavit showing these facts, and showing also that the court denied the motion, on the ground of a want of power, obtained an order at a special term of this court, for a mandamus, directing the Oyer and Terminer to settle and sign the bill. *Held*, on appeal, that this court could not interfere by mandamus, except to direct the Oyer and Terminer to hear the application of the relator, and to decide the same in the exercise of its discretion, instead of declining to exercise its discretion on the ground of a want of power. *The People on the rel. of Dean* v. *The Court of Oyer and Terminer of Yates Co.* Opinion by JAMES C. SMITH, J.

TENANTS IN COMMON.

Right of each as to partnership property.—On the 9th November, 1857, F and O owned in common a horse-power dredging machine, for excavating earth under water, which then was, and for more than a year had been, in the sole possession of F. On that day F entered into a written contract with M to hire out the dredge to him, to do certain work for him, at a stipulated price per day, and soon after he delivered the dredge to M, and the latter had the use of it under the contract. While he was using it, and after he had made partial payments to F, O gave notice to M that one-half of the dredge belonged to him, and he demanded that one-half of the earnings of the same should be paid to him, of which notice and demand M immediately notified F, and he thereafter declined to pay F beyond one-half the contract price unless he would indemnify him against the claim of O. On the 16th June, 1858, O sold and assigned to M his half of the dredge, and his share of the rent and earnings thereof from the 9th November, 1857, to the 1st June, 1858, and on the 17th of the same month F sold to M his half of the dredge. On the 13th July, 1858, F and M agreed upon the amount which the machine had earned while in the possession of M under the contract, and M paid to F a sum which, with the previous payments, made one-half of such amount, F still insisting that he was entitled to receive the whole of such amount. F had put repairs on the machine to a large amount, at his individual expense, while it was in his possession; and there was an unliquidated account between him and O for receipts and disbursements, profits and loss on account of the machine. F sued M to recover the remaining half of the earnings of the machine under the contract. *Held*, that M was bound by his contract with F; that by his purchase and assignment from O he acquired no defense to the claim of F except the right to call on him to account for one-half the net earnings of the machine, and that as it did not appear there was anything due from F on such account, he was entitled to recover. *Foster* v. *Magee*. Opinion by JAMES C. SMITH, J.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF RHODE ISLAND.*

ACCOUNT. See *Probate Account.*

ALIENATION OF TRUST ESTATES. See *Trusts and Trustees.*

APPEAL. See *Probate Appeal.*

ACTIONABLE WORDS.

To say of a person "I will tell you what the matter with her is. She has had the ——" (naming a venereal disease), is actionable, as importing that the person of whom these words were spoken was, at the time the words were uttered, suffering from the disease named. *Semble*, that these words would not have been actionable if they had simply imported that the disease was a thing of the past. *Irons & Wife* v. *Field & Wife.*

ASSESSMENT OF TAXES. See *Taxes.*

ATTACHMENT. See *Divorce*, 1, 2, 3 *and* 6.

BANKRUPT ACT.

A judgment in an action of trespass for assault and battery is a debt dischargeable under the National Bankrupt Act of 1867. *Manning & Wife* v. *Keyes.*
See *Poor Debtor's Oath.*

BANKS—BONDS OF CASHIERS OF. See *Cashier's Bonds.*

BONDS—CASHIERS'. See *Cashiers' Bonds.*

BONDS—EXECUTORS'. See *Pleadings and Practice at Law*, 5 *and* 6.

CASHIERS' BONDS.

1. In a suit against a cashier of a bank, and his sureties on their bond, where the defendants pleaded severally, it is no defense to the suit that the directors have been negligent in examining his accounts. *Atlas Bank* v. *Brownell.*
2. The admission of the cashier, that he had paid out large sums of money without the consent of the directors, is admissible evidence. *Ib.*

3. To avoid the bond on the ground of fraud on the part of the bank or its directors, there must be a fraudulent concealment of something material for the surety to know. *Ib.*

CHARITABLE USES. See *Trusts and Trustees, Equity Pleading and Practice*, 2.

CHARTER. See *Corporations.*

CORPORATIONS.

A stockholder in an insurance company, the charter of which provided, at the time he purchased his stock, "that the stockholders should not be liable to any responsibility further than the amount of their respective shares and interest thereon, for or on account of any damage or loss sustained by said company, or for or on account of any debt due thereon," cannot object to an assessment made upon him under and in conformity to the provisions of chapter 635 of the statutes, which provides that, "whenever the capital stock of any insurance company shall be diminished by reason of losses, or from any other cause, the stockholders of said company, at any legal meeting thereof called for the purpose, may (after making due allowance from the assets of the company of such amount as may be required to re-insure its outstanding risks) assess such further sum as may be necessary to fill up the capital stock to its original amount, upon the several stockholders in proportion to the amount of stock owned by each, and the stock of every stockholder shall be pledged and liable for such assessment," although said last named act was passed subsequently to his purchase of stock; when the General Assembly have expressly reserved to themselves the power in the charter to alter, amend, or repeal it at pleasure. *Gardner* v. *Hope Insurance Company.*

COURT OF PROBATE.

In case of an application to the Court of Probate to appoint a guardian of a person of full age, the intended ward is the only person necessary to be notified, although it may be advisable, in certain cases, to notify others. *Hamilton* v. *Court of Probate of North Providence.*
See *Probate Account; Probate Appeal.*

DEPOSITIONS — WHEN ADMISSIBLE. See *Pleading and Practice at Law*, 7.

DIVORCE.

1. When S., wife of O. B. S., had obtained a decree of divorce from bed and board and future cohabitation with her husband and the custody of her children, said decree charging certain real estate of the husband with a fixed annual payment decreed to her for her own use and the support of her children; *it was held*, that the court would not, at her suit, pass a decree enjoining creditors of the husband who had made attachments on said estate and subsequently obtained judgments in the suits in which said attachments were made, and who had levied their executions thereon, from proceeding with their executions, nor would the court declare the liens created in her favor by the decree entered in her petition to have precedence of said attachments or levies because said attachments were made subsequently to and with notice of the *filing* of the petition, when it appears they were made previously to the *service* thereof. *Spencer* v. *Spencer.*
2. *Held, further*, that she was not entitled to such a decree because her aforesaid decree of divorce and alimony was entered prior to the levies made by the defendants on their executions. That the attachments and not the levies, determined the rights of the parties. *Ib.*
3. *Held, further*, that although the aforesaid S. had filed her ancillary petition, service of which had been made prior to the aforesaid attachments upon W. S., the attorney in fact of O. B. S., and a decree had been passed enjoining the said O. B. S. and W. S. from alienating or encumbering the estates described in the principal petition (being the estates attached as aforesaid), until the hearing therein, and charging said estates with an *ad interim* allowance, neither the filing of the petition, nor the decree entered therein, could have any effect to defeat or postpone these attachments. *Ib.*
4. The laws of Rhode Island, except to the extent of the right of dower, do not accord to the right of wife and child to support out of the husband's property a preference over the right of the creditor to payment, but rather the reverse. *Ib.*
5. The filing of a petition for divorce and alimony does not create a lien on the property therein described, and out of which alimony is prayed, before service. *Ib.*
6. Doctrine of *lis pendens* considered. If applicable to petitions for divorce, it is applicable only on the ground that the property described, having by the service of the petition been put in litigation, will be held to abide the event of the suit, to prevent the defeat or embarrassment of the litigation by any alienation made or lien acquired *pendente lite.*

Hence, notice of such a petition to third persons, who are creditors of the respondent husband, is not, as to such persons, equivalent to service so as to postpone the *bona fide* attachments. *Ib.*

EQUITY PLEADINGS AND PRACTICE.

1. It is within the jurisdiction of the Supreme Court, under the full chancery powers conferred upon it by sec-

* From JOHN F. TOBEY, reporter.

tion 8, chapter 164, of the Revised Statutes, to sanction, in a proper case, the sale or exchange of real estate held upon trust for charitable uses. *Brown and others, Trustees, v. Meeting Street Baptist Society.*

2. When a grant is made upon a trust for charitable uses, the remedy, if the estate be misapplied, is not its forfeiture to the grantor or his heirs, but a proceeding on the equity side of the Supreme Court to enforce the trust, unless the trust is coupled with a condition that the estate shall revert if misapplied. *Ib.*

See *Divorce*, 1, 2, 3.

EVIDENCE.

The admission of a cashier of a bank that he had paid out large sums of money without the consent of the directors, is admissible evidence in a suit upon his bond against him and his sureties. *Atlas Bank* v. *Brownell.*

See *Wills*, 2, 3; *Pleading and Practice at Law*, 7.

EXECUTORS. See *Pleading and Practice at Law*, 5 *and* 6; *Mortgagees' Sales*, 2.

INSURANCE.

1. A mortgagee who has procured his interest in the mortgaged property to be insured against loss by fire by a policy of insurance, which provides that, in case of loss, the amount thereof shall be paid him "whenever and as soon as his lien upon said property, by virtue of said mortgage, is established by a decree of court or otherwise," is only obliged, in case of loss, to establish his lien on a portion of the mortgaged property equal in value to the amount of his insurance, in order to recover the amount insured. *Harris* v. *Gaspee F. & M. Insurance Company and others.*

2. All moneys received by said mortgagee, from the sale of what remained of the insured property after the fire, must be deducted from the amount which should otherwise be paid by the insurance company, and interest on the amount to be so paid is to be computed only from the time the lien is established. *Ib.*

INSURANCE COMPANIES. See *Corporations.*

MARRIAGE AND DIVORCE. See *Divorce.*

MORTGAGEES' SALES.

1. K. W. and E. W., his wife, being mortgagees with power of sale, sold the mortgaged premises to H. A. P., and took a reconveyance to themselves. The mortgagor, or owner of the equity of redemption prior to the sale, filed a bill to redeem, alleging that the mortgagees had sold to themselves. The answer to the bill was, in substance, that the mortgagees agreed with H. A. P. that if he would bid upon said mortgaged property to the amount of their mortgages at least, in case so much should not be bid by others, they would purchase the same of him at the price by him bid, and save him from any loss in consequence of his so buying said property, or take it off his hands, and admitted that said H. A. P. had conveyed to them the said premises in pursuance of said agreement. *Held*, the case being tried on bill and answer, that the mortgagor was still entitled to redeem, the mortgagees having acquired, as against him, only defeasible titles. *Parmenter* v. *Walker and others.*

2. An executor of a deceased mortgagee may sell at public auction real estate under a power of sale contained in a mortgage, and convey good title to said property, notwithstanding the provisions of Title XXIV. of the Revised Statutes, chapter 157, §§ 7–16, said sections referring only to mortgages not containing a power of sale in the usual form, and not prohibiting contracts between the parties independently of the statute. *Richmond and others, Executors*, v. *Hughes.*

MOTION FOR NEW TRIAL. See *New Trial.*

NEW TRIAL.

Where the excess of damages awarded by a verdict of a jury is so gross and palpable that in the opinion of the court the verdict ought not to stand as found, the court will grant a new trial unless the plaintiff will enter a *remittitur* of record to the amount of the excess over what the court think a liberal compensation for the damages he has been shown to have suffered. *Burdick* v. *Weeden.*

PERSONAL LIABILITY OF STOCKHOLDERS. See *Corporations.*

PLEADING AND PRACTICE AT LAW.

1. The court will presume, after verdict rendered, that everything was found by the jury which was necessary to support the verdict, even if not alleged in the pleadings of the party in whose favor the verdict has been found. *Irons & Wife* v. *Field & Wife.*

2. Although a person accused of an offense cannot be called upon to pay the costs of the State as part punishment, in advance of his conviction, yet it is competent for the court before which the case against him is pending to require him to pay them as a condition of the continuance of his case, which he seeks, and which it is within the discretion of the court either to grant or refuse. *In the matter of Daniel Esten for certiorari.*

3. The officer charged with the service of the writ returned that "the body of the defendant was not to be found within his precinct," and attached the defendant's goods. Plea: that the defendant was at large and not concealed, and could have been found, etc. *Held*, that the requirement of the statute, that the officer shall use his best exertions to find the defendant, is directory only. The proper form of pleading in such a case is, that the defendant was within the State (or precinct), and there to be found at large. *Weldon* v. *Wood.*

4. The doctrine of repleader considered. It is generally within the discretion of the court whether it shall be allowed. *Ib.*

5. The remedy in case of the neglect or refusal on the part of executors to render an account, is a suit upon their bond, which must, under the provisions of our statute, be brought at the instance of some party interested, which means some party having an interest in the estate. *Dunnell and others* v. *Municipal Court of Providence.*

6. Sureties on an executors' bond have no interest in the estate which entitles them to bring suit on it upon the failure of the executors to perform its condition, and, therefore, the Supreme Court will not decide, upon their application, whether the executors, whose sureties they are, are liable to render an account to the Court of Probate, or whether said court ought to cite them to render their account. *Ib.*

7. A deposition otherwise admissible in evidence may be used in the trial of a cause, although the deponent is himself in court at the time it is produced, and could be put upon the stand by the parties offering his deposition if they so desired. *Thayer* v. *Thayer.*

See *Court of Probate; Probate Account; Probate Appeal.*

POOR DEBTOR'S OATH.

The National Bankrupt Act of 1867, chapter 91, second session thirty-ninth Congress, does not suspend or supersede the *Poor Debtor's Act* of Rhode Island (Rev. Statutes, title 8, chapter 198), although, as held by the court in the case of Gideon Reynolds, it has, to the extent of its application, suspended the *insolvent law* of the State (Revised Statutes, title 28, chapter 200). *Jordan, Marsh & Co.* v. *Aldrich and others.*

POWERS. See *Mortgagees' Sales.*

PROBATE ACCOUNT.

Errors in a probate account may be corrected by opening the account, or by proper charges, or credits in a new account, where the items have not been specially adjudicated upon. *Sherman* v. *Chase.*

PROBATE APPEAL.

On a probate appeal, charging that an administratrix had not accounted for certain property, where it did not appear that the Court of Probate had adjudicated specially on the items of her account, but the Supreme Court were satisfied that she had accounted for the property, although under an incorrect description: *Held*, that as the balance stated was correct, there was no need of opening or amending the account to correct the description. *Sherman* v. *Chase.*

REPLEADER. See *Pleading and Practice at Law*, 4.

SALES BY MORTGAGEES. See *Mortgagees' Sales.*

SET-OFF.

In an action by executors against a bank, to recover a sum of money on deposit in said bank, which stood to the credit of their testate at the time of his decease, but was subsequently transferred by said bank to the credit of said executors, the bank cannot be allowed to set off a debt due to itself from said testate, it having no lien on said deposit. *Tobey's Executors* v. *Manufacturers Nat. Bank.*

SLANDER. See *Actionable Words.*

STOCKHOLDERS—PERSONAL LIABILITY OF. See *Corporations.*

TAXES.

B. resided in the town of N. P. for the larger portion of the twelve months preceding the first day of April, A. D. 1866. He afterwards changed his place of residence to the city of P. *Held*, that by the provisions of the Tax Act (Revised Statutes, title 8, chapter 38, section 10) he was properly taxed in the town of N. P. in the year 1866, for personal property, the statute being held to apply as well to persons having only one residence, who by removal have it successively in different towns, as to persons having at the same time different residences in different towns. *Tripp, City Treasurer*, v. *Brown.*

TRUSTS AND TRUSTEES.

1. M. B. conveyed to O. B. and others, a certain lot of land in trust, for the purpose of erecting thereon a school house and a meeting house for the people of color of the town of P. forever. *Held*, that as the primary purpose of the donor was the promotion of the charity, the Supreme Court might disregard his incidental purpose, that the particular property given should be used for its promotion, and allow said lot of land to be sold or exchanged, if thereby the charity would be benefited. *Brown and others, Trustees*, v. *Meeting Street Baptist Society.*

2. The sale or exchange of such a trust estate, in such a case, is no violation of the implied contract on the part of the trustees that they will perform the trust, as the

power of alienation is itself implied in the grant, and the trustees perform the trust by the proper exercise thereof. *Ib.*

WILLS.

1. Decision in *Wheeler* v. *Wheeler*, 1 R. I. 364, reaffirmed, that revocation of a will by marriage, under our statutes, is presumptive only. *Miller and others* v. *Phillips, Executor.*

2. Evidence that the testratrix, who wrote a will before her marriage, spoke of her will after her marriage, held to be properly admitted. *Ib.*

3. Evidence of parol declaration is admissible to rebut the presumption of revocation from marriage, to be weighed by the jury in connection with other evidence. *Ib.*

4. John D'W., by the third clause of his will, provided as follows: "I give, bequeath and devise unto my son John D'W., Jr., during his natural life, the use and improvement of the farm where I now live, with the live stock and farming utensils belonging thereto, and after his decease I give, devise and bequeath the same estate, both real and personal, to my grandson, Algernon S. D'W., his heirs, executors, administrators and assigns, forever. Provided, however, that if the said A. S. D'W. should die without lawful issue living at the time of his death, then, in that case, I give, bequeath and devise the same estate, both real and personal, unto his surviving sisters, Susan A. D'W., Elizabeth V. D'W., and Maria G. D'W., or such of these as may survive the said A. S. D'W., their heirs and assigns forever." *Held*, John D'W. being dead, Amelia D'W. having died previously to John, leaving children, Algernon living and having issue, Elizabeth and Maria both living, and Elizabeth being married;—*First*, that the estate given to Algernon S. D'W. was a fee simple, subject to the conditions expressed in the will;—*Secondly*, that the gift over referred to issue living at his death, and was not void as referring to an indefinite failure of issue, but was good as an executory devise; and, *Thirdly*, that the sisters of Algernon, who survived him, would take the estate in fee (if he died without leaving issue living), but that the issue of his sister Amelia, the sister who died before him, took no interest in the estate, and that, if no sister of Algernon should survive him, the fee, once vested in him, would not be divested. *D'Wolf* v. *Gardner.*

5. A mere naked possibility or expectancy cannot be assigned at law, but a contingent right, founded on an executed instrument, where the contingency does not depend on the existence at a particular time of a person now in existence, can be released to the *terre tenant*, or person in possession by a rightful title (although, *quære*, whether it can be so released to strangers). Hence, *it was held, fourthly*, that the sisters of Algernon D'W. might pass their interest in said estate to him, by any instrument operating by way of estoppel or release, the power being given to his married sister to release her interest jointly with her husband, by chapter 726 of the statutes, even if it did not exist under the provisions of § 6 of chapter 136 of the Revised Statutes. *Ib.*

WORDS ACTIONABLE. See *Actionable Words.*

DECISIONS BY THE U. S. SUPREME COURT.

The following decisions were rendered by the U. S. Supreme Court on the 14th inst.:

The Justices of the Supreme Court of the Third Judicial District of New York v. *The United States, ex rel. Murray and Buckley.*—The questions presented for decision in this cause were, whether the act of Congress providing for the removal of a cause for new trial in the Federal Court, after judgment by a State Court, is constitutional; and, second, whether the provision of the Constitution, which declares that no fact tried by a jury shall be re-examined in any court of the United States than according to the rules of the common law, applies to facts tried by a jury in a State Court. Mr. Justice Nelson delivered the opinion of the court, holding substantially that the clause of the act of 1863, which provides for the removal of causes after judgment from the State to the Federal Court, was not in pursuance of the Constitution, and was, therefore, void. The conclusion arrived at in respect to the second question stated above amounts to an answer in the affirmative. The cause is remanded, with directions to dismiss the writ of error, to the State Court, and all proceedings under it. This is the false imprisonment case of *Patrie* v. *Murray*, and one of his deputy marshals, and which, after judgment against the defendants, it was attempted to remove to the Circuit Court of the United States by writ of error under the act in question, supported by a writ of mandamus, the Judges of the State Court declining to send up the record of judgment.

BOUNTY UNDER THE PRESIDENT'S CALL FOR VOLUNTEERS, 1861.

The United States v. *Henry J. Hosmer.*—Appeal from the Court of Claims.—A judgment was given below for the claimant for $100 bounty for enlistment under the President's call for volunteers in 1861, he having been discharged for disability upon a surgeon's certificate. The question was whether, under the act of Congress ratifying the act of the Executive, the claimant could recover, the act providing that two years' service should have been rendered to entitle the soldier to the bounty, unless discharged for wounds. Mr. Justice Swayne delivered the opinion of the court, holding substantially that the proclamation of the President and the general orders of the War Department stipulating to pay $100 for each volunteer, followed by the enlistment of the claimant, constituted a valid contract between the Government and the claimant, upon which he was entitled to the bounty, he having been honorably discharged, even though he did not serve two years nor was discharged for wounds. The judgment was affirmed.

THE LEGAL TENDER DECISION.

Mr. Wallace, Reporter of the United States Supreme Court, recently wrote the following letter to the Philadelphia *Ledger* relative to the recent legal tender decision:

To the Editor of the Money Article of the Ledger:

WASHINGTON, D. C., *March* 9, 1870.

When the decision in what is called the legal tender case was made, the Supreme Court of the United States consisted of eight judges, the number then fixed for it by law. And the decision that notes of the United States, when tendered in payment of a contract made previously to the passage of the legal tender act of February, 1862, was no lawful tender, was concurred in by *five* judges, not by *three*, as assumed in the paragraph quoted. These five judges were the Chief-Justice and the Justices Nelson, Grier, Clifford and Field. Judge Grier had left the bench before the *opinions* were delivered, but he was on it when the case was argued in conference, and when the judgment of affirmance of the Court of Appeals of Kentucky, which had decided the tender bad, was irrevocably and perfectly agreed on. And this, in substance, is stated in the opinion of the court as officially printed, though not in others that I have seen.

While on the subject, and since I have seen it stated that the decision does not apply to *interest* which has accrued since the legal tender acts on obligations given before them, and that, under the decision, interest on such obligations may be paid in paper, I may take leave to add that the decision did apply to interest just as much as to principal. Part of the tender made in the case was exactly for interest; interest, I mean, which had accrued after the passage of the legal tender act. The Court of Appeals made no distinction between principal and interest, but held the tender bad *in toto*. And so the Supreme Court held it.

I may add that on no great constitutional question, where professional and public opinion has been largely divided, do I recall a case for many years where the judges were unanimous, or nearer to unanimity than in the present one. That the case was not hastily adjudged may be believed not more from its importance than from the fact that the question involved in it was, in one case or in another, and with more or less fullness, argued at the bar not less than *six* different times, and was held very long under advisement. I am your obedient servant,

J. W. WALLACE.

The *Ledger*, from which we take this, adds:

We have yet to learn that there is any case now on the docket which involves the legal tender question. All have been disposed of, as we hear. It would take two or three years before a new case could be got up, in the present crowded state of the Supreme Court docket; and a case raised up now, and in the face of the late emphatic decision, would look so much like a case raised for delay of payment that the party taking an appeal would probably be considered as coming within the rule of the court which allows the bench to add *ten per cent interest* above the legal rate on any case which they believe is brought for delay. The rule, as the reported decisions of the court show, has been twice enforced lately, and it is a dangerous one to trifle with. It shows, as we have sought to show, that there is nothing for our State or for our large corporations, owing money on bonds issued prior to February, 1862, to do, but to look the matter in the face and conform to the solemnly settled law of the land.

SUPREME COURT.

THE CORN EXCHANGE INSURANCE COMPANY *v.* ARMINA BABCOCK, *impleaded, etc.*

Where a married woman, possessed of separate real estate, indorsed a note as surety for her husband, without consideration and without benefit to her separate estate, and the indorsement purported in terms to charge her separate estate, with payment; *held*, 1st. That an action at law seeking an ordinary pecuniary judgment, as upon a personal contract, was not maintainable on such notes against the married woman.

2d. That, in order to make an indorsement, in such case, a charge upon her separate estate, a specific description of the property in the instrument creating the charge, executed according to legal formalities, and enforced in equity under a complaint seeking as relief the satisfaction of the charge out of the specific property subjected thereto, is essential.

APPEAL from a judgment entered upon the report of a referee.

The action was brought upon three promissory notes, having upon each the special indorsement of the defendant, Armina Babcock, substantially in the following form:

"For value received, I hereby charge my individual property, with the payment of this note.

"ARMINA BABCOCK."

At the time the notes were executed and indorsed by the appellant, Armina Babcock, which was in 1863 and 1864, she was a married woman (being the wife of the defendant, Edward Babcock), and the owner of a separate estate, consisting of real property. The other defendants were insolvent. The referee found that she made the indorsements for the benefit of the other defendants, Stephen E. and Edward Babcock, and that she had no interest in the transaction; but made no finding that she intended to charge her separate estate. The action was in the ordinary form against makers and indorsers of a promissory note, except that the above indorsement was literally copied, and the complaint alleged in Armina Babcock the possession of separate estate and her intent to charge said estate.

The appellant raised by exception a number of objections to the plaintiff's recovery, and also moved to dismiss the complaint as asking a personal judgment against a married woman; as being improperly joined with the other defendants; as not liable in such an action, but only, if at all, in equity; as not proving an intent to charge her separate estate, etc.

The judgment was the usual general judgment in an action at law for a pecuniary sum as damages (the amount of the notes), and the costs of the action.

R. A. PARMENTER, for plaintiff.

J. A. MILLARD, for defendant.

By the Court, HOGEBOOM, J.—In this case the learned referee gave a personal money judgment against the appellant, a married woman, in an action at law for a debt of her husband, not benefiting her separate estate, upon a note of which she was simply indorser or guarantor for him. And in the proceedings in which action her separate estate was not specifically described, and to which separate estate the judgment made no allusion. The complaint was in the ordinary form against the maker and indorsers of the note, except that it described in *hæc verba* the appellant's indorsement, and by amendment embraced the further allegation that the appellant was the wife of the defendant Edward Babcock, "and at the time of making her said indorsement had and still has a separate estate, and intended to charge her separate estate by her said indorsements." The only proof of such intent produced at the trial was the character of her indorsements, which was as follows:

"For value received I hereby charge my individual property with the payment of this note.

"ARMINA BABCOCK."

And the fact that at the time she had, and still owns as her separate estate, a house and lot in the city of Troy worth several thousand dollars, and that her co-defendants were insolvent. The referee does not find any such intent, nor that the indorsement was for the benefit of her separate estate, but on the contrary finds that "such notes were indorsed by the said Armina for the benefit of the said Stephen E. and Edward Babcock, she having no interest in the transaction."

Under these circumstances, I do not think this judgment can be sustained, for reasons which I proceed to give: 1st. The common law disability of the wife to bind herself in any such way as is claimed to have been done by these indorsements is conceded. A question is raised whether the writing of the appellant upon the back of the notes amounts to an indorsement, but for the purposes of this case I assume that it does. One of them clearly is so, because it directs the payment to be made to the secretary of the plaintiff. The disabilities attaching to coverture are not to be regarded as any further removed than they are so by the married women's acts of 1848, 1849, 1860, 1862, and the question is, whether these acts justify the judgment given in this case. While they are, perhaps, to be construed liberally to promote the objects intended, it must not be forgotten that their leading object was to benefit and protect married women, and not to expose their separate estate to new and increased dangers and liabilities. 2d. Prior to the acts of 1860 and 1862, it was not supposed, so far as I know (even under the acts of 1848 and 1849), that married women could be made liable under an instrument like that now under discussion; certainly they could not be charged personally. In the leading case of *Yale* v. *Dederer*, 18 N. Y., 265 (repeatedly before the courts), it was held, that the capacity of married women to bind themselves by their contracts is not enlarged by the acts of 1848 and 1849, and a married woman having a separate estate, does not bind it by signing a promissory note as surety for her husband. This case came again, and finally before the Court of Appeals, 22 N. Y., 450, where the court reached this conclusion, that in order to create a charge upon the separate estate of a married woman, the intention to do so must be declared in the very contract, which is the foundation of the charge, or the consideration must be one going to the direct benefit of the estate. The court did not decide in what manner (otherwise than that it must be in the contract itself) this intention must be made to appear whether by a specific mortgage, pledge or appointment of property, specifically described, which was in force, in equity, in a direct proceeding to sell such separate estate, as had long been the practice of courts of equity (the common law courts not assuming jurisdiction of such a proceeding), or whether a general declaration of an intent to charge, or of an actual charge upon her separate estate, without in any way describing it, was sufficient. This decision was made in 1860, but without any reference to the act of that year, and of course without any to the subsequent act of 1862.

The act of 1860, ch. 90, sec. 3, as amended in 1862, ch. 172, p. 344, empowered married women to bargain, sell, and convey such real estate as they possessed as their separate property, and to enter into any contract in reference to the same with like effect in all respects as if they were unmarried. I observe in the statute no like provision in regard to personal property, but assuming that her power was equally operative over her personal estate, one question would be whether a general judgment affecting all her property, as well as that of her husband, in which she had an interest by reason of the conjugal relation as her own separate property, would be proper. I think this is not answered by saying that the execution of the judgment can be controlled so as to limit its enforcement to her separate property; the judgment itself should be such as not apparently to cover or affect any property other than that on which it is a lawful lien.

The broader and more important question, however, is, whether the authority given to enter into any contract in reference to her real estate is practically carried out in accordance with the intention of the law makers by an indorsement of a note saying that she charges her individual property with the payment of the note. If she attempted to make a deed or conveyance of her property in such a way it would be plainly illegal, and I think neither of the acts of bargain, sale, or conveyance, which in the previous part of the same sentence she is empowered to make, would be well executed by a simple statement in writing, saying: "For value received I hereby bargain (or sell or convey) my individual property to A B." It appears to me it would be rejected for indefiniteness as well as for non-compliance with the forms of law, and I am strongly inclined, to think the loose and indefinite language contained in this instrument is a decisive objection to its validity. "For value received" may possibly answer however wholly untrue it in fact is. "I hereby (that is upon the back of a promissory note) charge (that is mortgage, pledge, or make liable) my individual property (without describing it, without acknowledging the instrument, without recording it, without letting any body know what property it covers or whether it covers any) with the payment of this note." If she indorsed a hundred notes to different persons in the same way, which is to have preference, according to the date they were given or according to the date when judgment is obtained? No man, I think, could legally mortgage or pledge his property in that way, and I doubt whether any woman can.

3d. But it is said we are controlled by authority on this subject which we are bound to respect. In *Barnett* v. *Lichtenstein* (39 Barb. 194) the majority of the court went far enough to sustain the liability of the wife in the present case, putting it upon the ground that the words and intent of the statute were complied with by a charge made in this way and in this general form. But Justice INGRAHAM dissented, holding that, according to well settled rules of courts of equity, when a wife wishes to charge her real estate as security for her husband's indebtedness, she must do so by a mortgage or other proper charge of specific property, which is to be enforced as such. That she cannot contract a personal liability for her husband and for his benefit upon her note without any consideration to herself, and that the effect of sustaining the doctrine of her liability in the case under consideration, would be to place her in a worse condition than if sole, and to deprive her of the safeguards which the law has thrown around her to protect her property from the debts of her husband. Although this is a General Term decision it was made by a divided court, and cannot claim absolute authority in a condition of the law so new and unsettled and so much the subject of conflicting decisions.

It is directly opposed by a still later general term decision in the 4th district, made also by a divided court (Justice Rosecrans dissenting) not yet reported in the case of *Kelso* v. *Tabor*, where the attempt was made to recover upon the wife's note given for her husband's debt, and charging her estate in the same form as in the present case. Justice Potter, delivering the opinion of the court held, that though not in terms, yet in principle, the case was decided by the case of *Yale* v. *Dederer*, 18 N. Y. 265, and 22 N. Y. 450. That the contract of a married woman is absolutely void at law; that the statutes of 1848 and 1849 have taken from the wife no disability of her coverture, because the consideration of the contract in question has no relation to her separate estate, and the note is no conveyance of any interest therein; that the question is not what she might do with money on hand, or by an executed instrument, under seal, in a form to bind real estate, but by an executory contract, not given for her benefit, in which she has no interest, which is void at law, and for the enforcement of which there is no adequate inducement in equity to step aside from the well established rules prevailing in that court; that the question is whether the writing which would be void at law as a contract, is made valid and binding, by a direction that the indebtedness be charged upon her separate estate; that the action also is one at law, seeking a money judgment, and not equitable relief, and cannot succeed in that form nor be turned into an equitable action without violating the

principles of pleading. (*Heywood* v. *The City of Buffalo*, 14 N. Y., 540.)

I feel inclined to adopt the reasoning of the last mentioned case rather than that of *Barnett* v. *Lichtenstein*, as more in accordance with the spirit of equity and the intent of the legislature, and to grant a new trial in this cause substantially for the following reasons:

1st. That an action at law seeking an ordinary, pecuniary judgment as upon a personal contract consummated by a judgment of that character, in the ordinary form, is not maintainable against a married woman, who, without consideration and without benefit to her separate estate, and simply as the surety of her husband, and for his accommodation, indorses his note.

2d. That the plaintiff, having received these notes upon a pre-existing indebtedness, is not entitled to protection as a *bona fide* purchaser for a valuable consideration.

3d. That as the attempted charge upon the wife's separate real property in this case was not founded upon any benefit to such estate, or upon any matter in which she had any interest, or on account of which she had received any consideration, there is no occasion or justification for any departure from the established principles and proceedings of a court of equity, which require, in order to make and enforce a valid charge, a specific description of the property in the instrument creating the charge, executed according to legal formalities, and enforced in equity under a complaint seeking as relief, not a general judgment, but the satisfaction of the charge out of the specific property subjected thereto.

4th. That section 3 of the act of 1862, empowering a married woman, possessed of real estate as her separate property, to bargain, sell, and convey the same, and to enter into any contract in reference thereto with the like effect in all respects as if she were unmarried, refers to such modes and forms of bargain, sale and conveyance of real estate and contracts relative thereto as were recognized as legal, and were in conformity with the law as expounded in judicial tribunals at the time, and does not sanction a contract or charge of the kind now under investigation.

5th. That section 7 of the act of 1862 authorizes a married woman to sue or be sued in all matters having relation to her sole and separate property in the same manner as if she were sole refers mainly to her right and liability to sue and be sued without having her husband joined with her, and does not intend to confound or overthrow the rules of law or legal proceedings which theretofore obtained in regard to the essential characteristics of such actions, or the kind of relief to be sought, or the mode of in which it is to be reached.

6th. That the weight of authority is against the maintenance of the action in its present form.

I am therefore of opinion that the judgment should be reversed and a new trial granted, with costs, to abide the event.

TERMS OF SUPREME COURT FOR MARCH.

4th Monday, Special Term, White Plains, Tappen.
4th Monday, Circuit and Oyer and Terminer, Yates, J. C. Smith.
4th Monday, Circuit and Oyer and Terminer, Herkimer, Mullin.
4th Tuesday, Special Term, Erie, Talcott.
Last Monday, Special Term, Monroe, Dwight.
Last Monday, Circuit and Oyer and Terminer, Tompkins, Parker.
Last Tuesday, Special Term, Albany, Miller.
Last Tuesday, Special Term, Cortland, Murray.

APPOINTMENTS BY THE GOVERNOR,

BY AND WITH THE ADVICE AND CONSENT OF THE SENATE.

Notaries Public confirmed March 16, 1870:

Chautauqua County.—Geo. W. True, J. E. Mayhew, Timothy Judson, John Francis, Charles Holcomb, Henry Kidder, Fred'k F. Driggs, Leveret R. Johnson, Edward L. McCullough, Wm. L. Lester, James Fenner, George W. True, Jr., Austin L. Wells, Josias P. Kent, William Green, David Barwell, Orson Stiles, Wm T. Coleman, Jabez B. Archibald, Almond Z. Maison, Langley Fullager, William Zimmerman.

Ulster County.—Charles R. Adkins.

Albany County.—Wm. T. Dodge, Seth F. Owens, Edwin Ellis, Wm. Reid, T. S. Van Hoevenberg, Louis Dreyer, Cornelius Glen, Peter Veeder, H. J. Boyle, Murray Hubbard, Stephen W. Whitney, Dwight King, John C. Nott, John L. Van Valkenburgh, Thomas B. Morrow, William Kimmey, Wm. D. Field. Wm. N. Sanders, Thomas Whitbeck, Calvin W. Eaton, John Templeton, Hiram Griggs, Henry G. Radcliffe, Verplanck Colvin, Thos. W. Stevens, Joseph F. Winne, Theo. Papen, John Gurney Fine, Gerrett A. Van Allen, Geo. G. Davidson, Norman W. Falk, Chas. H. Van Arnam, Alston Adams, Wm. R. Prentice.

Franklin County.—John C. Hollenbeck, Julius D. Beckwith, Putnam B. Fisk, James C. Sawyer, Clark J. Lawrence, George Trimble, Eli B. Smith, Samuel A. Beman.

Broome County.—Joseph B. Chaffee, William E. Abbott, Stephen C. Willard, Martin Rockwell, Orville E. Coure, John B. Berry, Peter Schafer, George P. Sibley, Peter J. S. Coon, Aaron Delano, Francis B. Smith, Cornelius Reynolds.

Chemung County.—Daniel F. Pickering, Edward C. Van Duser, Jas. M. Edsall, Platt V. Bryan, Hosea N. Rockwell, Wright P. Sherman, Curtis C. Gardiner, Samuel C. Taber, Lewis M. Smith, John E. Stowell, Oliver C. Herrington, George H. Richards.

Tompkins County.—William W. Hare, Philip J. Partenheimer, Ransom Howland, Silas S. Montgomery, Marcus Lyon, Edward J. Moore, Garry E. Chambers, Asa B. Clark, Cyrus H. Howe, David Nichols.

Kings County.—J. J. Vail, John Kleinlein, Dudley W. Hayes, C. J. Jack, Oliver G. Carter.

Allegany County.—David R. Stillman, Benjamin C. Brundage, A. Perry Carter, Gabriel Bishop, Rufus L. Colwell, Samuel M. Russell, Abijah J. Wellsman, John S. Minard, Ezekiel R. Clarke, Alban A. Lewis, Hiram York, Woodward Willis, George S. Jones, William C. Bingham.

Delaware County.—John M. Olmstead, Daniel M. Dibble, James F. Scott, Charles Noble, George E. Marvine, James A. Huntly, A. Taylor, Henry Welsh, David H. Gay, Isaac Maynard, Marshall J. Bailey, Charles J. Knapp, Lemuel Sines.

Fulton County.—J. McLarren, Nathan P. Wells, Lester Getman, James P. Rosa, Jr., C. J. Mills, H. D. Smith.

Herkimer County.—Albert M. Mills, Watts T. Loomis, William Getman, Josiah A. Steele, Chester Crim, Floyd C. Shepard, Dennis R. Keeler, John A. Pitcher, William Vanderbergh, John D. Henderson, Morris Fikes.

Jefferson County.—George M. Hopkinson, George F. Paddock, John C. McCartin, Justin W. Weeks, John F. Moffat, Frederick Lansing, Nathaniel P. Wardwell, Silas W. Wilson, Andrew C. Cornwall, Hugh Maccandia, Richard H. Huntington, E. H. Myen, John Q. Adams, Charles W. Jennings, Charles W. Hubbard, Anson E. York, Herbert J. Barton, G. B. Barney Whipple, Joseph W. Reade, John T. Connell, John C. Fulton, Orrian S. Lewis.

Lewis County.—David T. Martin, Jr., John G. Marvin, Nicholas Gawdel, Alfred H. Kellogg, Edward McCarty, William R. Wadsworth, Isaac A. Warmuth, Edward A. Brown, Jr., Leon Talcot, D. A. Blinn, Alva L. Nichols, David T. Martin, William McCullock.

Montgomery County.—George Yost, Norman S. Brumley, Earl S. Gillett, David D. Cassidy, Joshua Vedder, William N. Johnson, Joseph Maxwell, Hicks B. Waldron, Abram V. Morris, John D. Serviss, H. Bleckman.

Ontario County.—James R. Heartwell, Thomas A. Wenkley, Alfred Franklin, John Wirde, Isaac W. Runyan, D. A. Lisk, George E. Pritchett.

Richmond County.—Theodore Frean, Frederick Groshen, John J. Clute, George J. Greenfield, Webley J. Edwards, Francis Hamilton, Frederick Cassner, Edward B. Merrill, Abram H. Wood, E. H. Murdock, Lewis McSorley.

St. Lawrence County.—James C. Armstrong, Edwin M. Hosbrook, Chipman S. Martin, George R. Myers, Delos McCurdy, Horace Moody, Edward W. Thomas, Stillman Foote, John G. McIntyre, George Z. Erwin, Milton Brown, Watson J. Ferry, John T. Rutherford, Charles R. McClelland, James M. Spencer, Charles Anthony, Morell D. Beckwith, James Miller, Nathaniel P. Hayes, Enos Beach, George A. Dillingham, Emory W. Abbott, Allen Wight, Peter Robertson, George B. Shepard, Samuel C. Crane, Charles C. Montgomery, Thomas S. Hall.

Saratoga County.—Aaron R. Olmstead, David R. Oakley, S. H. Richards, John J. Hornibrook, John Peck, A. A. Palmer, Edward C. Bullard, Lemuel B. Pike, N. R. Prentiss, John J. Lee, George B. Martin, Lawrence Vandermark, Henry White, John H. de Ridder, Silas P. Briggs, Patrick H. Cowen, Perry C. Parker.

Schenectady County.—Wm. L. Goodrich, John A. Decremer, Frederick L. Richwine, John Sanders, Robert Payne, James Fuller, Charles E. Palmer, Jacob W. Clute.

Schoharie County.—John B. Grant, Seymour Boughton, Jr., John Van Schaick, Robertson J. Roscoe, Tiffany Lawyer, James H. Brown, David Relle, John H. Griffin, Stephen J. Hitchcock, John W. Russell, Henry Kingsley, Thomas Collins, John Reed, Wm. Mackey, Chauncey W. Hinman, Lewis C. Holmes.

Schuyler County.—Chas. M. Woodward, Orville Pattison, George Bradley, Hull Fanton, Theo. Squires, Adam G. Campbell, Henry M. Hillerman, Simeon L. Rood, D. Elbert Sears, Gaylord G. Whitman, Augustus W. Moore, John F. Stilwell, Jeremiah McGuire, James M. Kelley, Henry C. Van Duzer, Martin D. Hall, Andrew Cornell, Byron Sunderlin.

Wayne County.—Lyman Lyon, John L. Crane, Henry R. Taber, Francis C. Reed, Henry P. Knowles, Charles McLouth, John H. Camp, George O. Baker, Chas. H. Dennison, Merritt Purdy, John L. Cole, Aaron M. Winchester, Stephen P. Seymour, Lucien T. Yeomans, Charles H. Boyce, William O. Church Wm. H. Clark, Pardon Durfee, Riley Hill, William D. Wylie, Silas N. Gallup, Charles D. Lawton, George W. Tilotson.

The above appointments for Notaries Public will take effect March 30, 1870, and will continue two years.

It was a long while ago that a New Hampshire judge, in charging a jury, said: "The counsel for the State and for the prisoner have talked of law, as was right; but, gentlemen, you and I have something else to consider—it is not law we want, but justice."

NEW YORK STATUTES AT LARGE.*

CHAP. 59.

AN ACT to enable non-resident guardians to obtain property in this State belonging to their wards residing in other States or Territories of the United States.

PASSED March 10, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In all cases where any guardian and his ward may both be residents of any other State or Territory of the United States, and such ward may be entitled to property of any description in this State, such guardian, on producing to the Surrogate's Court or other court of competent jurisdiction of the county, in which such property or the principal part thereof is situated, a full and complete transcript from the records of a court of competent jurisdiction in the State or Territory in which he and his ward reside, duly exemplified or authenticated, showing that he has been appointed guardian of such ward, and that he has given a bond and security, in the State or Territory in which he and his ward reside, in double the value of the property of such ward, and also showing to such court that a removal of the property of such ward will not conflict with the terms or limitations attending the right by which the ward owns the same, then such transcript may be recorded in such court, and such guardian shall be entitled to receive letters of guardianship of the estate of such minor from such court, which shall authorize him to demand, sue for and recover any such property, and remove the same to the place of residence of himself and his ward. And such court may order any resident guardian, executor or administrator having any of the estate of such ward to deliver the same to such non-resident guardian: Provided, all debts known to exist against such estate have been first paid, and provided also, that the benefit of this act shall not extend to any citizen of any State or Territory in which a similar law to this, does not now exist, or may not hereafter be passed.

CHAP. 60.

AN ACT relative to certain documentary evidence.

PASSED March 10, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four of the act passed April thirteen, eighteen hundred and fifty-five, entitled "An act to authorize the recording of Charters of colleges and academies, and alterations and amendments thereto, by the Regents of the University, in the office of the secretary of the board of Regents," is hereby amended so as to read as follows:

§ 4. Copies of and extracts from any and all records, books, papers, documents, files and manuscripts in the possession or custody of the Regents of the University, as such, or as trustees of the State Library, or otherwise, in their official capacity, and duly authenticated under the hand of the Chancellor or Secretary, and under the common seal of the said Regents, as a true copy of such original and of the whole thereof as aforesaid, may be used and read in evidence in all courts and places in this State, with the same force and effect as the originals might be, if produced.

§ 2. The fees for recording applications as to colleges and academies, and for other services mentioned in the second section of the said act hereby amended, are hereby abolished.

§ 3. This act shall take effect immediately.

CHAP. 74.

AN ACT in relation to the records of Surrogates' Courts.

PASSED March 16, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All acts, hitherto, of surrogates, and officers acting as such, in completing, by signing, in their own names, the unsigned and uncertified records of wills, and of the proofs and examinations taken in the proceedings of probate thereof before their predecessors in office, are hereby confirmed and declared to be valid and in full compliance with the pre-existing statutory requirements.

§ 2. For greater certainty, and to avoid all doubt, it is hereby declared to be lawful for any surrogate, or officer acting as such, hereafter, in like manner and under like circumstances, in his own name, to sign, certify and complete all unfinished records of wills, and of proofs and examinations, taken by and before his predecessor in office, adding to his signature the date of so doing; and which shall have the like effect as in the preceding section mentioned.

§ 3. This act shall take effect immediately.

CHAP. 69.

AN ACT to increase the powers of supervisors.

PASSED March 14, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The supervisor of a town, or any ward in any of the cities of this State, shall have power to administer oaths to persons necessary in relation to any matter or thing which may come before such supervisor, or the board of supervisors of which such supervisor is a member, in his or their official capacity.

§ 2. Any person guilty of false swearing to any oath or affidavit which may be lawfully required and administered under this act shall be deemed guilty of perjury, and on conviction be punished the same as in other cases of perjury.

§ 3. This act shall take effect immediately.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the Secretary of State which is attached to the copy from which we print. — ED. L. J.

LEGAL NEWS.

Jno. G. Williams, a prominent lawyer of Richmond, Va., died on the 14th inst.

The members of the Bar in Virginia are organizing a State Law Society.

Judge Strong, just elevated to the bench of the Supreme Court, left a law practice of $23,000 a year for a salary of $6,000.

A trespass suit is on trial in Buffalo which only involves $25, and on which the costs already amount to $600, and promise to become double that amount.

James A. L. Wittier, librarian of Harvard Law School, has been appointed non-resident lecturer on law in Norwich University.

A constable in Kentucky, in publishing some personal property for sale, put up a notice with the following clause: "I wyll xpose fr sail the 5 day 1870 uv Jan won lytle rone horse, or so much tharof as ma be nesary to satisfi sed gugment."

In the circuit court of Kane county, Illinois, Frank Jackson obtained a verdict of $18,000 against the Chicago and Northwestern Railway. He was an employee of the company, and while coupling cars, last November, was run over, and lost both his legs. A motion has been made for a new trial.

In the case of the Cincinnati Mutual Health Insurance company against Rudolph Rosenthall, to recover a sum agreed to be paid for insurance, the Recorder's court of Chicago held that the plaintiff could not recover, the contract being made by a foreign insurance company without the authority of the State of Illinois.

Another vacancy on the Bench of the United States Supreme Court is soon to be created by the resignation of Justice Samuel Nelson, of New York, and of the Second Circuit. There is great interest among legal circles as to the succession, for which Wm. M. Evarts and Ward Hunt, of Utica, are prominently spoken of.

A man was recently arrested in Schuylkill county, who made a pretended confession that he had committed a murder in Pittsburgh. He was taken to that city where he was recognized as an "old offender," and the confession was a confidence dodge to obtain free transportation. He will work his fare out in the city prison.

In the celebrated case of the bark Grapeshot, the Supreme Court of the United States decided that the Provisional Courts established by President Lincoln in the South were valid, but on the merits of the case the judgment below was reversed, with directions to refer the account for repairs to commissioners to act under instructions of the court.

The United States Supreme Court has just decided a point which has long been mooted, but never before legally determined. The point was brought up in several cotton cases, and was, in brief: When did the war close? The court fixed it as the 17th day of August, 1866, that being the date of President Johnson's proclamation to that effect.

The Albany Law Journal.

Albany, April 2, 1870.

HUSBAND AND WIFE AS WITNESSES FOR AND AGAINST EACH OTHER.

Legal reforms are slowly effected; for lawyers are proverbially conservative; and it is the profession that decides every question of reform. It is, however, by no means true that an active practitioner is always a good legislator. But the past twenty years have witnessed great improvements in the law of evidence. Made with the reluctant consent of many of the profession, these reforms have worked so well that the wonder is they were so long delayed.

Though much has been done, there is need of future change. At the risk of being considered as much of an extremist as the tragedian who was never satisfied with his make-up as "Othello" until he blacked his whole body over, we would suggest that the new order of things has not gone far enough, and that another class ought to be freed from their legal incompetency as witnesses.

To-day the tendency is to universal competency, to the exclusion of no one. The true theory is, let all objections to testimony be made to its weight, not to its reception. Let the judge or jury hear it, and stamp it at its true value. Juries are constituted differently now from what they were when the laws of evidence were first growing into a system. They have too much intelligence to be deceived by a witness simply because he may have some interest (never mind how trifling), in the event of the suit; or simply because he admits his disbelief in God, or has been incarcerated in a State prison. They know pretty accurately how much consideration to give to circumstances such as these; how much it is likely to affect his credibility. They do not believe in the doctrine, so long an insult to human nature, that a man in either of these relations, is therefore so likely to commit perjury that it is unsafe to admit him to say anything at all.

Each party now tells his story upon the stand, and almost every avenue of information has been thrown open. We are not yet prepared to go so far as the learned Chief Justice of Maine (a State which has in answer to his able and energetic efforts taken the lead in these reforms), and to urge the abolition of the confidential privilege of attorney and client (Appleton on Evidence, pp. 156–172); but we confess that, upon deliberation, we cannot but believe there is much to be gained by an abolition of the restrictions upon the competency of husband and wife as witnesses for and against each other.

It is very hard to get rid of the traces of a common law doctrine, no matter how far equity or statutes may have modified it. We are apt, in spite of the growing privileges of married women, to look upon husband and wife not as two individuals, but as one person, and the husband as that one. Coercion by the husband is one of the relics of the common law, of which there is more in law than in fact. It is true that such coercion exists. So does coercion of the husband by the wife, but nobody thinks of founding a rule of law upon it. A wife cannot make a valid contract with her husband, because they are one. Because courts do not wish the spectacle of husband and wife quarrelling over a broken agreement, or because creditors would be easily defrauded, are reasons much more worth considering. The time will come probably when a valid conveyance can be made directly between a husband and his wife, without the meaningless ceremony of calling in a third person to act as a conduit.

But the present inquiry is, why not let husband and wife go upon the witness stand under any and all circumstances? Works upon evidence (and it is a subject that has been illuminated by the labors of as excellent text-writers as those in any branch of the law), abound in reasons for the present rule of exclusion. So they abounded in explanations, often labored, why the old-fashioned restrictions were right and proper. A system of arbitrary rules, they appear to have been grounded on artificial theories, where policy was sometimes consulted quite as much as justice.

The chief objection to the change suggested is, that the sanctity of the domestic relation would be violated. If a husband or wife testify against the other, domestic peace and concord would be broken and destroyed.

It is probable that, in a majority of cases, this objection would have no weight practically. Except in divorce suits, husbands and wives generally come into court with harmonious feelings and motives; perhaps almost invariably their sympathies are for each other. The only danger to be apprehended is from their being too swift in each other's behalf. Juries would not fail, however, to make due allowance for such an intimate relation as that of marriage.

But there are cases where the wife might be summoned in as a witness against her husband; hence a domestic grievance, a public detriment, so severe that the party had better go without her testimony for the sake of peace. Without stopping to inquire how frequently would a lawyer, who knew anything of witnesses, take the risk of summoning a wife against her wishes, where all her feelings are enlisted on the side of her husband, we would suggest that many a husband would be glad to send his wife in as a witness on the other side, if her testimony were not particularly damaging to him. His opportunity to cross-examine would very likely be well improved. If her testimony, however, would be very strong against him and he knew it, so much the better average for the truth to work upon him, and compel him to a settlement.

A wife, or husband, who goes reluctantly on the stand to testify against the other, will not be likely to provoke anger in the bosom of that other where it never before existed. If the step is taken eagerly, and the testimony is given with the animus of an opposing witness, such indications of domestic infelicity are assuredly not created by this rule of law, but only brought to the surface.

We do not ignore the argument that this privilege, if thrown open to married people, will be abused and resorted to as a means of widening and aggravating an already existing dissension. A sad picture, it is urged, might be drawn of those whose vows have been

to love and cherish, arrayed in public against each other, evincing estrangement and all the hostility that the occasion and the presence of the court will permit. This, we confess, might be occasionally one of the incidents of a change in the law. Very unhappy—very much to be regretted; and if the court could go deeper and remove the cause of it, everybody would rejoice. But even if the direct result of the new rule, we are satisfied it is not sufficient to outweigh the permanent advantages that would flow from it.

The more intelligent and cultivated the married couple, the more readily will they yield to a provision of law that treats them as separate, thinking individuals, with the same duties and obligations as other individuals to come forward and tell the truth, when facts are in controversy. Among the more ignorant classes, while there is sometimes great affection, there are sometimes very lively discussions between man and wife; and the appearance of one on the witness stand to swear against the other would be quite as readily forgiven and forgotten as would the interchange of high words, or even of blows.

A woman can testify against her husband if he make an assault upon her. Here there has evidently been a domestic difficulty, and the court is not afraid of augmenting it by hearing the parties. In those cases, where a wife refuses to go into court and perjure herself for her husband's interests, is there such a violation of some duties that the court will choose to shut its ears, lose an important witness, and prevent a possible quarrel that will be sure to break out in some other direction.

We do not believe that the practical results of this experiment would make any serious difference in the family relation. Children testify against their parents, brother against brother, but we never heard of that fact alone making them inimical to each other. The fact is, that the husband and the wife would speedily conform themselves to such a rule, and their treatment of each other would be affected very little by the simple requirement of law that each knows the other cannot avoid.

The advantages of the rule we contend for are too obvious to need setting forth or comment; and beside it has been subjected to the test of practical application in the State of New York, and has been found to be fraught with none of those evils which have been predicted of it. Upon the question of privileged communication, we may have something to say in another article.

OUGHT THE STATE TO RE-IMBURSE ACQUITTED PRISONERS?

The topic which we have suggested may, "on first blush," appear to be almost too absurd for sincere consideration. We are convinced, however, that before we shall have concluded the few remarks which we propose in this article to present, we shall have progressed in some considerable degree in establishing the propriety and force of an affirmative answer to our query. It is to us a matter of considerable surprise that, amid all the varied legislation upon almost every other subject connected with the administration of civil affairs, the distinguished and sagacious gentlemen to whose wisdom and forethought are intrusted the formation, reformation and regulation of all that pertains to the practice of the law, civil as well as criminal, in our commonwealth, should have overlooked one important subject, which seems to call now, as it long has called, loudly for legislative interposition and action.

We refer to the fact that the unfortunate individual who happens to be, for any reason, subjected to a criminal prosecution, has, in the event of, establishing his innocence of the offense with which he stands charged, no redress in any form for the expense, annoyance or suffering attendant upon such a prosecution.

While, in civil actions, the person against whom any proceeding is wrongfully instituted, has, in case his defense be successful, the satisfaction of knowing that, according to the statute in such case long ago provided, he is at liberty to enter up a judgment against his unsuccessful adversary for the amount of his costs and disbursements, and compel their repayment, the miserable victim of the criminal law, on the other hand, against whom the State takes proceedings, has no such return, nor any recompense whatever to which he may look forward, in case he succeed in establishing his innocence.

In other words, when the luckless object of some false or unfounded suspicion, or of the malicious suggestions of some spiteful enemy, prompted by malicious purposes, is at length discharged for lack of evidence to prove the charge on which he is held, he has no compensation whatever for the loss of time and unavoidable injury to his character, or for the expenditure of the necessary fees and expenses attendant upon the trial, although he has all along been conscious of his absolute innocence of any crime, and, perhaps, never dreamed of being arraigned upon a criminal charge.

It may be said that, in many cases, criminals or persons charged with the commission of crime, are acquitted rather from the lack of legal evidence than from any moral doubt as to their guilt. This does not furnish any argument against the change proposed. The innocence of a party thus acquitted is to be presumed. At least there is no more reason for such a distinction in criminal than in civil cases.

There certainly ought to be some provision made at once for such cases, so that when the State shall proceed against one of its citizens in a criminal action, and shall fail upon the trial thereof to sustain the charge made, the person whom it thus subjects to loss of time, money, and sometimes reputation itself, shall have some remuneration and reimbursement for such loss.

Still another good result would follow such a change in the law, namely: there would be of a necessity fewer cases of *nolle prosequi* than at the present time. It is apparent to any one who is at all familiar with the history of our criminal courts, particularly those of inferior grade, that of the large number of cases which are called up for trial a surprising proportion of them are either dismissed before they have a hearing at all, or else they are in the process of trial, when the prosecuting attorney suddenly discovers that he is unable to prove his complaint and the jury, whose annoyance and expense ought likewise to be considered, are therefore directed, *pro forma*, by the court, to return a verdict of "not guilty." The delighted

prisoner is then informed, in a tone of judicial dignity and severity, which seems almost like a rebuke, and is without the pretense of an apology, that he may depart in freedom: and he emerges from the court room, into which he had been dragged without any provocation, stained in character, degraded in his own eyes, as well as in the estimation of his neighbors; and in addition to all, in many cases, shorn of the few hard earned dollars which mayhap he had managed to lay by, after much close economy and pinching frugality, and which have been entirely consumed in defending himself against charges which ought never to have been instituted, and which would never have been instituted but for the wide discretion and looseness characteristic too often of prosecuting officers, who, in the majority of cases, scarcely know what their case is until they come into court.

In what we have said, we have not pretended to exhaust this subject, but will rest satisfied if we have succeeded in calling attention to a matter which admits of much more argument and elaboration than we have time to bestow upon it.

We say in conclusion, then, that there ought to be some provision made by the Legislature for enabling the victims of unsuccessful criminal prosecution to collect the costs thereof, as in civil cases from his adversary; and the result will be that prosecuting attorneys will give closer attention to such cases before bringing them to a public trial, and a smaller calendar will occupy the attention of our criminal courts, composed of cases which will have some show of being established.

ANTIQUITIES OF THE LAW.

To carry out our purpose of reconciling this generation to the present mode of administering justice, by contrasting it with the past, I have amused a leisure hour by jotting down some notes of the cumbersome machinery resorted to in olden times. Your readers, who are at all acquainted with the simplicity of modern practice, can realize the improvement.

Formerly the great instrument was a WRIT. I will first give the definition of what that was, and then show the uses to which it was put.

WRIT is the king's precept, whereby any thing is commanded touching a suit or action. And these writs are diversely divided: some, in respect of their order or manner of granting, are termed original, and some judicial.

Original writs are those that are sent out summoning of the defendants, to begin the suit.

Judicial writs are those which are sent out by order of the court where the cause depends.

The original bear date in the name of the King, but the judicial bear teste in the name of the Chief Justice.

Acquietandis Plegiis, a writ that lies for a surety against a creditor who refuses to acquit him after a debt is paid.

Arrestandis bonis ne dissinpentur, a writ which lies for a man whose goods, &c., are taken by another, who during the contest doth or is like to make them away.

Arrestando ipsum qui pecuniam recepit, a writ that lieth for apprehending a person who hath taken the King's prest money to serve in the wars, and hides himself when he should go.

Arresto facto super bonis mercatorum alienigenorum, a writ which lies for a denizen against the goods of an alien in recompense of goods taken from him in a foreign country after denial of restitution.

Bahio amovendo, a writ to remove a bailiff from his office for want of sufficient land in his bailiwick.

Besaile, a writ that lies where the grandfather was seized in his demesne as of fee of any lands or tenements the day he died, and after his death a stranger abates or enters the same day on them and keeps out the heir.

Brief, any writ in writing issued out of any of the King's courts of record at Westminster, whereby any thing is commanded to be done in order to justice.

Cape is a writ judicial touching pleas of lands, &c. It is divided into *cape magnum* and *cape parvum*, both which take hold of things immovable. The former lieth before appearance and the latter after.

Capias is of several kinds:

Ad respondendum, to have the body in court to answer the plaintiff.

Ad satisfaciendum, to take the body in satisfaction of the debt.

Utligatum, to apprehend an outlawed person.

In withernam, where a distress is carried out of the county and an equal amount of the distrainor's goods are to be taken instead.

Casu consimili, a writ of entry granted where the tenant by the curtesy or for life aliens in fee or in tail, or for another's life.

Casu proviso is a writ of entry given by the Statute of Gloucester, c. 7, where a tenant in dower aliens in fee.

Catallis captis nomine districtionis is a writ that lies within a borough or house for rent going out of the same, and warrants a man to take the doors, windows or gates by distress for rent.

Catallis reddendis, a writ which lies where goods are delivered to a man to keep a certain day, and are not upon demand delivered at the day.

Cui ante divortium is a writ that a woman divorced hath to recover lands, &c., from him to whom her husband had alienated during marriage.

Cui in vita is a writ of entry which a widow hath against him to whom her husband alienated her lands, which must contain in it that during his life (*cui in vita*) she could not withstand it.

Day writ.—The King may grant a writ of *warrantia diei* to any person which shall save his default for one day, be it in plea of land or other action, and be the cause true or not; and this by his prerogative.

Decceptione, a writ that lies properly against him who deceitfully does any thing in the name of another.

Decies tantum, a writ that lies against a juror who hath taken money for giving his verdict, called so because it is to recover ten times as much as he took. Stat. 98, Edw. III. c. 12 and 13.

It lies also against sheriffs taking rewards for arraying a panel. 11 Hen. VI, c. 14; Vin. Abr. 378.

De effendo quietum de tolonio, a writ which lies for those who are by privilege freed from the payment of poll.

De expensis militum, a writ commanding the sheriff to levy so much a day for the expenses of a Knight of the Shire. 4 Inst. 46.

De exoneranda pro rata portionis is a writ that lies where one is destrained for rent that ought to be paid by others proportionably with him.

De quibus sur disseisin, a writ of entry.

Detinue is a writ which lies where any man comes to goods by delivery or finding and refuseth to deliver them. 1 Inst. 286.

Diem clausit extremum, a writ out of chancery to the escheator of the county, upon the death of any of the king's tenants *in capita*, to inquire by a jury of what lands he died seized, their value and who was next heir to him.

Distringas, a writ to the sheriff to distrain one of his goods to enforce compliance with what is required of him.

Distringas juratores, a writ to the sheriff to distrain upon a jury to appear.

Domo reparanda, a writ for one against his neighbor, by the fall of whose house he apprehends injury to his own.

Dote assignanda, a writ that lay for a widow where it was office found that the king's tenant was seized in fee or tail at the day of his death, and that he held of the king. In which she came into chancery and there made oath she would not marry without the king's leave, and thereupon she had this writ to the escheator. 15 Ed. III, c. 4.

Dote unde nihil habet, a writ of dower against one who bought land of her husband, who was seized in such sort that their issue might have inherited. F. N. B., 147.

Dum non fuit compos, a writ that lies against the alience for him that, not being of sound mind, aliened his lands.

Dum fuit infra ætatem, a writ that lies for him that, before he came of age, made a feoffment of his land.

Ejectione custodiæ, a writ which lies against him who casts out a guardian from any land during the minority of the heir.

Elegit, a writ of execution against the lands of the debtor. 1 Inst. 289; 13 Ed. I, c. 18.

Entry, writ of, directed to the sheriff, commanding a tenant to render to the demandant possession of lands, or appear in court and show why he hath not done it.

It is of four kinds. Writ of entry *sur disseisin;* a writ of entry *sur disseisin in the per;* a writ of entry *sur disseisin in the per and cui*, and a writ of entry *sur disseisin in the post.* 1 Inst., 238.

Error, writ of, a commission to judges of the superior court to examine the record upon which a judgment was given in an inferior court. Jenk. Rep., 25.

Excommunicato deliberando, a writ to the sheriff for the delivery of an excommunicate person out of prison upon certificate of his conformity to the jurisdiction ecclesiastical. F. N. B., 63.

Excommunicato capiendo, a writ to the sheriff for the apprehending him who stands obstinately excommunicated forty days, and imprisoning him without bail or mainprize. 5 Eliz., c. 23.

Excommunicato recipiendo, a writ whereby persons excommunicate, being for their obstinacy committed to prison and unlawfully delivered thence, before they have given caution to obey the authority of the church, are commanded to be sought for and imprisoned again.

Ex gravi querela, a writ that lies for him to whom lands in a city or borough are devised, and which the heir of the devisor has taken possession of.

Exigent, a writ that lies where neither the defendant nor any property can be found, and commands the sheriff to proclaim him five times, in order that he may be outlawed.

Exoneratione sectæ, a writ that lies for the king's ward to be disturned of all suits during his minority.

Expensis militum levandis, a writ commanding the sheriff to levy the allowance for knights in parliament.

Expensis militum non levandis, a writ prohibiting the sheriff from levying such allowance upon those that held in ancient demesne.

Extent, a writ to the sheriff for the valuing of lands and tenements.

False judgment, writ of, lies where a false judgment is given in a court not of record.

Fieri facias, a judicial writ that lay within a year and a day to levy the judgment of defendant's goods.

Grand distress, a writ which lies in two cases—either where defendant has been attached and does not appear, or where he has once appeared and after makes default.

Habeas corpora, a writ to bring in the jury, or so many of them as refuse to come on *venire facias*.

Habeas corpus.—"This is the most celebrated writ in the English law," and is of several kinds, viz.:

Ad subjiciendum, to relieve from wrong imprisonment.

Ad faciendum, to remove a cause into a superior court.

Ad respondendum, to remove a defendant who is in custody in a lower court to answer to a cause of action in a higher court.

Ad deliberandum, to remove a prisoner into the county where he is to be tried.

Ad satisfaciendum lies after judgment.

Ad testificandum, to bring a prisoner into court to testify.

Habere facias visum, a writ commanding a view of the lands in question.

Habere facias seisinam, a writ of execution commanding the sheriff to give the plaintiff possession of a freehold. Where the interest is less than freehold the writ is known as *habere facias possessionem.*

Homine replegiando, a writ to bail a man out of prison.

Identitate nominis, a writ that lies for him who is committed to prison for another man in the same name.

Ingressu, a writ of entry, "whereby a man seeks entry into lands or tenements; it lies in many cases and hath many several forms."

Inhibition, a writ to forbid a judge from further proceeding in a cause before him.

Injunction, a prohibitory writ restraining a person from doing a thing which appears to be against equity and good conscience. 3 Bac. Abr. 172.

Intrusion de gard, a writ that lies where the infant within age entered into his lands and held his lord out.

Juris utrum, a writ that lies for the incumbent of a church whose predecessor hath alienated his lands.

Justicies is a writ directed to the sheriff to do justice in a plea of trespass *vi et armis* in the county court. It is in the nature of a commission.

Latitat, a writ whereby all men in personal actions are called originally in the King's Bench.

Levari facias, to the sheriff to levy money of the lands of him who hath forfeited his recognizance.

Levari facias residuum, a writ for levying the remnant of a debt in part satisfied before.

Libertatibus allocandis, a writ lying for a burgess of any city, who, contrary to the liberties of the city, is impleaded before the King's justices to have his privilege allowed. F. N. B. 229.

Licentia surgendi, "the writ whereby the tenant *essoined de malo lecti* obtains liberty to rise."

(*Essoin* signifies the excuse for him that is summoned or sought for, and *essoin de malo lecti* is the excuse that the man is sick a bed, and he had to sue out the writ of *Licentia surgendis* in order to get it up again.)

Mandamus, "an high prerogative writ of a most extensive remedial nature, and may be issued *in some cases* where the injured party has also another more tedious mode of redress." 3 Black. 100.

Manucaptio, a writ that lies for a man, who, being taken on suspicion of felony, and offering sufficient bail, cannot be admitted thereto by the sheriff or other having power to let to mainprize. F. N. B. 149.

Maritargio amisso per defaltam, a writ for the tenant in *frank marriage* to recover lands, etc., whereof he is deforced by another.

("Frank marriage is a tenure in tail special, whereby the donees shall have the land to them and the heirs of their bodies, and shall do fealty to the donor till the fourth degree.")

Media acquitando, a writ judicial to distrain a lord for acquiring a mean lord for a rent which he formerly acknowledged in court not to belong to him.

Miltimus, a writ by which records are transferred from one court to another.

Monstraus de droit, a writ out of chancery for the subject to be restored to lands, which he shows to be his right, though by office found to be in the possession of another lately dead.

Monstraverunt, a writ which lies for the tenants in *ancient demesne*, being distrained for any toll or imposition contrary to their liberty.

Nativo habendo, a writ to the sheriff for a lord whose villien run from him, for apprehending and restoring him to his lord again.

(Villain or villien were of two sorts in England—one termed *villien in gross* who was immediately bound to the person of his lord and his heirs.)

Ne admittas, a writ that lies for the plaintiff, who fears

the bishop will admit the clerk of the defendant during the suit between them.

Non molestando, a writ which lies for him who molested contrary to the king's protection.

Non ponendis in assisis et juratis, a writ for freeing persons from serving on assizes or juries by reason of their old age; but "by 4 and 5 W., c. 24, no such writ shall be granted unless upon oath made that the suggestions on which it is granted are true."

(All justices of the peace were obliged to be present at all assizes, to which were issued commissions of oyer and terminer and gaol-delivery.)

Officiaris non faciendis, a writ to the magistrates of a corporation not to make such a man an officer until inquiry be made of his manners.

Onerando pro rata portionis, a writ that lies for a joint-tenant or tenant in common, who is distrained for more rent than his proportion.

Parco fracto, a writ that lies against him who violently breaks a pound and takes out beasts which were legally impounded for trespass done.

Ponendis in assis, a writ to show what persons the sheriff ought to impanel upon assizes and juries and what not, as also what number.

Pontibus reparandis, a writ directed to the sheriff requiring him to charge one or more to repair a bridge to whom it belongeth.

Post disseisin, a writ for him that having recovered land by *pr ecipe quod reddat* upon default of rendition is again disseised by the former disseisor.

Precipe, a writ commanding one to do the thing required or show cause why he hath not done it.

Procedendo ad judicium, a writ which lies when the judges of any court delay the party, and will not give judgment in a case when they ought to. Wood's Inst., 570.

(Worth preserving in modern practice.)

Prohibition, a prerogative writ to the judges of an inferior court, commanding them to cease prosecuting a matter before them. 3 Black., 112.

Prohibitio de vasto, a judicial writ to a tenant prohibiting him from making waste upon the land in controversy during the suit.

Quae plura, a writ which lay after an inquisition by the escheator for lands imagined not to have been found.

Quare impedit, a writ against him that disturbs one in the right of his advowson, by presenting a clerk thereto when the church is void.

(*Advowson* is the right of presentation to a church.)

Quare non admisit, a writ against a bishop refusing to admit a clerk that hath recovered in a plea of advowson.

(Clerk means *clericus sacerdotis*, a parish clerk or inferior assistant to the parochial priest.)

Quid juris clamat, a judicial writ issuing out of the record of a fine.

Quod ei deforceat, a writ that lies for the tenant having lost his lands by default.

Quod permittat, a writ that lies for one who is disseised of his common of pasture.

Quo jure, a writ for him in whose land another claims common of pasture, to show by what title the common is claimed.

Quo warranto, a writ of right for the king against him who claims or usurps an office.

Ravishment de gard, a writ against him who took from a guardian the body of his ward.

Recto de dote, a writ of right of dower.

Rege inconsulto, a writ issued from the king to the judges ndt to proceed in a cause which may prejudice the king until he is advised.

Regio assenser, a writ whereby the king gives his royal assent to the election of a bishop.

Reparatione facienda, a writ for one tenant in common to compel his co-tenants to unite in repairs.

Retorno habendo, a writ which lies for him who has proved his distress lawful to have the cattle returned to him.

Scire facias, a judicial writ whereby the sheriff is commanded to summon the defendant in a judgment to show cause why execution should not issue.

Scutagio habendo, a writ that lay for the king or other lord to the tenant, to serve by himself or send a substitute.

Secta ad curiam, a writ that lies against him who refuses to perform his suit either in the county or court baron.

Securitate pacis, a writ that lies for one who is threatened with death or danger. It is taken out of chancery and directed to the sheriff.

Seisin a habenda, a writ which lies for the delivery of seisin to the lord of his lands, after the king in right of his prerogative hath had the year, day, and waste.

("Year, day, and waste" is part of the king's prerogative whereby he challenges the profits of their lands, etc., for a year and a day that are attainted of pity, treason, or felony; * * * and not only so, but in the end may waste the tenements, destroy the houses, root up the woods, garden, and pasture, and plough up the meadows. Staundf. Perog, c. 16.)

Significavit, a writ *de excommunicate capiendo* issuing out of chancery upon a certificate of the ordinary, that a man stands obstinately excommunicated for forty days, for laying him up in prison without bail or mainprize until he submit himself to the authority of the church. So called, because *significavit* is an emphatical word in the writ.

("Ordinary" is the judge who hath exempt and immediate jurisdiction in causes ecclesiastical. 2 Inst. 19. "Mainprize" is taking a man into friendly custody upon his giving security for his forthcoming.)

Si non omnes, a writ of association whereby if all in a commission cannot meet, it is allowed that two or more may finish the business.

Subpœna, a writ by which all persons are called into chancery where the common law fails and hath made no provision.

Summons, a writ to the sheriff to warn one to appear at a day.

Supersedeas, a writ whereby a person is directed to forbear doing something therein mentioned, or, if done already, to revoke the act. 4 Bac. Ab. 668.

Supplicavit, a writ issuing out of chancery for taking the surety of the peace against a man.

Terris liberandis, a writ that lies for a man who is attainted to take a fine for his imprisonment and restore him his lands again.

("Attainted" is one convicted of treason or felony whereby his children cannot inherit.)

Thelonium, a writ for a burgess to sue him from a toll by reason of the privilege of his city or town.

Tort, a writ whereby a cause pending in a court baron is removed to the county court.

Vasto, a writ that lies for the heir against the tenant for making waste. F. N. B. 55.

Venditione exponas, a writ judicial, directed to the under-sheriff, commanding him to sell goods which he had seized for satisfying a judgment.

Ventre inspiciendo, a writ to search a woman that saith she is with child, and thereby withholds lands from the next kin. By which writ the sheriff is commanded that, in presence of twelve men and as many women, he cause examination to be made whether she is with child or not, and if with child, then about what time it will be born, and that he certify the same to the justices of the assizes, or at Westminster, under his seal and the seals of two of the men present. Cro. Eliz. 506.

Vi laica removenda, a writ which lies where two persons contend for a church, and one of them enters by force, and he that is holden out shall have this writ directed to the sheriff that he remove the force.

Utlagato capiendo, a writ for the taking of an outlawed person in one county, who afterward flies into another.

Warrantia chartæ, a writ that lies where a man is enfeoffed of lands with warranty, and then he is sued or impleaded. F. N. B. 134.

Warrantia custodiæ, a writ judicial, and lay for him who was challenged, to be a ward to another, in respect to lands said to be holden in knight's service.

Warrantia dici, a writ lying where a man, having a day assigned to appear personally in court, but in the mean time is employed in the king's service, it commands the justices that they neither take nor record him in default that day.

Writ of waste, to punish the offense after it is committed, partly founded on the common law and partly on the statute of Gloucester. 3 Black. 227.

Writ of assistance issues out of exchequer to authorize any person to take a constable to seize goods prohibited or uncustomed.

Writ of inquiry, a judicial writ to the sheriff upon a judgment by default, commanding him to summon a jury to inquire what damages plaintiff hath sustained.

LAW AND LAWYERS IN LITERATURE.*

XII.

CURIOUS IMAGINARY TRIALS.

Dogs have always been a favorite subject of imaginary trials, as we have seen in Aristophanes and Racine. In 1681-2 the Earl of Argyle was tried and convicted of high treason in refusing the test oath without certain qualifications. Halifax told Charles II he understood not the Scots law, but the English law would not have hanged a dog for such a crime. Clarendon blessed God, he lived not in a country where there were such laws. The very hospital children made a mockery of the reasoning of the crown lawyers. The boys of Heriot's Hospital resolved among themselves that the house dog belonging to that establishment held a public office, and ought to take the test. The paper being presented to him, he refused to swallow the same unless it was rubbed over with butter. Being then buttered, the dog swallowed it, and was then accused and condemned for having taken the test with a qualification, as in the case of Argyle. There is an exceedingly rare "Account of the Arraignment, Trial, Escape, and Condemnation of the Dog of Heriot's Hospital in Scotland, that was supposed to have been hang'd, but did at last slip the halter." The prisoner's escape was urged as additional proof of his guilt, and proclamation of attainder was issued against this "cutt-lugged, brownish-coloured Mastiff Tyke, called Watch, short-leged and of low stature."

The dog is again made a scape-goat in "The Trial of Farmer Carter's Dog for Murder," written in 1771, by Edward Long, some time Judge of the Admiralty Court of Jamaica, which purports to have been composed in consequence of "a real event which actually took place in 1771, near Chichester." The names of the justices engaged in the event ridiculed have been preserved, and it is said that the court were long and well known by the nick-names assigned them in Mr. Long's pamphlet. In presenting this admirable satire in full, I regret that I cannot reproduce the accompanying picture of the criminal, shackled and haltered, sitting bolt upright, in mortal terror.

"COUNTY OF SEXGOTHAM, *ss:*

At a High Court of Oyer and Terminer and Gaol-Delivery, holden this —— day of ——, 1771, at Gotham Hall.

Present—The Worshipful J. BOTTLE, Esq., President.

A. NOODLE, MAT. O'THE MILL, OSMYN PONSER, Esqs., Just-asses and Associates.

GAME-ACT, *Plaintiff*, v. PORTER, *Defendant.*—The court having met, the indictment was read, which we omit for the sake of brevity.

Court: Prisoner, hold up your paw at the bar.

First Counsel: He is sullen and refuses.

Court: Is he so? Why, then, let the constable hold it up, *nolens volens.* (Which was done according to order.)

Court: What is the prisoner's name?

Constable: *P—P—Po—rt—er*, an't please your worship.

Court: What does the fellow say?

Constable: Porter! an't please you; *Porter.*

Mat.: He says Porter. It 's the name of a liquor the London *kennel** much delight in.

Ponser: Ay, 'tis so; and I remember another namesake of his. I was hand in glove with him. I'll tell you a droll story about him.

Court: Hush, brother. Culprit, how will you be tried?

Counsel for Pros.: Please your worship, he won't say a word. *Stat mutus*—as mute as a fish."

Here imagine the before-described picture inserted.

"*Court:* How?—what?—won't the dog speak? Won't he do what the court bids him? What's to be done? Is the dignity of this court to be trifled with in such a manner?

Counsel for Pros.: Please your worships, it is provided by the statute in these cases that when a culprit is stubborn and refuses to plead, he is to be made to plead, whether he will or no.

Court: Ay? How's that, pray?

Counsel for Pros.: Why, the statute says that he must first of all be *thumb-screwed.*

Court: Very good.

Counsel for Pros.: If *that* will not do, he must be laid flat on his back, and squeezed like a cheese in a press with heavy weights.

Court: Very well, and what then?

Counsel for Pros.: What then? Why, when all the breath is squeezed out of his body, if he should still continue dumb, which sometimes has been the case, he generally dies for want of breath.

Court: Very likely.

Counsel for Pros.: And thereby saves the court a great deal of trouble, and the nation the expense of a halter.

Court: Well, then, since the law stands thus—constable, twist a cord about the culprit's forepaws—

Counsel for Pros.: *Four* paws! Why, he has but two.

Court: Fore paws, or fore feet, blockhead! and strain it as tight as you can till you make him open his mouth. (The constable attempted to enforce the order, but in drawing a little too hard received a severe bite.)

Constable: 'S blood and suet! He has snapped off a piece off my nose.

*His worship meant *canaille.*

Court: Mr. Constable, you are within the statute of swearing, and owe the court one shilling.

Constable: Zounds and death, your worships. I could not help it for the blood o' me.

Court: Now you owe us two shillings.

Constable: That's a d—d bad plaster, your worships, for a sore nose.

Court: That being but half an oath, the whole fine amounts to two shillings and sixpence, or a half-crown bowl. So, without going further, if you are afraid of his teeth, apply this pair of nut-crackers to his tail.

Constable: I shall, your worships. (He had better success with the tail, as will now appear.)

Prisoner: Bow, wow, wow, wow, wow!

Court: Hold, enough; that will do.

It was now held, that, though the prisoner expressed himself in a strange language, yet, as he could speak no other, and as the law cannot only make dogs to speak, but explain their meaning too, so the law understood and inferred that the prisoner pleaded not guilty, and put himself upon his trial. Issue, therefore, being joined, the counsel for the prosecution proceeded to address the court, but was stopped by the other side.

Prisoner's Counsel: I take leave to demur to the jurisdiction of the court. If he is to have a trial *per pares*, you must either suppose their worships to be his equals; that is to say, not his betters, which would be a great indignity, or else you must have a *venire* for a jury of twelve dogs. I think you are fairly caught in this dilemma.

Counsel for Pros.: By no means; it is easily cured. We'll send the constable with a *mandamus* to his Grace's kennel.

Prisoner's Counsel: They are foxhounds. Not the same species; therefore, not his equals. I do not object to the harriers, nor to a *tales de circumstantibus*.

Counsel for Pros.: That's artful, brother, but it won't take. I smoke your intention of garbling a jury. You know the harriers will be partial, and acquit your client at any rate. Neither will we have any thing to do with your *tales*.

Mat.: No, no; you say right. I hate your tales and tale-bearers. They are a rascally pack altogether.

Counsel for Pros.: Besides, the statute gives your worships ample jurisdiction in this case; and if it did not give it, your worships know how to take it, because the law says, *boni est judicis ampliare jurisdictionem*.

Prisoner's Counsel: Then I demur for irregularity. The prisoner is a dog, and cannot be triable as a man. *Ergo*, not within the intent of the statute.

Counsel for Pros.: That's a poor subterfuge. If the statute respects a man (*a fortiori*) it will affect a dog.

Ponser: You are certainly right; for when I was in the Turkish dominions I saw an Hebrew Jew put to death for killing a dog, although dog was the aggressor.

Counsel for Pros.: A case in point, please your worships, and a very curious and learned one it is; and the plain induction from it is this: that the Jew (who I take for granted was a man), being put to death for killing a dog, it follows that said dog was as respectable a person, and of equal rank in society with, the said Jew; and, therefore—*ergo*—and moreover, that said dog so slain was, to all and every purpose of legal inference and intendment, neither more nor less than a man.

Court: We are all clearly of that opinion.

Counsel for Pros.: Please your worships of the honorable bench. On Saturday, the — day of February, instant, on or about the hour of five in the afternoon, the deceased Mr. Hare was traveling quietly about his business, in a certain highway or road leading towards Muckingham; and then and there, the prisoner at the bar, being in the same road, in and upon the body of the deceased, with force and arms, a violent assault did make; and, further, not having the fear of your worships before his eyes, but being moved and seduced by the instigation of a devilish fit of hunger, he the said prisoner did him the said deceased, in the peace of our lord of the manor then and there being, feloniously, wickedly, wantonly, and of malice aforethought, tear, wound, pull, haul, tousle, macerate, masticate, lacerate and dislocate, and otherwise evilly entreat; of all and singular which tearings, woundings, pullings, haulings, tousleings, mastications, and so forth, maliciously inflicted in manner and form aforesaid, the said Hare did languish, and languishing did die, in Mr. Just-ass Ponser's horse-pond, to wit: and that is to say, contrary to the statute in that case made and provided, and against the peace of our said lord, his manor and dignity.

This, please your worships, is the purport of the indictment; to this indictment the prisoner has pleaded not guilty, and now stands upon his trial before this honorable bench.

Your worships will, therefore, allow me, before I come to call our evidence, to expatiate a little upon the heinous sin of which the prisoner at the bar is charged. Hem!—to murder—Ehem!—to murder, may it please your worships, in Latin, is—is—*murderare;* or, in the true and original sense of the word, *murder-ha-re. H*, as your worships well know, being not as yet raised to the dignity of a letter by any act of parliament, it follows that it plainly is no other than *murder-a-re*, according to modern refined pronunciation. The very root and etymology of the word does, therefore, comprehend, in itself, a thousand volumes in folio, to show the nefarious and abominable guilt of the prisoner, in the commission and perpetration of this horrid fact. And it must appear as clear as sunshine to your worships, that the word *murderare*, which denotes the prisoner's crime, was expressly and originally applied to that crime, and to that only, as being the most superlative of all possible crimes in the world. I do not deny that since it first came out of the mint, it has, through corruption, been affixed to offenses of a less criminal nature, such as killing a man, a woman, or a child. But the sense of the earliest ages having stamped hare-murder, or *murder-ha-re* (as the old books have it), with such extraordinary atrociousness, I am sure that Just-asses of your worships' acknowledged and well-known wisdom, piety, erudition, and humanity, will not at this time of the day be persuaded to hold it less detestable and sinful. Having said thus much on the nature of the prisoner's guilt, I mean not to aggravate the charge, because I shall always feel due compassion for my fellow-creatures, however wickedly they may

demean themselves. I shall next proceed, with your worships' leave, to call our witnesses. Call Lawrence Lurcher and Toby Tunnel.

Pris. Counsel: I must object to swearing these witnesses. I can prove they were both of them drunk, and *non compos*, during the whole evening, when this act is supposed to have been committed.

Bottle: That will do you no service; I am very often drunk myself, and never more in my senses than at such times.

Court: We all agree in this point with brother Bottle. (Objection overruled, and witnesses sworn.)

Lurcher: As I and Toby Tunnel here was a-going hoam to Squire Ponser's, along the road, one evening after dark, we sees the prisoner at the bar or somebody like him, lay hold of the deceased or somebody like him, by the back, an't please your worships. So, says I, Toby, says I, that looks for all the world like one of Squire Ponser's hares. So the deceased cried out pitifully for help, and jumped over a hedge, and the prisoner after him, growling and swearing bitterly all the way. So, says I, Toby, let's run after 'um. So I scrambled up the hedge; but Toby laid hold of my leg to help himself up; so both of us tumbled through a thick furze bush into the ditch. So next morning, as we was a-going by the squire's, we sees the deceased in his worship's horse pond.

Prisoner's Counsel: Are you sure he was dead?

Lurcher: Ay, as dead as my great-grandmother.

Prisoner's Counsel: What did you do with the body?

Ponser: That's not a fair question. It ought not to be answered.

Lurcher: I bean't ashamed nor afeard to tell, not I. We carried it to his worship Squire Ponser, and his worship had him roasted, with a pudding in his belly, for dinner, that same day.

Counsel for Pros.: That is nothing to the purpose. Have you any more questions for the witness?

Prisoner's Counsel: Yes; I have. Pray, friend, how do you know the body you found was the very same you saw on the evening before?

Lurcher: I can't tell, but I'm ready to take my Bible oath on't.

Prisoner's Counsel: That is a princely argument, and I shall ask you nothing further.

Mrs. Margery Dripping, cook to his worship Squire Ponser, deposed to the condition of the deceased.

DEFENSE.

Prisoner's Counsel: Please your worships, I am counsel for the prisoner, who, in obedience to your worships' commands, has pleaded not guilty; and I hope to prove that his plea is a good plea; and that he must be acquitted by the justice of his cause. In the first place, the witnesses have failed in proving the prisoner's identity. Next, they have not proved the identity of the deceased; thirdly, they do not prove who gave the wounds; fourthly, nor to whom they were given; fifthly, nor whether the party died of the wounds, if they were given, as supposed, to this identical hare. For I insist upon it, that because a hare was found in the squire's horse pond, *non sequitur* that he was killed and thrown in by the defendant. Or if they had proved that defendant had maliciously, and *animo furioso*, pursued the deceased into the horse pond, it does not prove the defendant guilty of his death, because he might owe his death to the water; and, therefore, in that case the pond would be guilty; and if guilty, triable; and if triable, punishable for the same, and not my client. And I must say, under favor, that his worship would likewise be *particeps criminis*, for not having filled it up to prevent such accidents. One evidence, who never saw the prisoner till now, nor the deceased till after the fact supposed to have happened, declares he is sure the prisoner killed the deceased. And why? Because he is ready to take his Bible oath on't. This is, to be sure, a very logical conviction.

Court: It is a very legal one, and that's better.

Prisoner's Counsel: I submit to your wisdoms. But I must conclude with observing, that admitting a part of the evidence to be true, viz.: that the prisoner did meet the deceased on the highway, and held some conference with him; I say, that supposing this, for argument sake, I do insist that Mr. Hare, the deceased, was not following a lawful, honest business at that late hour, but was wickedly and mischievously bent upon a felonious design of trespassing on farmer Carter's ground, and stealing, consuming and carrying off his corn and his turnips. I further insist, that the defendant, knowing this his felonious and evil machination, and being resolved to defend the property of this his good friend and patron from such depredations, did endeavor to divert him from it, which, not being able to effect by fair means, he was then obliged to try his utmost, as a good subject and trusty friend, to seize and apprehend his person, and bring him, *per habeas corpus*, before your worships, to be dealt with according to law. But the deceased, being too nimble for him, escaped out of his clutches, and tumbling accidentally in the dark into his worship's horse pond, was there drowned. This is, I do not doubt, a true history of the whole affair; and proves that in the strictest construction of law, it can only be a case of *per infortunium*, unless your worship should rather incline to deem it a *felo de se*.

Noodle: A fall in the sea! No such thing; it was only a horse pond; that's clear from the evidence.

Prisoner's Counsel: Howsoever your worships may think fit to judge of it, I do humbly conceive, upon the whole matter, that the defendant is not guilty; and I hope your worships, in your wisdoms, will concur with me in opinion, and acquit him.

The counsel for the prosecution replied in a long speech. He contended that Mr. Hare, the deceased, was a peaceable, quiet, sober and inoffensive sort of a person, beloved by king, lords and commons, and never was known to entertain any idea of robbery, felony or depredation, but was innocently taking the air one afternoon for the benefit of his health, when he was suddenly accosted, upon his majesty's highway, by the prisoner, who immediately and bloodymindedly, without saying a syllable, made at him, with so much fury in his countenance, that the deceased was put in bodily fear, and being a lover of peace, crossed the other side of the way; the prisoner followed him close, and pressed him so hard that he was obliged to fly over hedge and ditch, with the prisoner at his heels. It was at this very juncture they were observed by the two witnesses first ex-

amined. The learned counsel further affirmed from circumstances, which he contended amounted to presumptive evidence, that after various twinings and windings, in his endeavors to escape, his foot slipped, and the prisoner seized him and inflicted divers wounds; but that the deceased, finding means to get away, took to the pond, in order to swim across; when the prisoner, running round the pond incessantly, prevented his escape; so that, faint and languishing under his wounds and loss of blood, the hapless victim there breathed his last, in manner and form as the indictment sets forth. He also alleged that as Mr. Hare lived within his worship's territory, where there are several more of the same family, he could not therefore be going to farmer Carter's; for that would have been absurd, when he might have got corn and turnips enough on his worship's own ground. Can there, said the learned gentleman, be a stronger, a weightier, a surer, a — a — a?

Court: We understand you. It is as clear as crystal. (Their worships in consultation.)

Court: Has the prisoner's counsel any thing further to offer in his behalf?

Prisoner's Counsel: Call farmer Carter. Pray, farmer Carter, inform the court what you know of the prisoner's life, character and behavior?

Carter: I have known the prisoner these several years. He has lived in my house great part of that time. He was always sober —

Court: Never the honester for that. Well, go on.

Carter: Sober, honest, sincere, trusty and careful. He was one of the best and most faithful friends I ever knew. He has many a time deterred thieves from breaking into my house at night, and murdering me and my family. He never hated nor hurt anybody but rogues and night-walkers. He performed a million of good offices for me, for no other recompense than his victuals and lodging, and seemed always happy and contented with what I could afford him, however scanty the provision. He has driven away many a fox that came to steal my geese and turkeys, and for taking care of a flock of sheep there is not his equal in the country. In short, whenever he dies I shall lose my best friend, my best servant, and most vigilant protector. I am positive that he is as innocent as a babe of the crime charged upon him, for he was with me the whole evening, and supped and slept at home. He was, indeed, my constant companion, and we were seldom or never asunder. If your worships please, I'll be bail for him from five pounds to five hundred.

Court: That cannot be; it is not a bailable offense. Have you any thing else to say, Mr. Positive?

Carter: Say? I think I've said enough, if it signified any thing.

Bottle: Drag him away out of hearing.

Carter: I will have justice! You, all of ye, deserve hanging more than your prisoner, and you all know it, too.

Court: Away with him, constable! Scum of the earth! Base born peasant! (Carter is hauled out of the court, after a stout resistance.)

Court: A sturdy beggar! We must find out some means of wiring that fellow.

The counsel for the prosecution prayed sentence of death upon the culprit at the bar.

Court: How says the statute? Are we competent for this?

Counsel for Pros.: The statute is, I confess, silent. But silence gives consent. Besides, this is a case of the first impression, and unprovided for by law. It is your duty, therefore, as good and wise magistrates of the Hundreds of Gotham, to supply this defect of the laws, and to suppose that the law, where it says nothing, may be meant to say whatever your worships shall be pleased to make it.

Bottle: It is now incumbent upon me to declare the opinion of this high and right worshipful court here assembled. Shall the reptile of a dung-hill, a paltry muck-worm, a pitch-fork fellow, presume for to go for to keep a dog? And not only a dog, but a dog that murders hares? Are these divine creatures, that are religiously consecrated to the mouths alone of squires and nobles, to become the food of garlic-eating rogues? It is a food that nature and policy forbid to be contaminated by their profane teeth. It is by far too dainty for their robustious constitutions. How are our clayey lands to be turned up and harrowed, and our harvests to be got in, if our laborers, who should strengthen themselves with beef and ale, should come to be fed with hare, partridge, and pheasant? Shall we suffer our giants to be nourished with mince meat and pap? Shall we give our horses chocolate and muffins? No, gentlemen. The brains of laborers, tradesmen, and mechanics (if they have any), should ever be sodden and stupefied with the grosser aliments of bacon and dumpling. What is it but the spirit of poaching, that has set all the lower class, the *canaille*, a hunting after hares' flesh? You see the effects of it, gentlemen; they are all run mad with politics, resist their rulers, despise their magistrates, and abuse us in every corner of the kingdom. If you had begun hanging of poachers ten years ago, d'ye think you would have had one left in the kingdom by this time? No, I'll answer for it; and your hares would have multiplied till they had been as plenty as blackberries, and not left a stalk of corn upon the ground. This, gentlemen, is the very thing we ought to struggle for; that these insolent clowns may come to find that the only use they are good for is to furnish provision for these animals. In short, gentlemen, although it is not totally clear from the evidence that the prisoner is guilty, nevertheless hanged he must and ought to be *in terrorem* to all other offenders. Therefore, let the culprit stand up, and hearken to the judgment of the court.

Constable: Please, your worship, he's up.

Bottle: Porter, thou hast been found guilty of a most daring, horrible, and atrocious crime. Thou hast, without being qualified as the law directs, and without license or deputation from the lord of the manor, been guilty of shedding innocent blood. In so doing, thou hast broken the peace of the realm, set at naught the laws and statutes of thy country, and (what is more than all these), offended against these respectable personages, who have been sitting in judgment upon thee. For all this enormity of guilt, thy life doth justly become forfeit, to atone for such manifold injuries done to our most excellent constitution. We did intend, in Christian charity, to have given some moments for thy due repentance, but as the hour is late,

and dinner ready, now hear thy doom. Thou must be led from the bar to the end of the room, where thou art to be hanged by the neck to yonder beam, *coram nobis*, till you are dead, dead, dead. Hangman, do your duty.

Constable: Please your worships, all is ready.

Ponser: Hoist away, then; hoist away. (Porter is tucked up.)

Mat.: Come, it seems to be pretty well over with him now. The constable has given him a jerk and done his business.

Bottle: He's an excellent fellow.

Ponser: The best informer in the whole country.

Bottle: And must be well encouraged.

Ponser: He shall never want a license whilst I live.

Noodle: Come, shall we go to dinner?

Bottle: Ay, he'll never course hares again in this world. Gentlemen, the court is adjourned. (*Exeunt omnes.*)

EPITAPH,

Composed by Sam. Snivel, the parish clerk, proposed to be put, at farmer Carter's expense, on the unfortunate malefactor's tombstone: Here lie the remains of honest *Porter*, who, after an innocent and well-spent life, was dragged hither and tried for a crime he never committed, upon laws to which he was unamenable, before men who were no judges, found guilty without evidence, and hanged without mercy; to give to future ages an example that the spirit of Turkish despotism, tyranny, and oppression, after glutting itself with the conquest of liberty in British men, has stooped at length to wreak its bloody vengeance on British dogs! *Anno Dom.* 1771. *Requiescat in pace.*"

All the unities seem to be observed in this account. The only imaginable improvement would be to write the epitaph in dog Latin.

CURRENT TOPICS.

The law of this State with regard to marriage is, to say the least, very loose. No form or ceremony, civil or religious, no notice or publication, no cohabitation, no writing, no witnesses, even, are essential to the constitution of this the most important contract into which two persons can enter. Simple consent is the sole requisite. The statutes make very careful provisions for contracts effecting the sale of houses and lands, of goods, wares and merchandise, but leave without safeguards or precautions of any sort the contract that unites man and woman for life — that forms the basis and bulwark of all the social relations. In this respect, were it not cynical, we might be tempted to apply to matrimony the words of the poet: "*facilis descensus Averni; sed revocare gradum hoc opus, hic labor est.*"

A bill is pending before the Legislature providing for the publication of the laws in the newspapers of the several counties. The gist of the bill is that the laws shall be published in one paper of each of the principal political parties in each county. It would be more to the purpose to provide for a *speedy* publication of the laws after the adjournment of the Legislature. Under the present arrangement the laws are not published till months after the adjournment; and heretofore the profession have been kept in profound ignorance of the latest acts for a very considerable portion of the year. This difficulty is now mainly remedied by the LAW JOURNAL, which will publish all acts of a general nature directly after their approval; but, nevertheless, we insist that a speedy publication of the laws should be provided for.

The confirmation of Judge Bradley gives us a full United States Supreme Court. The following is a list of the judges, with their ages and the dates of their appointments:

	Age.	Appm't.
Salmon P. Chase, of Ohio	62	1864
Nathan Clifford, of Maine	66	1858
Samuel Nelson, of New York	77	1845
David Davis, of Illinois	55	1862
Noah H. Swayne, of Ohio	60	1862
Samuel F. Miller, of Iowa	54	1862
Stephen J. Field, of California	53	1863
William Strong, of Pennsylvania	61	1870
John P. Bradley, of New Jersey	57	1870

The Bar of New York city are going about the work of elevating the profession thoroughly and systematically. A bill is before the Legislature to incorporate their recently formed Bar Association, and now another bill has been introduced to incorporate an "Evening Law School." The bill names Edwin W. Stoughton, Sidney Webster, Algernon S. Sullivan, Clarence A. Seward, E. B. Hart, A. J. Requier, Lewis Sanders, and others, as corporators. The persons above named shall form the first board of trustees. These trustees shall elect a committee from their number, upon whose examination and recommendation, as evidenced by the degree of Bachelor of Laws conferred upon them, any graduate of this school shall be admitted to practice as attorney and counselor in all the courts of the State; but "no diploma shall be sufficient for such admission which shall be given for a period of attendance upon said law school less than three terms of twelve weeks each, or two terms of twelve weeks, with one year's study elsewhere." No professor or teacher in the law school shall be a trustee.

We print elsewhere the act providing for the election of the Court of Appeals judges under the new Judiciary article of the Constitution. The election is to take place on the third Tuesday of May next, and it is probable that the conventions for the purpose of making nominations will meet about the middle of the present month. This is a matter that directly affects the members of the bar, and we trust that they will personally interest themselves in securing the nomination of men every way qualified to do honor to the high position for which they are to be chosen. The selections should be made chiefly, if not entirely, from the present Supreme and Appeals benches, or from among those who have hitherto filled high judicial positions. The experiment of selecting men untried in the administration of justice, and unused to judicial duties, is fraught with risks which we cannot

at present afford to take. Nor is it necessary to take them; for among the thirty odd judges now on the bench can be found men every way qualified, both by experience and learning, to worthily fill the position. The qualities necessary to make an eminent judge are peculiar. Every great judge must be a profound lawyer, but not every profound lawyer would make a great judge. However well read in the law a man may be,—however eminent as a practitioner—his fitness for a judicial position can be fully determined only after he shall have been subjected to the test of experience. These and kindred considerations should lead to the selection of those men who have been tried and not found wanting.

The decision of the United States Supreme Court in the case of *The Justice of the Third District* v. *Murray*, a note of which was given in our last number, settles one constitutional question of considerable importance. Murray was, during the rebellion, marshal of the New York district, and as such arrested a man named Patrie for alleged treasonable words and acts, and had him confined in Fort Lafayette. Patrie was afterward discharged, and brought an action against Murray, which was tried at the Greene Circuit in 1864. Murray did not set up any special justification, but relied upon a general denial; a verdict was rendered by the jury against him for $9,000 and costs. Murray thereupon sued out a writ of error to remove the cause to the Circuit Court of the United States, under the fifth section of the act of Congress, passed March 3d, 1863, entitled "An act relating to *habeas corpus* and regulating judicial proceedings in certain cases;" and having executed and filed the bond required by law, moved before Mr. Justice MILLER, of the Third District, at special term, that the bond and sureties be approved, and that no further proceedings be had in the case, etc. On this motion Murray introduced affidavits alleging that he had made the arrest under an order of the President of the United States, etc. Mr. Justice MILLER, after a most learned and elaborate review of the authorities, held that the fifth section above referred to, so far as it authorized the removal of a cause from the State court after a verdict and a trial and determination of the facts and the law, in the same manner as if the same had been originally commenced in the Circuit Court of the United States, was in violation of the seventh amendment of the Constitution of the United States, and was, therefore, null and void. (43 Barb. 323; 29 How. 312.) On appeal the General Term of the Third District affirmed Judge MILLER'S decision. A motion was subsequently made in the Circuit Court of the United States for a mandamus directed to the Justices of the Third Judicial District of New York, requiring them to make return to the writ of error. On a hearing, the mandamus was issued, and from that order an appeal was taken to the Supreme Court, which reversed the decision of the Circuit Court and sustained the decision of the State court.

The Troy *Daily Press* says: "The ALBANY LAW JOURNAL disagrees with the position we have taken as regards the age of judges of the new Court of Appeals. It claims that position to be wrong, on the ground that it will deprive us of the services of those best qualified to occupy the bench. We admit that, and still are able to hold our position without a valid objection to it." The *Press* proceeds to say that the design of the long tenure was to make the court permanent, and that that design should be carried out, etc. The *Press* admits the only argument that it is necessary to urge against debarring men over fifty-six years of age, *viz.*, "that it will deprive us of the services of those best qualified to occupy the bench." While, in the lower courts, mediocrity may be tolerated, in the court of last resort pre-eminence is essential. The very best jurists in the State should be chosen irrespective of age or party. We believe that these will be mainly found on the present Supreme and Appeals benches—men of mature minds, of profound learning in the law, and of years of experience in the administration of justice. Surely, we can ill-afford to cast aside the services of such men because, forsooth, they have crossed the Rubicon of fifty-six. While it is undoubtedly true, that the object of the long tenure was to give the court stability and permanence, yet to accomplish this, it is not necessary that every man should sit the full term of fourteen years. The court is so constituted that the change of one man every year would not in any perceptible degree affect its stability; and it is hardly probable, that the term of more than one judge, or at the most two, would expire in any one year by reason of the disability of age. But there is another objection to the position taken by the *Press*, which is of grave importance, and ought, it seems to us, to prove fatal to it, and that is, that, by electing men all under the age of fifty-six, the terms of all the judges would expire on the same day, and an entirely new court would have to be formed. This would certainly be opposed to all ideas of permanence and stability. The fact is, that the men to whom will be intrusted the duty of making the nominations will have too much sense and wisdom to adopt the chimera of our worthy contemporary.

GENERAL TERM ABSTRACT.

SEVENTH DISTRICT—MARCH TERM, 1870.

DIVISION FENCE.

Unruly cattle.—In an action tried in the county court for damages to plaintiff's lands and crops by cattle of the defendant entering through a division fence: *Held*, that it was error to admit an answer to the question, on the part of the plaintiff, "Were the defendant's cattle unruly?" The rule of liability is fixed by the statute, and did not depend upon the character or disposition of the cattle. If the fence through which they passed belonged to the defendant to maintain, he was liable in any event. If to the plaintiff, the defendant was equally liable, unless the plaintiff had failed to maintain the fence, or to keep it in repair. The evidence received was calculated to mislead the jury as to the real issues in the case, and to operate to the prejudice of the defendant. *Potter* v. *Danforth*. Opinion by DWIGHT, J.

SUBMISSION WITHOUT ACTION.

A submission of a controversy without action, under § 372 of the Code, must be of some alleged cause of action *for adjudication* by the court. That provision of law is not intended to enable parties to take the advice or opinion

of the court upon questions in dispute between them. A case must be presented in which a judgment may be rendered in favor of one and against another of the parties; and the submission must indicate what judgment is sought.

Accordingly, where the case presented a statement of facts agreed upon between the parties, and then propounded three questions to be answered categorically by the court, without indicating what, or that any judgment was asked for, *held* that such submission must be dismissed without costs to either party. *Williams et al.* v. *The City of Rochester et al.* Opinion by DWIGHT, J.

ACTION ON LOST INSTRUMENT.

Where an action was brought by the representatives of a deceased person, on a note alleged to be lost, and on the trial the note was produced by the defendant, the maker, with his name torn off: *Held*, that, although it appeared that the note had not been paid, nor extinguished by offset, yet that a presumption arose from the facts of possession by the maker and cancellation, that the note had been released or acquitted; and judgment on the report of a referee, in favor of the defendant, was affirmed. *Gray's Admrs.* v. *Gray.* Opinion by DWIGHT, J.

OFFER OF EVIDENCE.

Where, in an action of trover against the sheriff, for goods levied on by execution, the defendant alleged, among other things, in his third answer, that the transfer by the judgment debtor to the plaintiff was fraudulent, and on the trial made an offer of proof in the following language: "The defendant then offered to prove the facts set up in the third answer, that," etc., etc., enumerating certain facts: *Held*, that such offer must be construed to be limited to the facts specially enumerated, and could not be held to embrace an offer to prove all the facts alleged in the third answer. Accordingly, the facts thus specially enumerated appearing to be immaterial, it was *held* that this was no error in the ruling of the court excluding the evidence, although material matters were alleged in the answer referred to. *Buckler* v. *Chase.* Opinion by DWIGHT, J.

EVIDENCE—STATUTE OF LIMITATIONS.

In an action by a creditor against the grantees of a deceased person, to set aside a deed of real estate on the ground of fraud, and as an impediment to proceedings before the surrogate to obtain an order to mortgage, lease or sell such real estate to pay debts of the intestate: *Held* that a judgment obtained by the creditor against the administrators of the deceased, upon a claim referred under the statute, was not evidence of the indebtedness of the deceased as against the defendants in this action; also, *semble*, that the judgment did not change the character of the indebtedness, and, therefore, did not take the case out of the operation of the statute of limitations applicable to a simple contract debt. *Sharpe* v. *Freeman et al.* Opinion by DWIGHT, J.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF WISCONSIN.*

ACTION.

1. *Against tenant.* — The statutory action against a tenant holding over after the expiration of his term (sec. 12, chap. 151, R. S.), must be brought by "the lessor, his heirs, executors, administrators, or assigns;" and if a guardian of the lessor's person and estate has been appointed, he must bring the action *in the name of his ward. King, Guardian, etc.*, v. *Cutts.*

2. *By receivers.* — In an action touching land, a receiver was appointed "to rent the premises, take care of them, and collect and take care of the rents during the pendency of the action;" and this appointment was not made under any special statute empowering the receiver to sue, etc. *Held*, that, without an assignment of the title to him by the defendant in said action, the receiver could not sue *in his own name* (under sec. 12, chap. 151, R. S.), to recover possession of the land from the lessee of said defendant, as a tenant holding over. *Ib.*

3. If the receiver desires to bring such action in the name of the legal owner, he must apply to the court for leave, on notice to such owner. *Ib.*

AGREEMENT.

1. *To compensate for services by legacy.* — Where A renders services to B for a salary, with an agreement that he is to be further compensated by a provision in B's last will, he may recover from B's estate enough to make up what his services are reasonably worth. *Bayliss* v. *Estate of Prichard.*

2. Proof that after A had left B's service from dissatisfaction with the salary paid him, B induced him to return by representing "that it should all be right, and that he had remembered him in his will;" *held*, sufficient to show such an agreement. *Ib.*

APPEALS.

Order staying proceedings. — An order staying proceedings in an action until an accounting has been had between the parties in another pending action is not appealable. *Johnson, ex'r, etc.* v. *Reilley.*

BILL OF EXCEPTIONS.

1. *Settlement of.* — A circuit judge may settle a bill of exceptions (either during or after his term of office), outside of the circuit for which he was elected and in which the cause was tried. *Oliver* v. *Town et al.*

2. Where a notice, in a cause tried in Fond du Lac county, designated the Senate chamber at Madison as the place for the settlement of the bill, the appellant's attorney and the judge being Senators, it not appearing that the respondent was prevented from taking part in the settlement by the character of the place selected, an objection to the bill on that ground is insufficient. *Ib.*

3. But where the judge, after signing the bill, wrote on it that "the whole charge given to the jury" was to be inserted therein, this not referring on its face to a written charge on file,—*Held*, a fatal defect. *Ib.*

BILL OF EXCHANGE.

1. *Essentials of.* — It is not essential to the validity of a bill of exchange that it should be made payable to order or bearer, or on a day certain, or at a particular place, or have the words "value received." *Mehlberg* v. *Fisher, imp., etc.*

2. *When prima facie payment.* — The taking of a bill of exchange on a previous indebtedness of drawer to payee, is *prima facie* a payment of the debt. *Ib.*

3. Such taking is absolute payment if payee or holder neglects to take proper steps to obtain payment of the bill, or to charge the drawer with liability on it if not paid. *Ib.*

4. *Notice of non-acceptance.* — Notice of non-acceptance or non-payment is not required in order to charge the drawer, if he has no funds or effects in the drawee's hands; but the burden of proving that fact is on the holder. *Ib.*

5. Evidence that the drawees *told* the holder, on presentation of the bill, that "they had no money to pay it," is not competent, being mere hearsay. *Ib.*

CHATTEL MORTGAGE.

Payment. — Where, by consent of the parties, mortgaged chattels are sold and the money paid to the mortgagee, he has an absolute right to apply it to the payment of the mortgage debt, and the mortgagor cannot direct its application to the payment of another debt due the mortgagee. *Masten* v. *Cummings.*

COMMON CARRIERS.

Liability for mistake. — Goods shipped by rail for Chicago were plainly marked "J. Weil & Bros.," but the station agent entered them on the way-bill as for "T. Weil & Co." When J. Weil & Bros. called for the goods at Chicago, they were told that there was nothing for them; and the mis-

*From Hon. O. M. Conover, State Reporter; to appear in Vol. 24, Wis. Reports.

take was not discovered until the goods were destroyed with the depot by fire. *Held*, that the carrier was liable. *Meyer* v. *Chicago & N. W. Railway Co.*

CONSTITUTIONAL LAW.

Commissioners. — Chapter 372, private and local laws of 1869, which appoints three commissioners "to superintend the erection of a court house in the county of Milwaukee," is invalid, being in conflict with section 23, Art. IV, of the State Constitution, which declares that "the legislature shall establish but one system of town and county government, which shall be as nearly uniform as practicable." *State ex rel. Keenan* v. *Supervisors of Milwaukee County.*

CONTRACT.

1. *For personal services.* — In an action for plaintiff's services as defendant's agent under a contract to employ him for a specified time at a fixed salary, the answer alleged that the contract (which was in writing), was procured by false and fraudulent representations, and asked that it be adjudged void and canceled. *Held*, 1, That it is doubtful whether equity will adjudge a contract for personal services to be canceled for fraud, the fraud being always a defense, and the contract not assignable. 2. *Quære*, therefore, whether the facts alleged furnish a ground of counter-claim. *Barker* v. *Knickerbocker Life Insurance Company.*

2. Such facts not being set up in the answer distinctly *as* a counter-claim, and defendant having gone into the proofs as though they were in issue (though there was no reply), it was not error to treat them merely as a *defense*. *Ib.*

3. The giving of instructions inapplicable to the facts in evidence is not error, if they do not mislead the jury. *Ib.*

4. Damages for a breach of contract for plaintiff's personal services may be reduced by the amount which he might have earned from other sources during the time of such breach; but the burden of showing that he might have made such earnings is upon the defendant. *Ib.*

5. The refusal of a new trial will not be regarded as error, on the ground that the verdict was contrary to the evidence, if any construction of the evidence which the jury were at liberty to give, would sustain the verdict. *Ib.*

6. Where plaintiff was shown to have made to defendant, before his employment by the latter, a false representation as to the amount of business he had procured for a previous employer, but there was also evidence that he had submitted to plaintiff's agent the book of accounts on which this representation was based, and they had gone over it together, the jury would be at liberty to infer that defendant did not act on plaintiff's representation, but on the examination made by its own agent. *Ib.*

CONVERSION.

1. *Demand.* — Part of a raft of logs which plaintiffs were running to market, after being sold by them to A, were wrongfully taken by defendants, were resold by A to plaintiffs, and were afterward sawed into lumber and disposed of by defendants: *Held*, that no *demand* was necessary to enable plaintiffs to maintain their action as for a conversion of their property. *Couillard* v. *Johnson et al.*

2. *It seems* that if the conversion had taken place before the resale to the plaintiffs, a demand by them would have been necessary. *Ib.*

3. Although no memorandum of such resale was made and no money paid thereon, yet, as the logs had not been separated and delivered to A at the time of the sale to him, the possession was with plaintiffs, as against him, and the resale was valid, notwithstanding the statute of frauds. *Ib.*

COUNTER-CLAIM.

1. *In action by lessor.* — Complaint against lessee of a hotel, alleging that when his term expired, instead of surrendering possession as he had covenanted to do, he carried off certain articles forming part of the property leased. Counter-claim for the value of articles owned by defendant, but which plaintiff refused to allow him to remove, when he surrendered possession of the building: *Held*, a good counter-claim under sub. 1, sec. 11, ch. 125, R. S. *Vilas* v. *Mason.*

2. It was alleged and proof offered by defendant, that plaintiff had promised, if said articles were left in the hotel, he would pay for them whenever they "should be adjudged, by suit or otherwise," to belong to defendant. *Quære*, whether the adjudication of title, which was the condition of the promise, could be made for the first time in an action on the promise itself; and whether, therefore, this could be upheld as a counter-claim arising *upon contract*. *Ib.*

3. An amendment which merely completes the statement of a cause of action or ground of defense, defectively stated, should be allowed on just terms. *Ib.*

4. Defendant having claimed title to the articles mentioned in his counter-claim under a purchase from a third party, and plaintiff having introduced evidence of paramount title in himself, it was not error to allow an amendment of the counter-claim by alleging any facts which would *estop* plaintiff from setting up such paramount title. *Ib.*

CRIMINAL LAW.

Consecutive sentences. — Where a person has been convicted of several distinct offenses, the court may proceed to give judgment upon each; and in so doing may direct that the term of imprisonment for one shall commence at the expiration of that for another, and so on until all the terms have expired. *Petition of McCormick for a Habeas Corpus.*

DAMAGES.

1. *In actions for injuries to wife.* — In an action by husband and wife under the statutes for injuries to the wife from defendant's negligence, damages cannot be recovered for loss of her time and services, or for the expenses of nursing and medical attendance. *Kavanagh et ux.* v. *City of Janesville.*

2. Whether damages for these items could be recovered in a separate suit by the husband, is not here determined. *Ib.*

3. Where such damages were improperly allowed, the judgment is affirmed on condition that plaintiffs remit a certain sum, being the largest amount which the jury could have allowed for those items, under the evidence. *Ib.*

DIVORCE.

For neglect and desertion. — The complaint alleges that defendant, though abundantly able to work and earn a good livelihood for himself and plaintiff (his wife), has utterly failed and refused to do so; that he has not purchased any clothing for her for several years, nor contributed any thing toward her support, but has compelled her to go out to work by the day and week among strangers, and then taken her wages and spent them for his own dissipation; that during two years before the action he has never furnished her with any house nor boarded her, but has compelled her to work out as a servant; that he has frequently left her for several months without her knowing where he was, and then she would learn by his writing to some neighbor or to her employer; and that he is wholly indifferent to her happiness, to her wishes, and to her appearance. *Held*, a sufficient ground of divorce, under sec. 11 and subd. 3, sec. 10, chap. 111, R. S. *Keeler* v. *Keeler.*

ESTOPPEL.

1. *When owner estopped as against purchaser from third party.* — An owner of property, who stands by and sees a third party selling it under claim of title, without asserting his own title or giving the purchaser any notice thereof, is estopped, as against such purchaser, from asserting it afterward. *Vilas* v. *Mason.*

2. In such a case the purchaser need not show by further proof that such owner *intended* to influence or *did* influence his conduct in making the purchase; since the law will so *presume* from the facts stated. *Ib.*

3. When any construction of the evidence which the jury were at liberty to give would sustain the verdict,

and the court below refused a new trial, this court will not interfere on the ground that the verdict is against the evidence. *Ib.*

EVIDENCE.

1. *Answer of witness.*—Where the answer of a witness states only facts which are admissible in evidence, there is no error, although the question was improperly allowed. *Couillard* v. *Johnson et al.*

2. *Entries in books of account.*—Where a witness has sworn that he knows certain entries in a book of accounts to have been correctly made, they may be read in evidence, although not made by the witness, but by another person from memoranda furnished by him, and although such witness cannot testify to the facts from present recollection independently of the entries. *Riggs* v. *Weise et al.*

3. *Of circumstances to explain acceptance.*—A draft by F. on defendants in plaintiff's favor was accepted "payable when the lumber is run to market." *Held*, in an action upon it, that the parties were entitled to show the circumstances under which it was made, to explain the acceptance. *Lamon* v. *French et al.*

4. Plaintiff proved that he worked for F. on logs out of which lumber was to be made; that the draft was given in payment for his labor; and that F. sold all his interest in the logs to other parties before the action was commenced. *Held*, that defendants were then entitled to show an agreement between them and F. at the time of the acceptance, that the lumber from the logs should be delivered to them to be sold for F. *Ib.*

5. On proof of the fact last mentioned, the acceptance must be held to mean, that defendants would pay the draft when *they* had run said lumber to market. *Ib.*

6. *Of verbal agreement on making of note.*—Evidence of a verbal agreement between the parties to a note, at the time it was made, is admissible to show a partial or total failure of the consideration. *Smith* v. *Carter et al.*

7. Thus it might be shown that the note was given in payment for logs cut by payee, and to be delivered by him to the makers, and was put in the hands of a third person with the understanding that he was to pay with funds of the makers all legal claims against said logs (which should be considered a payment upon the note), and that he did pay certain claims of that character; also, that payee did not deliver to the makers all the logs agreed upon; and that a part of those delivered had been cut upon the land of another person, of whom the makers were obliged to purchase them. *Ib.*

8. *Proof of description given of lost property.*—In an action against a hotel-keeper for the loss of plaintiff's shawl, the person who acted as plaintiff's agent in making demand for the shawl, having described it as a witness of plaintiff, proof of what he had said in describing it at the time of making such demand was admissible for the defendant as independent evidence. *Smith* v. *Wallace.*

9. The fact that such proof also tended to impeach the agent's testimony, and that no proper foundation had been laid for such *impeaching* evidence, did not render it inadmissible. *Ib.*

10. Where a new trial was denied, if any legitimate construction of the evidence will support the verdict, this court will not interfere, though it may think the weight of evidence was the other way. *Ib.*

EXECUTION.

Exemptions.—Section 31, chap. 134, R. S., after enumerating certain animals exempt from sale on execution, etc., also exempts "the necessary food for all the stock mentioned in this section, for one year's support." *Held*, that this does not exempt food for animals which the debtor does not possess, and has no present purpose of obtaining. *Cowan* v. *Main et al.*

GARNISHMENT.

1. *Affidavits.*—Chapter 200, Laws of 1864, does *not* require, before the process of garnishment, therein provided for, that an affidavit be filed stating that defendant in the principal suit is indebted to plaintiff in a certain sum in excess of all legal set-offs, etc. *Orton* v. *Noonan et al.*

2. The court has, however, an inherent power to control proceedings upon summary process, so as to prevent abuse. *Ib.*

3. Where an affidavit of the principal debtor is filed, stating that he is not indebted, etc., plaintiff should be required to furnish evidence to the contrary, at least by his own affidavit, in clear and express terms, of the existence of such indebtedness. *Ib.*

4. So of those facts which the act does require plaintiff's affidavit to state, if defendant's affidavit explicitly denies them, plaintiff should be required to establish them by further proof, or the process should be discharged. *Ib.*

5. The party moving for such discharge should serve and file his affidavits therefor, with notice of motion; plaintiff should then be required to file his affidavits by a certain day; and the moving party should then have a specified time for filing further affidavits to controvert any new facts alleged. *Ib.*

6. *Delivery of property to sheriff.*—The court *may* order the money or property in dispute to be paid or delivered by garnishee to the sheriff or clerk, or other officer, to be kept for the person who shall be found entitled thereto; and such order *should* be made where it appears there is danger of the property being lost or the debt becoming worthless. *Ib.*

7. *Judgment against garnishee.*—Judgment cannot be rendered against a garnishee for refusing to answer whether he has received property of the principal debtor *since* notice of garnishment was served upon him; that being the time when his liability is fixed. *Wood* v. *Wall, Garnishee.*

8. In case of a refusal of garnishee to answer a *proper* question, the court should inform him of his obligation to answer before rendering judgment against him for such refusal. *Ib.*

GUARANTY.

Substituted liability.—The city of Watertown issued its bonds in aid of the Milwaukee and Watertown R. R. Co., which guarantied their payment. Afterward that company became consolidated, in pursuance of law, with the Milwaukee and La Crosse R. R. Co., which subsequently sold the Watertown division of its road (including what had previously been owned by the Milwaukee and Watertown Co.), to a third corporation, which sold it to the defendant. *Held*, that while the guaranty of said bonds became part of the general indebtedness of the Milwaukee and La Crosse Co., after the consolidation, defendant, as purchaser from it of the Watertown division of its road, is not liable for any part of such indebtedness. *Wright* v. *Milwaukee and St. Paul Railway Co.*

HIGHWAY.

1. *Dedication.*—An acceptance by the town officers is not necessary to constitute a highway *by dedication*, but travel thereon by the public, to such an extent and for such a length of time as to show that the public convenience requires the road, is sufficient; and this time may be less than ten years. DIXON, C. J., dissents. *Buchanan* v. *Curtis et al.*

2. Proof of the owner's declarations, as well *after* the alleged dedication as at the time thereof, is admissible to show that there was no intention to dedicate. *Ib.*

3. *Defects in way.*—Objects within the limits of a highway *naturally calculated to frighten horses of ordinary gentleness* may constitute such defects in the way as to render the town liable, even though so far removed from the traveled path as to avoid all danger of collision. *Foshay* v. *Town of Glen Haven.*

4. An instruction "that an object existing within the limits of the highway, but leaving the traveled path unobstructed, so that the traveler is safe from collision with it, is not an insufficiency in the way, *merely because it exposes the traveler's horse to become frightened at the sight of it*, and the town in such case would not be liable;" *held*,

erroneous, because, in its most obvious sense, and as applied to the facts in the case, it conflicts with the law as above stated. *Ib.*

5. *Injuries from defective sidewalks.* — In an action against a city for injuries to plaintiff's person resulting from the defective condition of a sidewalk, plaintiff must show that the city authorities had actual notice of the defect, or that it was of such a nature and had existed for so long a time that knowledge on their part must be presumed. *Goodnough* v. *City of Oshkosh.*

INSURANCE.

1. *Continued compliance with conditions.* — How far the plaintiff in an action on an insurance policy must in the first instance introduce proof of a continued compliance on his part with all its provisions, *quære.* *May et al.* v. *Buckeye Mutual Ins. Co.*

2. A policy of insurance was issued upon a factory which was only run during a part of the year, and the answers to the company's printed interrogatories, stating the use of the building and the precautions observed against fire, were such as, from their nature, were appropriate only to the time during which the mill was run, and the agent who issued the policy was made fully aware of the facts, and himself filled up the application and wrote down such portions of the applicant's statements as he considered important. *Held*, that the company, even if it had not expressly made itself responsible for the agent's accuracy, could not avoid liability for a loss incurred during the season when the factory was stopped, on the ground that the answers in the application were warranties that the same state of things should continue during the life of the policy. *Ib.*

3. *Survey.* — The policy in this case, after stating what the application must contain, and that any false description by the assured, or omission to make known any fact material to the risk, shall render said policy void, adds: "But the company will be responsible for the accuracy of surveys made by its agents." *Held*, that the word "survey" must here be construed to include the whole application, when made out by the agent, and the company is thus expressly precluded from taking advantage of his inaccuracy or omission in drawing the same, where the facts have been fully stated to him by the assured. *Ib.*

4. Parol evidence is admissible in such a case, to show that the agent, in filling out the application, did *not* accurately and fully state the answers of the assured. *Ib.*

(*Concluded next week.*)

APPOINTMENTS BY THE GOVERNOR,

BY AND WITH THE ADVICE AND CONSENT OF THE SENATE.

Notaries Public confirmed March 18, 1870:

City and County of New York. — Re-appointments — Christian Angele, Chester A. Arthur, Bernard Amend, Francis B. Autz, George Ashforth, Wm. H. Burrell, James A. Byrnes, Charles E. Brown, Julius Binge, Charles E. Bogert, Wm. W. Brackett, Wm. Boeckkl, Herman F. Bower, Elie Bonin, Morris J. Bennett, Lawrence Burke, James L. Berrien, Robert T. Bailey, Wm. H. Barker, Henry G. Banks, J. Romaine Brown, John Bouton, Wm. A. Boyd, Seymour A. Bunce, Wm. Brourton, Alexander Blumenstiel, Vincent Clark, William Coddington, Francis J. Campbell, Jr., John M. Costa, Leonard J. Carpenter, Andrew B. Chalmers, George W. Collis, Calvin R. Cheever, Charles W. Dayton, William H. Davis, James L. Dayton, George Degener, David Davis, John Drake, James Sidney Douglas, Joseph W. Dugliss, Arthur J. Delaney, J. Albert Englehart, Edmund Elmendorf, Jr., Lewis L. Ettinger, Alexander M. Eagleston, Wm. A. Eydam, Myer Elsas, Thos. L. Feitner, Joseph P. Fallon, John R. Farmington, Wm. T. Graff, John Gautier, Jr., John V. Gridley, John F. Gray, William F. Gilley, Richard C. Greene, Charles E. Gildersleeve, Harrison C. Gibson, Chas. A. L. Goldey, Peter James Gage, Edward Gebhard, James S. Greves, John Hayes, Patrick J. Hanburg, John H. Harnett, Wm. Hibbard, Edward B. Heath, John R. Hackett, James W. Hale, William A. Herring, John Hayes, George Hillier, George H. Hansen, Louis P. Kircheis, William H. Kipp, Joseph Koch, Hale Kingsley, De Lancy W. Knevels, Wm. W. Kipp, Thomas B. Kingsland, John D. Krehbeil, Chas. P. Kirkland, Hugo P. Koelker, Charles H. Ketchel, Edgar Ketchum, Jr., Charles W. Kruger, Wm. Lindsay, Edward V. Loew, Joseph C. Levi, William Lee, Jandine Lyng, Smith E. Lane, William F. Lett, Florence Leary, Daniel Learny, Julius S. Lyons, Philip Merkle, Henry H. Morange, Henry Maurer, Thomas Marterson, Maximillian Morgenthan, Otts Meyer, James D. McClelland, Abraham Moses, Wm. H. Melick, David P. McBreen, George B. Morris, Benjamin A. Moran, David McAdams, Edward A. Moore, James M. Macgregor, James Marriner, Wm. T. McGrath, Henry McCabe, Daniel H. McDonnell, Robert A. Morrison, Patrick H. McDonough, Wm. F. McNamara, John D. McGregor, Thomas McSpeddon, Robert McCofferty, Alexander H. Nones, Wm. A. Neschke, Joseph B. Nones, Sylvester E. Nolan, Washington R. Nichols, Edw. A. Nichols, John R. Nelson, Charles Nanz, James A. Olivell, Wm. C. O'Brien, Francis V. S. Oliver, Thomas B. Osborne, Thomas W. Pittman, Jonas N. Phillips, Edward M. Plum, John A. Peritz, J. Augustus Page, Charles Price, Michael Phillips, John H. Porter, Wm. H. Richards, Lyman Rindskoff, Henry F. Ranney, Bernard Reilly, J. Leander Starr, Isaac Schreiber, Charles L. D. Spethoff, John E. Sweezey, George G. Sickles, Orlando P. Smith, Wm. W. Smith, John Stevenson, Wm. Schneider, Wm. A. Smalley, Jacob Seebacher, J. Raymond Smith, Jacob P. Solomon, Stephen N. Simonson, Ebenezer B. Shafer, Andrew J. Smith, Philip F. Smith, Nicholas Seagrist, Alva Spear, Charles Tillotson, Samuel W. Tuttle, Wm. H. Tracey, John A. Thompson, Wm. H. Tillotson, James Brainard Taylor, George M. Van Hoesen, Theodore S. Van Cott, Wm. B. Vandersmith, James M. Varnum, A. V. W. Van Vechter, R. Harwood Vernon, Richard T. Van Boskerck, Chas. M. Vanderwoost, Albert S. Whittaker, James E. Wheeler, Robert Wakefield, Samuel T. Webster, Chas. M. Willey, J. Wade Wilson, Hezekiah Watkins, Elbert A. Woodward, Benjamin A. Willis, Daniel Whalen, Joseph T. Webster, George Chalmers, James A. Colvin, Lucius S. Comstock, Adam Gos.

Kings County. — Re-appointments — Moritz Augentine, Seth B. Cole, Amzi B. Davenport, Abraham H. Dailey, James Eschwege, James R. Fairman, Wm. E. Goudge, Henry W. Honeywell, Theodore F. Jackson, Robert R. Lee, Thomas McCarty, Wm. Sullivan, Samuel Wagoner, Jr., Benjamin F. French, Thomas Cotrel.

Albany County. — New appointments — George R. Ten Broeck, Richard A. Southwick.

Cayuga County. — Re-appointments — Edward C. Marvine, Charles A. Myers, Josiah N. Starin, Corydon H. Merriman.

New appointments — Daniel O. Baker, George M. Watson, George D. Lanehart, D. M. Dunning, Joseph H. Parker, Wm. Davis, Sylvester W. Treat, Henry A. Maynard, Wm. H. Talor, Darwin C. Knapp.

Broome County. — Re-appointments — Charles M. Dickinson, Barna R. Johnson, Samuel W. Rogers.

New appointments — Judson M. Spaulding, Andrew J. Butts, Asabel Cummings, John N. Ring.

Niagara County. — Re-appointments — Joshua Haskill, Anthony McGee, John Hodge.

New appointments — Jerre A. Gladding, Horatio Kilburn.

Onondaga County. — Re-appointments — John P. Ballard, Edgar W. Marsh, John L. Rochner, Amasa H. Jerome, Horace H. Walpole, Geo. Doheny, H. C. Leavenworth, Christian Freeoff, Wm. G. Tracey, Chas. T. Hicks, Benj. S. Gregory, Henry J. Hubbard, Henry Babcock, Edwin R. Plumb, Geo. B. Leonard, Levi H. Ballard, J. Henry Benedict, R. A. Banta.

New appointments — Harlow De Wolf, Jacob A. Nottingham, Howard H. Edwards, Frank P. Hale, H. L. Darling, Mars Nearing, Milton H. Northrup, James S. Plumb, Napoleon B. Boughton, John C. Keefe, Andrew T. Gilmor, Clarence S. Safford, W. P. Love, Gould N. Lewis, W. Otto Weirkotten, George B. Warner, Damon Coats, Benoni Lee, Stephen L. Rockwell.

Fulton County. — Re-appointment — Ashley D. L. Baker.

Queens County. — Re-appointment — L. Bradford Prince, Elias J. Beach, Isaac Coles, William. W. Berger, John W. DeMott.

New appointments — John Ruland, W. R. Burling, Frederick O. Merkle, Samuel D. Roe, Wm. H. Onderdonk, Alex. Moran, Geo. W. Furman, John W. Furman, John Fleming, Henry B. Price, John H. Reed, Oliver Losea.

Jefferson County. — New appointments — Samuel T. Potter, Phelenzo Norton.

Genesee County. — New appointment — R. W. Watson.

Orleans County. — New appointment — Thomas O. Castle.

Allegany County. — Re-appointments — J. S. Norton, Julius Hayt.

New appointments — M. L. Butler, William Richardson, W. Otis Osborn, Levi A. Reynolds, Wm. P. Brooks.

Rockland County. — Re-appointments — Andrew Fallon, Thomas E. Blanch, Anthony D. Morford, Edward Suffern.

Putnam County. — Re-appointments — Edwin A. Pelton, Ambrose Ryder, Cyrus E. Nelson, Daniel Baker, William D. Garrison, Sexton Smith, Amzi L. Dean, George Luddington.

New appointments — Le Ray Barnum, John H. Perry, Charles H. Ferris.

Notaries Public confirmed March 23, 1870:

Chenango County. — New appointment — Melville Keyes.

Fulton County. — New appointment — Hubert A. Wood.

Yates County. — Re-appointments — Spencer S. Raplee, James V. Van Allen, Aaron R. McLean, Morris Brown.

New appointments — Chas. D. Davis, Michael A. Leary, Geo. R. Youngs, John Sutherland, Jacob Van Derventer,

Israel H. Arnold, Martin J. Sunderlin, James C. Beddoe, Oliver S. Williams.

Ontario County.—New appointment—Lindley W. Smith.

Essex County.—New appointment—Marshall Shedd, Jr.

Orange County.—Re-appointments.—Jno. C. Noe, Thomas C. Ring, Wickham T. Shaw, James N. Dickey, M. C. Belknap, John Baldwin, O. Young, Lewis E. Carr, John T. Johnson, Wm. M. Murray, M. Cooper, Wm. H. Birchard, James B. Hulse, Henry M. McQuaid, Henry A. Wadsworth, John Mullock.

New appointments.—Arthur Wilson, Nehemiah Fowler, Gerald Howardrop, Eugene A. Brewster, John W. Bushfield, A. Dubois Staats, Geo. Elmendorf, Geo. A. Guernsey, Wm. L. Graham, John P. Sears, Chas. L. Woodward.

Washington County.—Reappointments—Sam'l M. Burke, Lewis Potter, Wm. M. Keith, James Thompson, Silas P. Pike, Thos. McClaughry, David V. T. Qua, Marinus Fairchild, Edward H. Gibson, Peter Holbrook, Wm. A. Russell, Jr., E. H. Orcutt, Wm P. Robertson.

Erie County.—Re-appointments—Aaron Rogers, Hiram H. Smith, Wm. H. Slade, James Seveney, James Sheldon, Francis Schmale, Henry S. Sprague, Wm. L. G. Smith, Amos B. Tanner, Edmund B. Vedder, Tobias Wilmer, Thomas B. Wright, S. H. Wortman, Daniel E Waite, E. R. Bacon, Samuel D. Johnson, S. B. Thompson, John M. Laughlin, James M. Gallagher.

New appointments—J. H. Giltere, Wm. W. Hammond, Edward C. Hawks, George F. Haywood, Charles Huetter, Darius A. Hoovey, Chauncey J. Hastings, Henry D. Keller, Henry Koons, Chas. W. Kreatzer, Benjamin H. Long, John R. Lee, John G. Langner, S. R. Myers, Price A. Matteson, Philip Miller, Alex. Martin, Bernard H. Muehler, Louis D. Voltz, Geo. Newbrook, James W. Otts, Nicholas Ottenot, John H. Parsons, M. Pinner, John J. P. Read, John L. Romer, Leo M. Ritt, Gregory Ritt, S. Cary Adams, W. D. Allen, Wm. R. Allen, Henry Atwood, Otis Besser, Jas. C. Beecher, George Burt, Direk V. Benedict, William S. Bull, George Bigelow, Henry W. Burt, Chas. H. Bailey, Conrad Baer, Curtis H. Bates, Bela H. Colegrove, John A. Case, Asa Covell, Fred'k L. Danforth, David P. Dobbins, Ebenezer P. Dow, Joseph B Dick, Jno. G. Dayton, Aaron W. Eggert, Joseph E. Ewell, James H. Fisher.

Rensselaer County.—Re-appointments—William Hagen, Martin L. Townsend, Alvah Traver, John R. Kellogg, Francis Tim, Richardson H. Thurman, Silas K. Stow, Albert E. Wooster, Edward Babcock, John F. Calder, Rufus M. Townsend, Cole H. Denio, Henry C. Lockwood, Jared E. Bacon, Henry D. C. Osborn, Calvin E. Keach, Jonathan Denison, H. Drum, Alex. Walsh, Hastings Kellogg, Nelson Webster, Sidney S. Congdon, Wm. R. Scriven, Eber W. Carmichael, Randall A. Brown.

New appointments—Daniel W. Ford, Chas. D. Kellum, Michael S. Manning, Chas. H. Roberts, John H. O'Brien, John Hudson Peck, George H. Sagendorf, J. Edgar Hoag, George Barber, James Dongrey, Albert C. Comstock, Wm. Hand, Sylvester Waterbury, James A. Kennedy, Leonard R. Saunders, Jared A. Wells, Charles R. Lindsey.

Warren County.—Re-appointment—Henry Philo.

New appointments—John L. Weatherhead, H. Wood.

Notaries Public confirmed March 21, 1870:

New York County.—Charles Albert, Enoch Armitage, Joseph Bell, Gottlieb Bollett, Charles J. Breck, Samuel P. Bell, Edward C. Cook, Charles Dowd, George Elliot, Jr., Frederick Frech, William F. Flannelly, Frederick Hess, Clarence M. Hyde, Isaac H. Hall, Charles E. Hyatt, John Hageman, Jr., Geo. E. Jenkins, Edward H. Kent, John H. Kaiser, Jr., Peter Lux, Joseph A. Nessler, William H. Post, Henry Parsons, George N. Pratt, William C. Reddy, Michael J. Russell, James A. Ruthven, A. Lathen Smith, Frank C. Bowman, Thomas G. Baker, Allan Cooper, James L. Crittenden, William L. Gardiner, Isaac N. Gilbert, Cornelius Van Voorhies, Dudley R. P. Wilcox, James W. Carins, Albert G. Thorp, Jr.

Madison County.—Wallace E. Burdick, De Witt C. Fox, Gilbert Birdsall, William W. Campbell, Edwin C. Green, Thomas Barlow, Daniel Gates, William E. Fiske, B. Franklin Chapman, David H. Rasbach, Theodore F. Hand, Everett S. Card, D. Belford West, Charles Stebbins, Jr., Lorenzo D. Dana, Dennis Hardin, Thomas Crandall, Clarence Carskadden, Samuel L. Conde, Edwin J. Brown, Morgan L. Brown, Ezekiel P. More, Thomas T. Loomis, Henry K. W. Bruce, Thomas F. Petrie.

Albany County.—Mayer H. Cohen.

Dutchess County.—A. M. Card, Charles Gregory, Egbert Vincent, Andrew Cole, William R. Smith.

Orleans County.—George H. Porter.

Herkimer County.—Clinton A. Moon.

Cayuga County.—William Slade, Jr.

Lewis County.—S. Albert Johnson.

Orange County.—Samuel E. Derrick, Chas. B. Halstead, Lewis F. Corwin.

Wyoming County.—L. Lockwood Thayer, Gideon H. Jenkins, Byron Payne, Henry S. Joy, William F. S. Agett, Lyman S. Coleman, R. H. Steadman, John P. Robinson.

Onondaga County.—James Rogers.

St. Lawrence County.—Joseph Y. Chapin, Allen Babcock, Josiah F. Sanders, C. A. Parker, G. L. Robinson, Almison S. Squires.

Saratoga County.—George F. Watson.

Suffolk County.—Seth R. Clock, Timothy S. Carl, William E. Jones, James H. Stanbrough, Albertson Case, Jerry M. Edwards, Daniel B. Van Scoy, James R. Ferguson, Geo. W. Whittaker.

DAVID DUDLEY FIELD BEFORE THE JUDICIARY COMMITTEE.

Mr. David Dudley Field, of New York, appeared a few days since before the Judiciary Committee to urge some changes in existing laws. Coming from such a source, his suggestions are entitled to careful consideration. His remarks were in substance as follows:

"When the Legislature is asked to act in respect to an alleged evil, the first thing is to learn what the evil is, and then to seek the remedy. The reproach which has been cast upon our courts is some of it deserved, but much of it undeserved. The judiciary of this State is in the main learned, faithful, and upright. The evils which do exist can, for the most part, be remedied by the Legislature and by the united action of a majority of the judges, though some are inseparable from the judicial system established by the Constitution. In respect to the administration of civil justice, the evils complained of are delays, conflicts of authority, abuse of injunctions and receiverships, and judicial patronage in the appointment of referee. The delays are without excuse, except in the Court of Appeals. That court can never do all the work now put upon it. The bar and the community must make up their minds to restrict appeals to certain classes of cases, or the new court will be overwhelmed, as the last has been. But in the Supreme Court there is no reason whatever for delay. There are judges enough for all the work if they would act in concert, those of one district assisting those of another.

CONFLICTS OF JURISDICTION.

"The conflicts of jurisdiction are easy to be avoided by the judges themselves. The only legislation to this end which appears desirable is a return to that provision of the Code as it was originally passed, which declared 'the designation of judges to hold the courts shall be such as that not more than one-half nor less than one-fourth of the courts to which each shall be assigned, shall be held out of the district within which he was elected.' This provision was allowed to stand but a short time, and the judges now confine themselves chiefly to the districts in which they are elected, though they are judges for the whole State, and the design of the Constitution and the law is that they should circulate through it. Let the judges elected in the First district go to other parts of the State for at least one-fourth of their time, and let the judges from the other districts come to us. In this way the disintegration of the court, which has been going on ever since it was established, will be stopped, and the evil of local influences and associations will be proportionately avoided. The judges themselves have failed to meet in conventions for several years—I think twelve, though the Code requires them to meet every two years for the revision of the rules. But if the Legislature will restore the provisions of the Code which I have mentioned, and the judges will meet next August to revise the rules, they can effectually prevent conflicts of jurisdiction hereafter.

ABUSE OF INJUNCTIONS.

"The abuse of injunctions consists in their being carelessly granted *ex parte*. The complaint is not of late date, but is almost coeval with courts of equity. The scope of the power was restricted by the Code, but the number of those who could exercise equity jurisdiction being increased by the Constitution, the use of the process was increased, and with it the risk of carelessness in the using. Observe by what gradations the abuse has come to its present state. The first great step was in the Broadway railway case, where an injunction against an act by a common council to expire with 1852, was granted *ex parte* on the 27th of December, with an order to show cause on the second Monday of January, 1853, why it should not be made perpetual. This injunction was applauded by the whole community, and the members of the common council were fined or imprisoned for passing an ordinance in violation of it, though one of the judges of the Court of Appeals began a subsequent opinion upon another branch of the litigation, with this sentence: 'Not among the least striking and anomalous characteristics of this case is the earnestness and tenacity with which judicial power in every stage of it has been asserted and maintained.' The next step was in the street commissioners' controversy of 1857, where conflicting injunctions were issued by the Supreme Court and Common Pleas. Then came the Metropolitan Police controversy, which was begun by an *ex parte* injunction restraining the execution of an act of the Legislature. This led to a message from Gov. King to the Legislature, recommending that injunctions should only be granted upon notice. I drew and urged upon the Judiciary Committee some provisions, with a view to remedy the abuse, but I met with no success. The railway litigations of the last three years have brought out *ex parte* injunctions, if not more objectionable in themselves, yet more palpable in their objectionable features. Three remedies have occurred to me—one to restrict the power of granting *ex parte* injunctions to one judge in each district, to be selected by his brethren; another is to provide that each *ex parte* injunction shall contain a provision that the party enjoined may apply on two days' notice to vacate it, and forthwith upon such application the injunction must be continued, modified, or discharged.

This would, in effect, confine the continuance of an *ex parte* injunction to two days. For two years past I have urged this provision upon the Judiciary Committee of the Legislature, but without success. Once it passed one House, and was defeated in the other. The third remedy is never to allow injunctions *ex parte*, but require notice longer or shorter to be given in every case. This, upon the whole, I think the best remedy of all. A similar provision has always obtained in the Federal courts. The judges should favor it because it would relieve them from a great deal of disagreeable responsibility. They are now liable to be importuned by suitors upon exaggerated statements; they would then have an opportunity to hear both sides before acting. No doubt there are some cases where a right may be placed in jeopardy while the notice is running, but this evil in these few instances is small compared with the great evil of so many indefensible *ex parte* injunctions. And to lessen even the former, I would also provide that when an injunction is granted upon notice, the court shall have power also to order any thing done after the notice and before the motion to be undone and matters placed *in statu quo*. This would answer most of the purposes of a restraining order, while it avoided the evil of judicial order affecting one's rights before hearing him.

RECEIVERS AND REFEREES.

"As to the appointment of receivers, I do not believe that there ever was any authority to do it *ex parte*. I am sure such authority is liable to infinite abuse, and I would make sure against it by prohibiting it altogether. Judicial patronage in the appointment of referees is a source of much trouble. It was so in 1848, and one section of the Code was especially directed against it. That provided that when the parties agreed upon a referee, he should be appointed, and if they did not agree, one should be named by each party and the two should choose a third, or, failing to choose, a third should be drawn from the jury box. The note of the Commisioners to this section stated that—

"'The power given to the court of appointing referees has already, in the city of New York, given rise to great embarrassment. Judicial patronage by this means has become greater than has ever before been known among us, and should not be allowed to continue. We have devised the best means we could of putting an end to it absolutely. If the effect should be to induce parties to agree generally upon the referee, as we hope will be the case, we shall esteem it an opportune provision.'

"The section, however, stood but a short time, and gave way to the present mode of appointment. I would now recur to that, and would not only allow the parties to choose their own referee, but would provide for a mode of selection independent of the court, whenever the parties could not agree. Thus I venture to suggest, as the only legislation required to remedy the evils I have mentioned, the following provisions, viz.:

"1. Requiring the judges to sit one-fourth of the time at court out of their district.

"2. Requiring notice before issuing an injunction or appointing a receiver.

"3. Selecting referees solely by the intervention of the parties themselves. And I would also urge upon the judges to meet in August, and provide for a more general interchange throughout the State, and prevent conflicts of jurisdiction. The book of forms, prepared under the authority of the Legislature, and adapted to the Code, has never been adopted. It would be a convenience to lawyers and a saving to courts, and I beg leave to call your attention to the propriety of sanctioning it by a legislative act; not by way of imposing them upon those who do not wish to use them, but by declaring that, when used, they should be deemed sufficient.

"A bill has been drawn in accordance with these suggestions, which I will take the liberty of handing to you. Beside the provisions that have been mentioned it contains two or three others which appear desirable. One of them more clearly defines the duties of the sheriff in executing an order of arrest, so that he shall be obliged to take bail at any hour of the day or night. It has been the practice in New York to receive bail only at the sheriff's office, and as that is closed at night, a person afterward arrested is obliged to remain in custody till the next morning. This should be prevented; and if a defendant is arrested after nightfall he should be entitled to bail even at that time. Then, as to allowances in addition to costs, I submit that they should be reduced more nearly to the limit in which the Code first placed them, that is to actions for money demand or for specific lands or chattels. I would not have them extended generally to actions for specific relief—a section having that object is among the rest. Those are all the suggestions which I wish now to make in respect to the administration of justice in civil cases.

CODE OF CRIMINAL PRACTICE.

"In respect to criminal practice, I would earnestly urge upon the Legislature the adoption of the Code of Criminal Procedure, prepared by the Commissioners of Practice and Pleadings, and submitted to the Legislature in 1850. This Code has been sanctioned by a committee of the Assembly of 1855, who requested the opinions of judges and district attorneys, and received favorable answers. It has received a still higher sanction, that of the Legislatures of ten at least of the States and Territories of this Union, and of their people who have had it in use for several years. It is of course not possible for me here to enumerate all the benefits which I anticipate from its adoption, but I will mention some of them. It will place within the reach of every citizen a little book containing the whole law relating to criminal proceedings. It will furnish inferior magistrates with a guide for their conduct in office. It will do away with the cumbrous jargon of our present indictments, and substitute a simpler and plainer statement of the crime charged. It will render the prosecution of crime more effectual, by the most stringent provisions in respect to bail, and by requiring the preliminary examination after arrest to be gone through at a single sitting, unless the magistrate, for good cause shown by affidavit, adjourns it, the adjournment to be for not more than two days at one time, and not more than six days in all, unless by consent of the defendant. And it will throw additional safeguards about innocence, three or four of which only can I here mention. One of them is the giving to a defendant, in all cases, an opportunity to be heard before an indictment is found against him. The grand jury is now not infrequently made the instrument of private malice. It is here provided that, if the defendant has not previously had an examination before a committing magistrate, the grand jury shall be permitted to originate only a presentment, upon which a warrant for arrest and examination shall be had previous to an indictment. It is mentioned in one of the notes that an indictment had been found 'upon a one-sided and extra judicial affidavit taken in another State,' and that in another a witness was conducted into the grand jury room with a long written narrative prepared by another, and was sworn by the grand jury generally as to the truth of the statement.

"It is also provided that, when the grand jury have once dismissed a case, it cannot be renewed before another grand jury without the order of the court. Another is to require the magistrate before whom a person arrested is brought for examination to wait a reasonable time for counsel, and to send a messenger for any one in the same city or town whom the defendant may designate. Another is to allow a defendant his liberty in a bailable case, while under examination, upon the deposit of a sum of money fixed by the magistrate. The other provision is giving the defendant at the trial the last word to the jury. These examples will be sufficient, I trust, to induce you to examine this Code, and upon examination I trust you will see enough to induce you to give it your sanction.

CIVIL AND PENAL CODES.

"While I am upon the subject of codification, you will pardon me if I go a step further and urge upon you the adoption of the Civil and Penal Codes proposed and reported by the Commissioners of the Code in 1865. You know that the Codes of Civil and Criminal Procedure make but a part of our legal system, and that three other Codes—the Political, Civil, and Penal—were designed to form with them a complete body of law. These were all required by the Constitution under which we are living. How much labor has been spent upon them, I need not tell you. Everything was done which the Commissioners could do to render them perfect. First, a draft was prepared and distributed among the judges and others for criticism and suggestion. After that, a thorough revision was had; the whole work was gone over again, and everything which had been suggested, or which the Commissioners could think of, was considered. The Penal Code defines all the crimes for which a person can be punished, and prescribes the punishment, making, it is supposed, a more just gradation of crime and punishment than now exists. The Civil Code embraces the whole subject of civil rights and relations. No pains were spared in its preparation. Every section was written and re-written—some more than a dozen times.

FINAL SUGGESTIONS.

"What I venture to ask of this Legislature is to pass the few amendments to civil procedure which are contained in the bill I have presented, to sanction the book of forms and to pass the Code of Criminal Procedure; and if it will not, as I wish it would, pass at once the Civil and Penal Codes, refer them to a joint select committee, with directions to report to the next Legislature.

"One word more. Bills are pending to carry into effect the new judiciary article of the Constitution, and all of them contemplate the union of the First District with another in the formation of a General Term. The business of the First district is sufficient to occupy any one General Term the whole time, and if the business of another district is thrown upon it, I do not believe appeals can be heard as fast as they arise. Will the Legislature compare the judicial business of different parts of the State before deciding upon so important a measure?"

Judge Poland, and other lawyers in the House of Representatives, are preparing a bill giving the U. S. Commissioners and Registers in bankruptcy power to receive initiatory proceedings in admiralty cases. This is intended to facilitate admiralty proceedings, as the Supreme Court has decided that only U. S. courts can decide such cases.

BILL OF COSTS OF AN ENGLISH SOLICITOR.

A party in St. Louis, having fallen heir to a legacy of fifty pounds by the death of a relative in England, employed a solicitor of London to collect and transmit it. The business was done with promptness, and the solicitor sent the following bill of charges for his services:

Mrs. Baker to John Henry Pinkerton, *Solicitor*, Dr.

COSTS BETWEEN SOLICITOR AND CLIENT.

1868.	
June—*In re* Henry S. Baker and Mitchell Gardiner, deceased; instructions to apply for payment (for Mrs. Baker) of £50, balance of legacy left her deceased husband by Mitchell Gardiner	6s 8d
Letter to my correspondent in Hungerford, to ascertain particulars of property of the late Mrs. Gardiner, and entry	3s 6d
July 3—Letter to Mrs. Parks, for payment of legacy and entry	3s 6d
Letter to Mrs. Baker's solicitors in St. Louis, U. S. A., in reply to theirs, and postage	4s 6d
Attending and searching for will of Gardiner in Probate Court	6s 8d
Paid for search docket	1s
Attending to bespeak attested copy of will	6s 8d
Paid for same	£1 8s 4d
Copy of will for office use, 48 folios, at 3d	12s
1869.	
March 18—Attending on solicitor for Mrs. Parks, when he required me to produce authentication of probate of Mrs. Baker	6s 8d
April 14—Perusing letter from Mrs. Baker's solicitors, with probate	2s 6d
April 16—Letter to Mrs. Parks' solicitor that I had received authentication of probate, and requesting him to have the matter arranged, and entry	3s 6d
April 24—Letter to Mrs. Parks in reply to hers, and entry	3s 6d
April 28—Attending this day on Mrs. Parks and her solicitor to arrange what amount of interest I could claim on legacy, when, after consultation as to when the legacy was payable, and when funds were realized, I agreed to accept £60 in full	13s 4d
May 23—Letter to Mr. Boggs, Mrs. Parks' solicitor, that I should have matters settled forthwith or that I would take proceedings, and entry	3s 6d
June 1—Attending Mr. Boggs when he requested me to send him copies of administration and authentication, and he would let me know whether he would advise his client to pay	6s 8d
June 2—Copy of administration sent to Mr. Boggs, eighteen folios	4s 6d
Letter therewith, and entry	3s 6d
June 4—Perusing letter from Mr. Boggs that he could not advise his client to pay without some power of attorney from Mrs. Baker	2s 6d
June 5—Letter to Messrs. Smith and Jones, Mrs. Baker's solicitor, in St. Louis, U. S. A., and entry and postage	4s 6d
Oct. 3—Perusing letter from Messrs Smith and Jones, inclosing power of attorney	2s 6d
Oct. 5—Letter to Mrs. Parks' solicitor that I had received power of attorney, and requiring him to pay me amount agreed on	3s 6d
Oct. 8—Perusing letter from Mr. Boggs in reply, requiring me to furnish copy of power of attorney	2s 6d
Oct. 10—Copy power of attorney and authentication, twenty-six folios	6s 6d
Letter therewith, and entry	3s 6d
Oct. 24—Attending Mrs. Parks' solicitor, producing original power of attorney for his inspection, and settling form of receipt for amount	6s 8d
Nov. 22—Attending on Mrs. Parks when she paid me £60, and giving receipt	6s 8d
Dec. 3—Attendance at bank to get letter of credit for £51 9s 6d	6s 8d
Dec. 4—Letter to Messrs. Smith and Jones, solicitors, St. Louis, U. S. A., therewith, and entry and postage	4s 6d
	£8 10s 6d

Judge Carpenter, of Charleston, decided that a note drawn payable "six months after the declaration of peace between the United States of America and the Confederate States of America" could not be collected, as no peace has been declared between those Governments. Exceptions were taken on the ground that the close of hostilities was a virtual declaration of peace.

THE HIGH COURT AT TOURS.

The French Constitution of January 14, 1852, established a High Court of Justice, which adjudicates in cases of attempts against the life of the Emperor, or a conspiracy against him or the security of the State. Its jurisdiction also includes the trial of members of the imperial family charged with grave offenses. This Court is only convoked by imperial decree. It consists of a Chamber of Accusation and a Judgment Chamber, formed of Judges taken from the Court of Cassation, with a High Jury composed of members from the Councils Generals of the Departments. Each Chamber is composed of five Judges and five Assistant Judges They are named annually by the Emperor. The President, Procureur-General, and other magistrates required for the organization of the Court, are named by the imperial decree which summons it.

This body consists of thirty-six jurymen and four assistant Judges. When the decree of convocation is issued the first President of the Court of Appeal in such department is required within ten days to draw by lot, in open court, the name of one person from the list of the members of the Council General, to serve as jurymen under a heavy penalty. The thirty-six who are to form the jury are taken from the jurymen when the court convenes. Various officials are ineligible to act on the High Jury. The Council General from which the High Jury is thus selected is, it may be added, a body in each department, which legislates upon the concerns of the department in regard to internal improvements and the collection of taxes. It consists of as many members in each department as there are cantons, but the number is in no case to exceed thirty.

An electoral assembly in each canton, consisting of electors and citizens found on the jury list, elects a member to the Council General. Members thereof must be aged over twenty-five years, and pay two hundred francs annually in direct taxes. Some officials representing the Imperial Government are not eligible as members. Councilors-General are elected for nine years, but it is so arranged that one-third retire every three years. It is apparent from these details that the High Jury is constituted in a very distinguished manner.

When an Imperial decree notifies the High Court to exercise its functions the Chamber of Accusation, which is to a great extent equivalent to the Grand Jury in this country, enters upon its duties. If the charge is not sufficiently grave for the High Court it remits it to an ordinary tribunal. When it pronounces that the matter shall be heard before the Judgment Chamber the Emperor convokes the Chamber of Judgment, and names the place where the trial is to take place.

In the case of Prince Bonaparte, the Chamber of Accusation directed, by an order dated on the 18th day of February, that he is to be tried firstly for having committed homicide on the person of Victor Noir, which was preceded or followed by an attempt on the person of Ulrich Fonvielle; secondly, for having attempted the homicide of Fonvielle. This order places the Prince under article 301 of the penal code, the punishment being death. In case of extenuating circumstances the Court can lessen the sentence by two degrees.

Upon the announcement of this decision the Emperor convoked the High Court, which is now in session. In this decree, Counselor Glandaz is named Presiding Judge. He has had an experience of thirty-nine years at the legal profession, and belongs to a family eminent for the distinguished men it has contributed to the bar. The duties of Procureur-General are intrusted to M. Grandperret, Procureur-General of the Imperial Court of Paris, assisted by M. Bergognie, his deputy.

An important regulation of the High Court is that the declaration of the High Jury finding the accused guilty, or finding that extenuating circumstances exist, must be rendered by a majority of more than twenty votes. It will, therefore, be necessary that at least thirty-one members of the Jury agree to a verdict of guilty to render it of effect. It is evident that the chances of disagreement are very great.—*N. Y. Tribune.*

TERMS OF THE SUPREME COURT FOR APRIL.

1st Monday, General Term, New York, Ingraham, Cardozo and Barnard.
1st Monday, Special Term (Chambers), New York, Brady.
1st Monday, Circuit and Oyer and Terminer, Queens, Tappen.
1st Monday, Circuit and Oyer and Terminer, Kings, Barnard.
1st Monday, Circuit and Oyer and Terminer, Richmond, Gilbert.
1st Monday, Special Term (Motions), Kings, Pratt.
1st Monday, Circuit and Oyer and Terminer, Monroe, Dwight.
1st Monday, Circuit and Oyer and Terminer, Bath, J. C. Smith.
1st Monday, Circuit and Oyer and Terminer, Cayuga, Johnson.
1st Tuesday, General Term, Schenectady.
1st Tuesday, General Term, Syracuse.

A resident of St. Louis has been fined five dollars for calling a judge a liar.

LEGAL NEWS.

The bill incorporating the New York Bar Association has passed in the Senate of this State.

Every lawyer in Collinsville, Conn., has been blessed with an heir during the past two months.

Hon. Frederick Krapp, one of the leading members of the New York bar, is going back to Germany to live.

A San Francisco judge find a man ten dollars for assault and battery, and lent him the money to pay it.

Wm. M. Evarts has been retained by the English Erie stockholders as leading counsel in the suit against Fisk and Gould.

A judge at Muncie, Iowa, recently fined a female resident of that place twenty dollars for thrashing her two grown-up daughters.

Judge Ingraham, of New York, has decided that there can be no appeal from a decision of the Court of Special Sessions as newly organized.

George R. I. Bowden, a prominent New York lawyer, died in London a few days ago of congestion of the brain, in the sixty-third year of his age.

A Chicago court was enlivened the other day by a little "mill" between an attorney and a constable to decide whether or not the former told the truth in calling the latter a thief.

An Indiana lawyer recently charged a client $10 for collecting $9, but said he would not press him to pay the other dollar for a few days, if it would be more convenient for him to let it stand.

The President has signed the joint resolution appropriating one year's salary of an Associate Justice of the Supreme Court for the benefit of the widow and children of the late Edwin M. Stanton.

The Massachusetts House of Representatives have, by a two-thirds vote, passed to be engrossed a bill to allow husbands and wives to be witnesses for or against each other, both in civil and criminal suits.

The Chancellor of New Jersey has decided that the principal and interest due on a mortgage made prior to the passage of the legal tender act in 1862 was payable in gold and silver, at the option of the mortgagee.

The Pennsylvania legislature has passed a bill authorizing the jury in capital cases to determine by their verdict whether the prisoner shall be punished by death or by imprisonment for a period not less than fifteen years.

A father and son, named O'Donnell, have been committed for trial at New York, the former charged with attempted rape on his son's wife, and the son with beating her and driving her from home, on the facts being made known to him.

J. M. Gazzam, Esq., of Pittsburgh, Pa., was recently admitted to the United States Supreme Court on motion of Hon. B. F. Butler. The Washington *Chronicle* states that Mr. Gazzam is the youngest attorney ever admitted to that court.

The Massachusetts House judiciary committee have reported a bill to make the annual salary of the Chief Justice of the Supreme Court and the Associate Justices $6,000: Chief Justice of the Superior Court $5,500, and of Associate Justices $5,200 each.

One of the ladies on the late jury at Wyoming writes to a friend that she feels "no serious discomfort from being shut up four days and nights, and would have held out four months rather than be convinced by such an argument as that made by the counsel for the defense."

Judge Paxson, of Cincinnati, declares that the law enabling a party in the suit to testify in his own case has produced a frightful increase of perjury, and that it is not an uncommon occurrence for persons to come into the criminal courts completely encased in an armor of perjury.

A New Orleans paper laments the decline of the bar in that city, saying that while it has increased to more than four hundred members, candor compels the admission that not one-fourth of them are lawyers in the true sense of the term, but merely attorneys for collecting claims.

Brigham Young is desirous of obtaining the decision of the Supreme Court on the constitutionality of polygamy as a part of the Mormon religion, and under the protection of the constitution, which guarantees religious freedom; and professes himself willing to abide by such decision.

During a recent session of the Supreme Court (special term), in New York, a thief stole Judge Barnard's hat off the bench, and succeeded in making his escape, without being observed either by the judge, the lawyers or spectators. Judge Barnard once lost an overcoat in the same manner.

John C. Breckenridge, in an argument in a criminal case, at Lexington, Ky., denounced the men who belong to the "Ku-Klux" as either idiots or villains, and asserted that he was free from any fear of them, and would readily respond to a summons from the sheriff as one of a *posse commitatus* to arrest and bring these men to justice.

Some months ago an indictment was found against General Burbridge in the District Court for Missouri, since which time Attorney-General Hoar has addressed a letter to the United States attorney at St. Louis, authorizing him to enter a *nolle pros.* in the case, and adding: "The Secretary of the Treasury has transmitted to me his approval in writing of the discontinuance of the prosecution."

In one of Mr. Lincoln's first cases he appeared to defend a man accused of murder. Circumstantial evidence told strongly against the prisoner, but, having suddenly and unexpectedly received succor, Mr. Lincoln arose and said that, as the case stood, he could not look for any thing but a verdict against his client, but he asked permission to put a new and very material witness upon the stand. He then called his witness, who proved to be the "murdered" man.

Associate Justice Strong has been assigned to the Third Judicial District, embracing the States of Pennsylvania, New Jersey and Delaware. Associate Justice Bradley has been assigned to the Fifth Judicial District, comprising the States of Georgia, Florida, Alabama, Mississippi, Louisiana and Texas. This district has been, for some time past, attached to the Sixth District, to which Judge Swayne has recently been assigned.

At a recent session of the Saco (Maine) Supreme Court, a leading lawyer wished to demonstrate that deeds, not words, show the animus of an action, and accordingly cited to the jury the case of the prodigal son, "whose father divided his property among his two sons, and then said: 'Go work to-day in my vineyard;' and one of them said, 'I go,' but didn't; the other refused, and afterward went." The broad grin on the face of the court and jury convinced the advocate that quoting Scripture was not his forte.

The county court of Craig, Va., was broken up recently in an unusal manner. When the court met in the morning, the presiding magistrate of the court announced that one of the members of the court had consented to teach a negro school, and for one he would not sit on the bench with such a man. Two others followed his example, and the court was broken up. At the suggestion of some of the bar, the presiding magistrate procured four other magistrates, and opened the court anew, and considerable business was transacted.

At an Indiana divorce case recently, the principals were made to relate the course of their married life, and while recounting how happily they used to live, they began to weep at the recollection. The judge followed suit, the audience joined in, and the court room fluttered with handkerchiefs. When, at length, the emotion was somewhat under control, the still sobbing judge suggested to the husband and wife the propriety of trying married life once more. With a few more tears, they put up their handkerchiefs, left court, and went home together.

A farmer in Kansas, who sold a keg of butter to a storekeeper representing the same to be "a prime article," was lately sued by the latter, who declared that the farmer's statement regarding the quality of the butter was incorrect. On the occasion of the trial, the jury took the butter (which was in court) with

them when they went out to deliberate. Some crackers were procured, and, the keg being open, they all "pitched in," and after amply satisfying the wants of the inner man, they returned to the court room, and rendered a verdict of "no cause of action."

It is said that the Lord Chancellor of England contemplates establishing a sort of legal university, which will grant degrees to law students much in the same manner as the universities at Oxford and Cambridge confer distinctions for proficiency in classical and other acquirements. Lord Hatherly, it is also reported, proposes to create a new court of appeals, which shall take cognizance of all cases, whether in law or in equity, and the members of which shall consist of a president and four judges, two of the latter to be taken from the Court of Chancery and two from the Courts of Common Law. This new court, it is believed, will be the first step toward the suppression of the appellate jurisdiction of the House of Lords.

The suit of Mrs. Ruth P. Glenn, a fortune-teller of St. Joseph, Mo., on account of some injury received in an accident on the Hannibal and St. Joseph railroad, was determined recently. She claimed $3,000 as damages. There seemed to be a question involved in her alleged capacity as a fortune teller. On the one hand, if she could foresee the accident, she should scarcely claim negligence on the part of the company where her own was so evident; on the other hand she might have also foreseen that the damages she could recover would fully equal those she could sustain. The defendants alleged that they could show that she had agreed to compromise for $200; but her counsel threatened, if that evidence were offered, to prove her insanity at the time of making the agreement. The court gave her the option of an award of $500, or to bring the whole matter before a jury. Rather than have the case and the patience of 12 men thoroughly tried, she accepted the small fortune of $500 in full for her misfortune, and thereby conclusively proved that there was not a bit of insanity about her.

NEW YORK STATUTES AT LARGE.*

CHAP. 86.

AN ACT to provide for an election of Chief Judge and Associate Judges of the Court of Appeals, and Judges of the Court of Common Pleas of the city and county of New York.

PASSED March 22, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. A Chief Judge and six Associate Judges of the Court of Appeals shall be chosen by the electors of the State, on the third Tuesday of May next, pursuant to the Judiciary or sixth article of the Constitution. The names of all persons voted for at such election by any elector shall be upon one ballot, which shall designate the person voted for as Chief Judge and the persons voted for as Associate Judges, and no elector shall vote for more than the Chief Judge and four of the Associate Judges. Such ballot shall be indorsed "Judiciary," and the inspectors of election shall provide a box, labeled "Judiciary," in which the ballots shall be deposited. The person receiving the highest number of votes as Chief Judge and the six persons receiving the highest number of votes for Associate Judges shall be deemed chosen at such election.

§ 2. At the same election there shall be chosen by the electors of the city and county of New York three additional judges of the court of common pleas of said city and county, as required by the said sixth article of the Constitution. The names of the persons voted for shall be upon one ballot, which shall be separate from the ballot mentioned in the preceding section, and shall be indorsed "Judiciary, Common Pleas." The inspectors shall keep a box, labeled "Judiciary, Common Pleas," in which the ballots shall be deposited. The three persons receiving the highest number of votes shall be deemed chosen at such election.

§ 3. Notice of such election shall be given and published for not less than four weeks preceding the same. As to the Chief Judge and Associate Judges of the Court of Appeals, the notice shall be given as now required by law in reference to general elections, and as to judges of the said court of common pleas in New York, it shall be given as now required in reference to local elections in that city. No omission of notice shall invalidate any election provided for in this act.

§ 4. At such election the registry of votes, if any such registry of votes be required by the then existing law, prepared and used at the last preceding general or charter election, as the case may be, shall be used, but the inspectors of election shall meet in their several election districts, on the Friday and Saturday preceding the election, to revise, correct and complete, and shall revise, correct and complete, the said registry, in the manner now required by law in reference to general and charter elections, if such registry shall then be required by law.

§ 5. The board of State canvassers shall meet on the second Tuesday of June next, to canvass the votes for Chief Judge and Associate Judges of the Court of Appeals, and shall thereupon proceed according to existing laws; and except as in this act otherwise provided, all laws in force at the time in respect to the holding of elections, the qualifications of voters, the punishment for illegal voting, the canvassing and return of the votes, and all laws prescribing the duties of inspectors, officers and boards in reference to elections, shall apply to the elections authorized by this act, so far as the same shall be applicable thereto. Any vacancy in the office of inspector of election, in any election district in the State, shall be filled in the manner provided by law, on or before the day of such election.

§ 6. The additional judges of the Court of Common Pleas of the city and county of New York, to be elected pursuant to this act, shall enter upon their official duties on the first Monday of July next, and shall take the oath of office on or before that day.

§ 7. The Chief Judge and Associate Judges of the Court of Appeals shall meet at the capitol, in the city of Albany, on the first Monday of July next. They shall then, or before that time, take the oath of office, and shall thereupon enter upon their official duties.

§ 8. Every person elected Chief Judge or Associate Judge of the Court of Appeals, whether at the first or any subsequent election, and every person hereafter elected Justice of the Supreme Court, Judge of the Superior Court of the city and county of New York, or of the Court of Common Pleas of said city and county, or of the Superior Court of the city of Buffalo, or the city court of Brooklyn, or of any county court, shall, within ten days after he enters on the duties of his office, make and sign a certificate in which he shall state his age and the time when his official term will expire, whether by effluxion of a full term or by reason of the disability of age prescribed in the Constitution. The certificate shall be filed in the office of the Secretary of State; and the Secretary of State shall keep in his office a record in which shall be stated the name of every person elected or appointed to any office in this section specified, and the time of the commencement and termination of his official term.

§ 9. When the official term of any justice or judge of the courts mentioned in the last preceding section, except county judges, will expire at the close of any year, by the effluxion of time or the disability of age, the successor of such justice or judge shall be chosen at the preceding general election. Vacancies otherwise occurring in the said offices shall be filled in the manner prescribed in the ninth section of said sixth article of the Constitution

§ 10. This act shall take effect immediately.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the Secretary of State which is attached to the copy from which we print. — ED. L. J.

The Albany Law Journal.

ALBANY, APRIL 9, 1870.

REPORTS OF THE COURT OF APPEALS.

The recent reports of cases in this court, except that of Mr. Hand, are an outrage upon the court, the profession, and the world. For instance:

In *Gilbert* v. *Gilbert* (1 Keyes, 159; 34 Howard's Prac. 142) the opinion of Mr. Justice INGRAHAM was a dissenting opinion. The order of the General Term granting a new trial was in fact reversed, and the judgment on the report of the referee affirmed. (26 Howard's Prac. Rep. 603.) Substantially a contrary rule to that laid down by Mr. Justice INGRAHAM in his dissenting opinion had been established by the court in *Sernon* v. *Seaman* (29 New York Rep. 598), and see *Brown* v. *Jones* (46 Barbour, 100).

In *Mayor, etc.*, v. *Erben* (38 New York Rep. 305), the opinion of Judge HUNT, published, was a dissenting opinion. The judgment below (10 Bosworth, 189) was affirmed as to Erben as well as to the other defendant. (35 Howard's Prac. Rep. 647.)

In *Crounse* v. *Fitch* (6 Abb. Prac. Rep. N. S. 185) the opinion of Judge GROVER was a dissenting opinion. The judgment was reversed (35 Howard's Prac. Rep. 645) upon the ground that the court could not be certain the admission of the evidence referred to in the last head-note had not prejudiced the defendant.

In *Taylor* v. *Bradley* (39 New York Rep. 144-6) the writer was recently informed by one of the most eminent and careful of the judges who took part in the decision that the *court* did not decide that opinions of witnesses as to the value of a contract like that in controversy were admissible; that Judge GROVER wrote an opinion to the contrary *upon this point*, and the question was not passed upon, the judgment being reversed upon other grounds.

It is true the head-notes of the report of the case do not show the *court* decided that such opinions were admissible, but the opinion of Judge WOODRUFF so holds, and there is no note or memorandum by the reporter that the entire court did not concur in the proposition. This being so, according to the cases of *James* v. *Patten* (6 New York, 9), and *Oakley* v. *Aspinwall* (13 New York Rep. 500), where two or more points are discussed in the opinions delivered on the decision of a cause, and the determination of either point in the manner indicated in such opinions would authorize the judgment pronounced by the court, the judges concurring in the judgment must be regarded as concurring in such opinions upon all the points so discussed, unless some dissent is expressed or the circumstances necessarily lead to a different conclusion.

We are informed that, in consequence of this report, on a re-trial of the case at the Chenango Circuit, the Circuit Judge felt *compelled* to rule that, instead of the witnesses describing the farm and the cows, stating whether the season was favorable or unfavorable, wet or dry, and stating *facts* upon which the jury were to estimate the damages, the witnesses were by these opinions substantially made the jury, and the latter were left to determine simply the question as to which of the witnesses had guessed most correctly upon facts known, or supposed to be, by the witnesses, but not proven to the jury.

In *Flora* v. *Carbeau* (38 New York Rep. 111, 112), instead of a statement of facts, the first part of Judge WOODRUFF's opinion seems to be duplicated.

Several cases are twice reported in Keyes. To such an extent is this so, that even the editor feels called upon in the last volume to apologize for this carelessness.

These are errors which we have casually discovered without any systematic examination of the reports and other sources of information to determine whether or not there are others. It is highly probable there are.

The head-notes to these cases have already gone into the State Digests, and will soon appear in the United States Digest, upon which the bar of the Union depend. To say nothing of the disgrace thus brought upon the highest tribunal of our State, the consequences of such errors can neither be foreseen nor appreciated. Among them, however, may be mentioned erroneous advice by counsel to clients, involving them in serious troubles and losses, and perhaps ruin.

When the courts of a State or country have given a construction of its statutes, those of another will, ordinarily, consider the question settled by such decision (*Connecticut, etc.*, v. *Cleveland, etc.*, 26 Howard's Prac. Rep. 225), and the unwritten law of another State or country (if not, as by our Code, *prima facie* proven by the production of the reports themselves) may be proved by experts, who testify from the reports and their knowledge, that they are in current use in the State where they are published. (Story's Conflict of Laws, § 642.) Suppose the section of our statute relative to uses and trusts, involved in *Gilbert* v. *Gilbert*, *supra*, to be in controversy in the courts of Illinois, of England, or of France, and the report of that case in Keyes produced and proven; or that the courts of France should be called upon, in an action upon a transaction occurring here, to determine the points involved in *Mayor* v. *Erben*, as our courts were the French law relative to the marriage contract in *Barati* v. *Welsh* (24 New York Rep. 157), although that case strictly, perhaps, depended upon the Code Napoleon. Would not the party rightfully entitled to judgment, by the production of our reports, be wrongfully defeated? How are the profession, even of our own State, to know what has been *decided?*

The evil cannot be entirely remedied, but it may be alleviated by the publishers themselves reprinting the *first* leaves of the cases erroneously reported, drawing lines across the head-notes, adding a foot-note on the *first* page of the case, and furnishing the leaves to those who have purchased the volumes, and to the State Librarian, to be sent to exchanges for insertion instead of the leaves first published.

In the late imprints of 38th New York Reports, the publishers have added a correction at the *end* of the case. This is, practically, valueless; for, during the hurry of a circuit or argument, there is no time to read the case through to ascertain the error. Besides, the profession should not be compelled to spend the time necessary to read a long opinion only to find in the end that it is delusive and worthless.

Perhaps a better and more effectual remedy would be to destroy the value of the volumes thus published (4 of Keyes and 38th and 39th New York), to the publishers, by providing, by statute, for an authoritative republication of the cases by the Reporter, or some other competent person, who will, by examination of the records in the clerk's office, and otherwise, as far as he is able, at this late day, see to it, that the opinions published are in accordance with the judgments rendered. Reports thus published would soon supersede the trash thrust upon the profession by greedy publishers, and few would be found to condole with them on account of a retribution which would be likely to deter them and others from hereafter committing like offenses.

LAW AND LAWYERS IN LITERATURE.*

XIII.

"STULTIFERA NAVIS,

The Modern Ship of Fools," is the title of a little book published at London, in 1807, modeled upon the celebrated work of Sebastian Brandt, with the same title. It has a curious colored frontispiece, representing "Fools passing the Portico of Folly." Section six is addressed to "Foolish Counselors, Judges and Men of Law:"

"And can no quibble law itself excuse;
Must I condemn thee, spite of all thy ruse?
A wond'rous tale my chronicle now tells:
For in the place of judge's robe sedate,
The lawyer's garb, the wig on counsel's pate,
I view a zany's ladle, ears and bells.

Say, what's thy judgment? pr'y thee, silly ass,
Brittle thyself as any Venice glass;
Dar'st thou take life which Heav'n alone can give?
What are thy quirks, deceitful man of law?
What are thy pleadings, counsel, when a flaw
Condemns the guiltless, bids the guilty live?

Right is to thee a pleasing masquerade;
Thine object lucre, justice but a trade:
The fee will win thee, be it foul or fair.
Browbeat the evidence, turn black to white,
Hoodwink the jury by sophistic flight,
Hear innocence condemned; what need'st thou care?

Sable's thy robe; well fitted to impart
The sabler dye that stains thy callous heart,
Glutted with gold by fell extortion got.
Thy daring principle is *self* alone:
The cries of injur'd, and the prisoner's groan,
Ne'er urge thee to commiserate their lot.

L'Envoy of the Poet.

Mark o'er thine head now hangs the steady scale,
Pois'd in the hand supreme the balance see;
Knock at thy breast, and should stern justice fail,
Think on that justice which must wait on thee.

The Poet's Chorus to Fools.

Come, trim the boat, row on, each Rara Avis,
Crowds flock to man my Stultifera Navis."

Section 35 is "of fools who go to law for trifles," with the motto: "*Cum licet fugere, ne quære litem*":

"The fool who doth at trifles claw,
And to obtain 'em goes to law;
Yet having met with sad disaster,
Applies, to heal it, blister plaister.
The remedy ne'er fails to stick
Upon his head, so wondrous thick.
For, if with law you once begin,
'Twill strip the poor man to the skin;
And from the rich alike will steal
Enough to make the client feel.
Just like the sheep, that in a storm,
Sought 'neath the hedge a covert warm;
And there, from rain and wind defended,
He waited till the storm was ended;
Then bleated out a thousand thanks,
And bounded blithe to sunny banks;
But found, though shelter'd from the wind,
Part of his fleece was left behind.
Thus, bramble-like, we find that law,
When once a fool gets in its jaw,
Though from the theft it saves his coat,
'Twill steal the pound and leave the groat."

As no work on law can be considered complete without a

PRECEDENT FOR A BILL OF COSTS,

I offer the following, rendered by a tailor to his lawyer for a suit of clothes, and designed as a set-off against the lawyer's bill:

	£	s.	d.
Attending you in conference concerning your proposed suit, conferring thereon when you could not finally determine	0	6	8
Attending you again thereon, when found you prepared, and taking measures accordingly	0	6	8
Entering	0	3	4
Instructions and warrant to woolen draper	0	5	0
Copy thereof to keep	0	2	0
Instructions to foreman	0	6	8
Difficulty arising as to proceedings, attending him in consultation	0	6	8
Paid fees to woolen draper	4	18	6
Attending him thereon	0	6	8
Perusing his receipt	0	3	4
Attending to file same	0	3	4
Filing	0	1	0
Attending button-maker, instructing him	0	6	8
Paid his charges	2	19	0
Having received summons to proceed, perusing and considering same	0	6	8
Drawing consent and copy to keep	0	4	4
Postage	0	1	6
Copy order thereon and entering	0	3	0
Appointing consultation as to further proceedings, and attending same	0	13	4
Foreman having filed a demurrer, preparing argument against same	0	6	8
Attending long argument on demurrer, when same overruled	0	10	0
Perusing foreman's plea	0	6	8
Excepting to same	0	6	8
Entering exceptions	0	3	4
Perusing notice of motion to remove suit, and preparing valid objections to lay before you	0	10	0
Same being overruled, consent thereto on an undertaking	0	6	8
Expenses on removal of suit, paid by you at the time	0	0	0
Writing you my extreme dissatisfaction at finding the suit removed into the King's Bench, and that I should move the court, when you promised to obtain a Rule as soon as term commenced, and attend me thereon	0	10	0
Conferring with you, in presence of your attendant, at my house, on the first day of term, when you succeeded in satisfying me that you were a *Gent. one*, etc., and an honorable man, and expressed great dissatisfaction at the proceedings had with the suit while out of my hands; receiving your instructions to demand of your *uncle* that same should return to me, on my paying a *lien* he claimed thereon, and received from you his debenture for that purpose	0	13	4
Perusing same, and attending him in St. George's fields therewith and thereon	0	10	0
Paid him, principal and interest	2	10	4
In consideration of circumstances, no charge for receiving suit back	0	0	0
Perusing letter unexpectedly received from you, dated from your own house, respecting short notice of trial	0	6	8
Attending you thereon	0	6	8
Attending at Westminster several mornings to try the suit, when at last got same on	2	2	0
Paid fees	0	12	0
Fee to porter	0	5	0
It being determined that the suit should be put into a special case, drawing special instructions to box-maker for same	0	13	4
Attending him therewith and thereon	0	6	8
Paid him his fee for special case	2	2	0
Paid his clerk's fee	0	2	6
Considering case as settled	0	6	8
Attending foreman for his consent to same, when he promised to determine shortly	0	6	8
Attending him again thereon to obviate his objections, and obtained his consent with difficulty	0	6	8
Drawing bill of costs	0	15	0
Fair copy for Mr. —— to peruse and settle	0	7	6
Attending him therewith	0	6	8
Fee to him settling	0	5	0
Attending him for same	0	6	8
Perusing and considering the same as settled	0	6	8
Attending Mr. — again, suggesting amendments	0	6	8

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

Fees to him on amending	0	5	0
Perusing same as amended	0	6	8
Fair copy, with amendments, to keep	0	7	6
Entering	0	5	0
Fair copy for service	0	7	6
Thirty-eight various attendances to serve same	6	6	8
Service thereof	0	6	8
Drawing memorandum of service	0	5	0
Attending to enter same	0	3	4
Entering same	0	2	6
Attending you concerning same	0	6	8
Accepted service of order to attend at the theatre, and gave consent	0	6	8
Retaining fee at box office	0	1	0
Service of order on box keeper	0	6	8
Self and wife, with six children, two of her cousins, her brother and his son, two of my brothers, my sister-in-law, three nephews, four nieces, each attending for four hours and a half to see the "Road to Ruin" and the "Beggars' Opera," eighty-five hours and a half, at 3s. 4d. per hour—very moderate	17	0	10
Coach hire there and back	0	18	0
Attending you to acquaint you with particulars in general, and concerning settlement particularly	0	6	8
Instructions for receipt	0	3	4
Drawing receipt	0	5	0
Vacation fee	1	1	0
Refreshing fee	0	13	4
Perusing receipt and amending same	0	6	8
Fair copy to keep	0	2	6
Engrossing on stamp	0	2	6
Paid duty and paper	0	3	1
Fee on ending	2	2	0
Letters and messengers	0	10	0
	£63	0	9

To numerous, various, and a great variety of divers and very many letters, messages, and attendances to, from, on, and upon, you and your agents and others, pending a negotiation for settlement, far too numerous to be mentioned; and an infinite deal of trouble, too troublesome to trouble you with, or to be expressed, without more and further trouble, but which you must, or can, or shall, or may know or be informed of, what you please.....

£

The ruthless reformers of these evil days have done away with any necessity for the foregoing as a precedent, but it may serve to remind the profession of that paradise of compensation from which they have been ejected.

DONNE,

in rugged and forcible verse, thus scolds at lawyers in his Second Satire:

"The insolence
Of Coscus only breeds my just offense,
Whom time (which rots all, and makes botches pox,
And plodding on must make a calf an ox),
Hath made a lawyer; which (alas!) of late
But scarce a poet, jollier of this state
Than are new beneficial ministers, he throws
Like nets or lime-twigs, wheresoe'er he goes,
His title of barrister on every wench,
And woos in language of the pleas and bench.
'A motion, Lady.' 'Speak, Coscus.' 'I have been
In love e'er since *tricesimus* of the queen.
Continued claims I've made, injunctions got,
To stay my rival's suit, that he should not
Proceed; spare me, in Hilary term I went;
You said if I returned next 'size in Lent,
I should be in remitter of your grace;
In the interim my letters should take place
Of affidavits.' Words, words, which would tear
The tender labyrinth of a maid's soft ear
More, more than ten Slavonians' scoldings, more
Than when winds in our ruined abbeys roar.
When sick with poetry, and possest with muse
Thou wast run mad—I hoped; but men which choose
Law practice for mere gain, bold souls repute
Worse than imbrotheled strumpets prostitute.
Now, like an owl-like watchman, he must walk
His hand still at a bill; now he must talk
Idly, like prisoners, which whole months will swear
That only suretyship hath brought them there,
And to every suitor lie in everything,
Like a king's favorite, or like a king:
Like a wedge in a block, wring to the bar,
Bearing like asses, and more shameless far
Than carted whores, lie to the grave judge, for
Bastardy abounds not in kings' titles, nor
Simony and Sodomy in churchman's lives,
As these things do in him; by these he thrives.
Shortly, as the sea, he'll compass all the land,
From Scots to Wight, from Mount to Dover-strand,
And spying heirs, melting with luxury,
Satan will not joy at their sins, as he
For (as a thrifty wench scrapes kitchen stuff,
And barrelling the droppings, and the snuff
Of wasting candles, which in thirty year,
Relicly kept, perchance buys wedding cheer),
Piece-meal he gets lands, and spends as much time
Wringing each acre, as maids pulling prime.
In parchment, then, large as the fields, he draws
Assurances; big as glossed civil laws,
So huge, that men (in our time's forwardness)
Are fathers of the church for writing less.
These he writes not; nor for these written pays,
Therefore spares no length (as in those first days,
When Luther was profest*, he did desire
Short paternosters, saying as a friar
Each day his beads; but having left those laws,
Adds to Christ's prayer the power and glory clause.)
But when he sells or changes land, he impairs
His writings, and (unwatched) leaves out *ses heires*,
And slyly as any commenter goes by
Hard words or sense; or in divinity
As controverters in vouched texts leave out
Shrewd words which might against them clear the doubt."

THACKERAY,

In "Cox's Diary," one of his collection of minor sketches, gives this picture of an irrepressible Irish barrister: "We received a strange document from Higgs, in London, which begun: 'Middlesex, to wit: Samuel Cox, late of Portland Place, in the city of Westminster, in said county, was attached to answer Samuel Scapgoat of a plea, wherefore, with force and arms, he entered into one messuage, with the appurtenances, which John Tuggeridge, Esq., demised to the said Samuel Scapgoat, for a term which is not yet expired, and ejected him.' And it went on to say that we, 'with force of arms, viz.: with swords, knives, and staves, ejected him.' Was there ever such a monstrous falsehood?"

"Higgs, Biggs, and Blatterwick had evidently been bribed, for—would you believe it?—they told us to give up possession at once, as a will was found and we could not defend the action."

"Well, the cause was tried. Why need I say any thing concerning it? What shall I say of the Lord Chief Justice, but that he ought to be ashamed of the wig he sits in? What of Mr. —— and Mr. ——, who exerted their eloquence against justice and the poor? On our side, too, was no less a man than Mr. Sergeant Binks, who, ashamed I am for the honor of the British bar to say it, seemed to have been bribed, too, for he actually threw up his case! Had he behaved like Mr. Mulligan, his junior—and to whom, in this humble way, I offer my thanks—all might have been well. I never knew such an effect produced, as when Mr. Mulligan, appearing for the first time in that court, said: 'Standing here, upon the pidestal of secred Thamis; seeing around me the arnymints of a profission I rispict; having before me a vinerable joodge and an enlightened jury—the counthry's glory, the nation's cheap definder, the poor man's priceless palladium; how must I thrimble, my lard, how must the blush bejew my cheek—' (Somebody cried out, '*O cheeks!*' In the court there was a dreadful roar of laughing, and when order was established, Mr. Mulligan continued): 'My lard, I heed them not; I come from a counthry accustomed to oppression; and as that counthry—yes, my lard, *that Ireland*—(do not laugh, I am proud of it)—is ever, in spite of her tyrants, green, and lovely, and beautiful, my client's cause, likewise, will rise superior to the malignant imbecility—I repeat, the MALIGNANT IMBECILITY—

*Had taken vows.

of those who would trample it down; and in whose teeth, in my client's name, in my counthry's—aye, and *my own*—I, with folded arrums, hurl a scarnful and eternal defiance!'

"'For heaven's sake, Mr. Milligan'— ('MULLIGAN, me lard,' cried my defender.) 'Well, Mulligan, then, be calm and keep to your brief.'

"Mr. Mulligan did; and for three hours and a quarter, in a speech crammed with Latin quotations, and unsurpassed for eloquence, he explained the situation of me and my family; the romantic manner in which Tuggeridge, the elder, gained his fortune, and by which it afterward came to my wife; the state of Ireland; the original and virtuous poverty of the Coxes—from which he glanced passionately for a few minutes (until the judge stopped him) to the poverty of his own country; my excellence as a husband, father, landlord; my wife's, as a wife, mother, landlady.

"All was in vain; the trial went against us."

WESTMINSTER HALL.

The following lines are inscribed on an ancient print of Westminster Hall:

"When fools fall out, for ev'ry flaw,
They run horn-mad to go to law,
A hedge awry, a wrong plac'd gate,
Will serve to spend a whole estate.
Your case the lawyer says is good,
And justice cannot be withstood;
By tedious process from above,
From office they to office move;
Thro' pleas, demurrers, the devil, and all,
At length they bring it to the *hall;*
The dreadful hall by Rufus rais'd,
For lofty Gothic arches prais'd.
The first of Term, the fatal day,
Doth various images convey;
First, from the courts with clam'rous bawl,
The criers their attorneys call:
One of the gown, discreet and wise,
By *proper* means his witness tries;
From Wreathock's gang not right or laws,
H' assures his trembling client's cause;
This gnaws his handkerchief, while that
Gives the kind ogling nymph his hat;
Here one in love with choristers
Minds singing more than law affairs.
A sergeant limping on behind,
Shows justice lame as well as blind.
To gain new clients some dispute,
Others protract an ancient suit.
Jargon and noise alone prevail,
While sense and reason 's sure to fail.
At Babel thus law terms began,
And now at Westm——er go on."

The occupations of First Term Day are further described in the following, by John Baynes, a lawyer, who lived in the latter half of the last century; the names all represent real persons:

OF JUSTIFYING BAIL.

Baldwin: Hewett, call Taylor's bail—for I
Shall now proceed to justify.
Hewett: Where's Taylor's bail?
1st Bail: I can't get in.
Hewett: Make way.
Lord Mansfield: For heaven's sake, begin.
Hewett: But where's the other?
2d Bail: Here I stand.
Mingay: I must except to both. Command
Silence—and if your lordship crave it,
Austen shall read our affidavit.
Austen: Will Priddle, late of Fleet street, gent,
Makes oath and saith, that late he went
To Duke's place, as he was directed,
By notice, and he there expected
To find both bail—but none could tell
Where the first bail lived—
Mingay: Very well.
Austen: And this deponent further says
That asking who the second was,
He found he'd bankrupt been, and yet
Had ne'er obtained certificate.
When to his house deponent went,
He full four stories high was sent,
And found a lodging almost bare;
No furniture but half a chair,
A table, bedstead, broken fiddle,
And a bureau.
(Signed) *William Priddle.*
Sworn at my chambers.
Francis Buller.
Mingay: No affidavit can be fuller.
Well, friend, you've heard this affidavit,
What do you say?
2d Bail: Sir, by your leave, it
Is all a lie.
Mingay: Sir, have a care.
What is your trade?
2d Bail: A scavenger.
Mingay: And pray, sir, were you never found
Bankrupt?
2d Bail: I'm worth a thousand pound.
Mingay: A thousand pound, friend—boldly said—
In what consisting?
2d Bail: Stock in trade.
Mingay: And pray, friend, tell me, do you know
What sum you're bail for?
2d Bail: Truly, no,
Mingay: My lords, you hear—no oaths have check'd him
I hope your lordships will—
Willes: Reject him.
Mingay: Well, friend, now tell me where you dwell?
1st Bail: Sir, I have lived in Clerkenwell
These ten years.
Mingay: Half a guinea dead. (*Aside.*)
My lords, if you've the notice read,
It says Duke's place. So I desire
A little further time to inquire.
Baldwin: Why, Mr. Mingay, all this vapor?
Willes: Take till to-morrow.
Lord Mansfield: Call the paper."

RICHE

compares the learned and liberal professions together in "Riche—his Farewell to Militarie Profession," and estimates the Law thus: "To become a student in the lawe, there are suche a number of theim already that he thinkes it is not possible that one of theim should honestly thrive by another; and some will saie that one lawyer and one goshauke were enough in one shire. But of my conscience, there are more lawyers in some one shire in Englande, with attorneis, solicitours, or, as they are termed, brokers of causes, or pettie foggers, than there are goshaukes in all Norwaie."

JUDICIAL LEGISLATION.

IV.

In our last article we promised to conclude what we intended to say on this topic by considering the advantages of judicial legislation. This will lead us to compare its products with those of legislatures and parliaments. The great, if not the prime, quality of statute law is its certainty, its inflexibility, its precision. This quality is of first importance in criminal law, for in that, certainty is the grand desideratum; that the people may know exactly what is a crime, and what its punishment; and it has ever been a favorite maxim of the common law, that criminal laws should be construed strictly, and that all doubt should be in favor of the accused.

This caution, so necessary to the preservation of public liberty, can never bear hard on individuals, for the law cannot be made to inflict a punishment beyond what the letter of the law would warrant. But what would be the result of applying this doctrine of strict construction to the law of property? Would it not be a mere contrivance whereby the honest and unsuspecting would become the prey of the evil and designing?

Indeed, it is alleged by a distinguished legist as a

reason why fraud has not been accurately defined in the law, that the dishonest would then easily find means of evading it. Chancellor Kent says, in his Commentaries, "that it is the constant labor of the courts to prevent, by their construction of the law, the crafty and designing from circumventing it; for, as fast as devices are gotten up to take advantage of existing laws, the courts, by construing them so as to effect their beneficent object, contrive to checkmate them."

We shall not be permitted in this brief essay to extend to any length a comparison between statute and judicial law, though we may be permitted to give an illustration of how defective and unsatisfactory statutory law is, when applied to property and the private rights and business of mankind.

It is said that Sir Mathew Hale drew the statute familiarly known as the statute of frauds. He was undoubtedly a man of rare genius and great learning. He knew, as well as any man that lived in his time, or perhaps before or since, what he meant to say and how to say it. He had also abundant materials, since much of the statute is said to be but an affirmance of the rules and principles of the common law, yet more than two centuries have been spent, and untold sums of money, in attempting to find out exactly what that statute means. Even at this late day its meaning may be said to be quite uncertain, and a distinguished legist, who has been but recently selected by the governor of this state for the very important position of one of the revisers of our statutes, is, it is said, just about to issue a work in two volumes, to supply a "want, long felt by the profession, of an accurate treatise on the statute of frauds." We need not add that this statute, carefully as it was framed, proved a ready instrument to promote fraud and injustice until judicial legislation loaned it its aid. And this is not an isolated case. The statute for the protection of married women, passed in this state over twenty years ago, with several amendments since, has so involved the law under that title that the profession feel that all subjects connected with that law are in great doubt.

A moment's reflection will show us that this is necessarily so, for there is so small a portion of the relations under that title that can possibly fall within the letter of the statute, that it leaves the great body of the law to be evolved by the courts, whose duty it is to harmonize, and reduce to a system, the law under that title, in accordance with the supposed intention of the legislature.

Those statutes — and, we might add, most others in which the legislature attempt to provide rules in respect to property, or to provide for future emergencies—illustrate the advantage, nay, the necessity, of judicial legislation. For, as Sir Matthew Hale says, in his preface to Rolle's Abridgment, "where the subject of a law is single, the prudence of one age may go far at one essay to provide a fit law; and yet, in the wisest provisions of that kind, experience shows us that new and unthought of emergencies often happen, that necessarily require new supplements, abatements or explanations."

We do not by this mean to intimate that the legislature should never interfere with the laws of property — should never even make those radical changes in the law which the sentiments of the people require, but we do mean to say that experience has shown that such statutes are necessarily imperfect, and require for their perfection the aid of a trained body of men who are thoroughly versed in the law; and further, that the most perfect legislation that we have under any titles in the law, is under those that are almost wholly the creation of the courts.

And while that which is facetiously termed in satire and song "the glorious uncertainty" of the law may be one of the characteristics of judicial legislation, still we think it is, on the whole, preferable to the certainty of an arbitrary code like that of the Medes and Persians, which changes not, and consequently cannot be "extended, restricted or modified to satisfy new wants, to meet the exigencies of new branches of business, or to become adapted to the requirements of an ever refining, enlarging and progressive civilization." And as we have seen arbitrary and inflexible rules, when applied to property, tend to promote fraud and injustice; therefore we say that some degree of uncertainty is better for all, than that the honest and unsuspecting should invariably become the prey of the crafty and designing.

And beyond this we lay it down as a well-settled fact, that judicial legislation is indispensable to a living nation — to a progressive civilization.

History is said to be philosophy teaching by example, and no fact is better taught or more fully illustrated in history than that codes and arbitrary statutes alone will not answer the purposes of a living civilization. Rome, comparatively soon after she entered upon her mighty career, adopted a code called the twelve tables, but experience soon taught that people that a collection of arbitrary rules was not adapted to the wants of a living nation. To supply this deficiency, judicial or prætorian legislation was introduced, and we are informed that, in the time of Cicero, judicial legislation had wholly taken the place of the code or twelve tables.

This development of judicial law culminated during the period of the republic, and declined with the destruction of freedom, when the true Roman life had departed. Henceforth there was no need for constant reproduction.

Then came the proper time for a code. The dead nation needed no more law. Hence Justinian properly ordered that the principles, maxims and rules which lay scattered along her pathway should be collected into a code; her laws were then sufficient for her needs.

In this we perceive how soon a living nation outgrows the wisest and most carefully prepared codes, and this logically follows from the fact that codes and statutes only embrace what is then known upon the subject.

But judicial legislation, by its slow, steady, adaptive growth, provides for and conforms itself to emergencies and circumstances as they arise. Our own national constitution must submit to the same process. Already great changes have been made, and doubtless in the course of a few centuries its text will become as obscure as the twelve tables in the days of Cicero.

That this system is not without its embarrassments and disadvantages, is not claimed; for courts are operated by human agents, who are not exeinpt from the infirmities of our common humanity, and must sometimes modify and reverse their own decisions. The late action of the supreme court of the United States upon the subject of the legal-tender act may be cited as an instance of the disadvantages attending the system.

It cannot be denied but that the decision in that case — soon about to be reversed, it is said, by the admission of new members, who have adjudged the case before argument — turns mainly on the view taken by the court of the current history of the country at the time of the passage of the act, as the following synopsis of the opinions in that case will show:

The opinion of the court, as pronounced by Chief Justice Chase, lays down substantially this proposition, that is: The law is not expressly authorized by the constitution, and was not indispensably necessary to preserve the life of the nation, and does necessarily impair the obligation of contracts then existing; therefore, it cannot be within the spirit of the constitution, and must be void.

Justice Miller, who delivered the dissenting opinion of the minority, lays down this as his proposition: That the law is not prohibited by any express provision of the constitution; that it was indispensably necessary to preserve the life of the nation; that it does not impair the obligation of existing contracts more than other acts, which have been adjudged constitutional; therefore, the act is within the spirit of the constitution, and is constitutional: showing that, practically, the great point at issue between them was as to the strict necessity for the legal tender clause at the time of its passage.

Still this ultimate power — this power of declaring what shall and what shall not be law in cases of doubt — as that alone must be lodged somewhere; and though it takes the form of legislation in the case referred to, the only question is, should it be lodged in congress or in the court? If in congress, then we should have no further need for a written constitution, for all acts of congress would have the force of constitutional provisions, and, swayed as that body always has been and always will be, by party passion and prejudice, the liberties of the people would be jeopardized in the struggle for power between rival parties and factions; and, if we may credit the teachings of experience and history would ultimately be lost, and the scenes enacted in the days of Marius and Sylla would be re-enacted in this western world of ours; for, we take it, men are as ambitious now as then, and would not hesitate to use the same means if they had the same opportunity.

Having now, as we think, shown that judicial legislation is no myth, but a living power; that in all constitutional governments it is the practical depository of the sovereign power, and having traced its source and legitimacy to necessity and the infirmity of human nature; having shown that its modes of operation are equitable and beneficent, and infinitely superior to those of statutory enactments; and, finally, that in every living, progressive civilization, a municipal law — the result of judicial legislation — is absolutely necessary to its perfection, we conclude by saying that judicial legislation has furnished a body of laws which fills up every interstice and occupies every wide space which the statute law does not or cannot fill; that it is the product of the wisdom, counsel and experience of many ages of wise and observing men; that its maxims and principles are admirably calculated to protect and preserve civil liberty; in fine, that it is the grandest monument of human wisdom, that has withstood the "waves and weather of time." And, that it may continue to occupy its present place, we must have a judiciary distinguished for their experience and learning, who shall be above fear or favor, distinguished for their immaculate purity, unbending integrity and lofty morals, who shall be above even the suspicion of being the paid retainers of wealthy corporations, or the supple tools of party leaders, so that our courts of civil judicature may ever present the "image of the sanctity of a temple where truth and justice seem to be enshrined and to be personified in their decrees."

CURRENT TOPICS.

Mr. Attorney-General Hoar seems to entertain the opinion that the binding authority of a decision depends upon the majority of the court in its favor. He had the exceeding bad taste — to call it by no harsher name — to urge, as a reason for re-opening the legal tender question, that the former decision rested upon the judicial opinion of a single man. However slight the majority in its favor, it was the decision of the court, and, as such, is entitled to the same consideration as any other decision. It would certainly be a novel rule to introduce, that a precedent might be questioned on the ground that it was made by a divided court. We should have decisions divided into as many degrees as some jurists are in the habit of dividing negligence, and the first question to be determined, before any decision could be received as an authority, would be as to how the court stood that pronounced it.

It is proposed in some quarters to secure a higher standard of qualification for admission to the bar by requiring a longer and more severe examination of the candidates for admission. This will not answer the purpose. Almost any graduate of a first-class New England college, after three months' study, with this end in view, will pass any examination that may be given him by a committee of lawyers. The questions will be answered or evaded, and, so far as the committee can determine, he is equally qualified with one who has passed years of study in an office. An examination, without a knowledge of the previous habits and instruction of the candidate, will not determine his fitness. Aptness and accident have much to do with success, so much, indeed, that at present a person will hardly be excluded because he passes a poor examination. Some other means must be taken to determine the qualifications requisite for admission to the bar.

It is strange that the contract of marriage, which is considered of so high a nature that the parties to it

can neither release nor vary its obligations, may be entered into so easily. Under our present law, persons unable, on account of age, to make a valid bargain for the purchase of a sheet of paper, may bind themselves by a promise which reaches, not only their entire property, but their persons, and affects, either directly or indirectly, the prosperity, the happiness, and the reputation of their families. And this promise may be made without previous notice, without publicity, and without ceremony, and will be binding under circumstances and conditions that would avoid any other contract. Many of the states, for the purpose of alleviating the evils which result from the multitude of hasty and ill-advised alliances, have opened wide the gates of divorce, by placing upon their statute books laws which are a disgrace to our civilization. A similar course has been recommended to our own state, but we think the better plan would be to throw around the contract of marriage such forms and civil solemnities as would secure deliberation and publicity, adding, in the case of minors, some further requirements sufficient to protect them against the consequences of their own imprudence. If this be done, we will have fewer divorces, and be less frequently called upon to witness those disgraceful occurrences which result from unfortunate marriages.

The United States supreme court are again to rehearse that very lively and interesting play, "The way to pay old debts," and it is not at all improbable that the epilogue will turn out quite the reverse of that pronounced by the Chief Justice. On motion of Attorney-General Hoar, that court has decided to give preference to the case of *Latham* v. *The United States*, involving the legal tender question. This motion was granted by a vote of five to four — the Chief Justice and those concurring with him in the Hepburn case voting nay, and those dissenting in that case and the two new judges voting aye. While it does not necessarily follow from this action of the court that the former decision will be reversed, we cannot escape the conviction that such will be the ultimate result. Aside from the merits of the question involved, such a result must certainly be looked upon as a grave calamity. The question has been but recently decided upon solemn argument and mature deliberation, and the court should feel bound, by every consideration of prudence, propriety and dignity, to adhere to that time-honored and wise maxim, *stare decisis*. In making their former decision, as in making any other decision, the court created a moral power above itself, and the individual opinions of the members of the court should acknowledge its force. It is only through the stability that comes from a reverence for precedents, that professional men can give safe advice on matters of law, or that mankind in general can, with confidence, engage in the ordinary affairs of life; and it will be a serious blow at this stability if the highest tribunal in the country shall so soon or so lightly ignore a precedent itself has solemnly established. While we are not prepared to say that courts should be bound by authority as firmly as the Pagan deities were supposed to be bound by the decrees of fate, yet we most decidedly concur with a remark of Chancellor Kent, that, "when a rule has been once deliberately adopted and declared, it ought not to be disturbed, unless by a court of appeal or review, and never by the same court, except from very cogent reasons, and upon a clear manifestation of error."

We confess to some surprise that the deliberations of the senate judiciary committee should have produced no better results in the shape of a bill to reorganize the supreme court than the one of which we give an abstract elsewhere. We shall content ourselves with pointing out two or three of what we believe to be its principal short-comings. The third section reads as follows: "The governor, by a writing to be filed in the office of the secretary of state, shall, immediately after the passage of this act, designate, from the whole bench of justices of the supreme court, a presiding justice and two associate justices for each of the said departments, to compose the general term therein. One, at least, of the justices composing the said general terms shall be selected from each judicial district in the department. In all cases, any person designated as presiding justice shall act as such during his official term; and any person designated as associate justice shall act as such for five years from the thirty-first of December next after the time of his designation, or until the earlier close of his official term. The governor shall, in like manner as aforesaid, designate presiding and associate justices to sit in such general terms, as often as vacancies therein shall occur, for the unexpired term." We are at a loss to determine, precisely, the force of the expression "*for the unexpired terms.*" Should an associate justice die or resign, before the expiration of the five years for which he was appointed to act as such, it may be that there would be an "unexpired term;" but, suppose the official term of an associate justice should close before the expiration of five years, it can hardly be claimed that there would be an "unexpired term," since the term as associate would be limited in his case by the clause "or until the earlier close of his official term." Or suppose an associate justice shall act as such for the entire five years, what, then, is the "unexpired term" for which the governor is to appoint? It seems to us that a fair construction of the language of the section would limit the appointing power of the governor, after the first appointments, to the filling of vacancies for "unexpired terms." If this be so, there is no provision in the bill for the filling of vacancies occasioned by reason of the expiration of the time limited during which the general term justices are to sit. At best, the intent of the section is not expressed in such clear and precise terms as should be employed in drafting a statute.

Again, the fourth section provides that, in case no presiding justice shall be present at a general term, one of the associates is to act in that capacity, but no provision is made for filling the vacancy occasioned by the absence of the presiding justice, and yet the concurrence of two justices is made necessary to pronounce a decision. A general term composed of but two justices, where the concurrence of both is requisite to decide a case, will be likely to give rise to a

great deal of unnecessary delay, vexation and expense to litigants.

No provision is made in the bill for the appointment of a reporter, an oversight which seems to us somewhat extraordinary. The judiciary article of the constitution says, "The legislature shall provide * * * for the appointment, by the justices of the supreme court designated to hold general terms, of a reporter of the decisions of that court," and we know of no more appropriate place to make this provision than in the bill to reorganize the court. The appointment of a competent reporter, who will promptly and carefully report the decisions of the court, is a matter of importance to the profession and the public, and the legislature should make all necessary provisions to that end. It is to be hoped that this bill will be so amended in the assembly as to remedy these defects which have escaped the attention of the senate.

The senate of this state has passed a bill for the reorganization of the supreme court. This bill was reported by the committee on the judiciary as a substitute for the other bills introduced on that subject, and heretofore printed in the LAW JOURNAL. The leading features of the bill passed are as follows: The existing general terms are abrogated after the first of May, and all causes pending are to be cognizable before the new general terms; provided, however, that the existing general terms shall meet on some day, to be designated by the justices, for the purpose of deciding all matters pending before them on the first of May. The state is divided into three judicial departments: The first, comprising the first and second judicial districts; the second, comprising the third, fourth and sixth districts; and the third, the fifth, seventh and eighth districts. In the first department six general terms are to be held in New York and two in Brooklyn. In the second department four general terms are to be held in Albany, one in Ballston, one in Canton and one in Binghamton. In the third department two general terms are to be held in Syracuse, four in Rochester and two in Buffalo. The first sessions of the general terms are to be held on the first Monday in June. The general term for each department is to be composed of a presiding justice and two associate justices, to be designated from the entire supreme bench by the governor. At least one of the justices composing the general terms shall be selected from each judicial district in the department. The presiding justices are to act during their official term, and the associates for five years from the 31st December next after the time of their designation, or until the earlier close of their official term. Vacancies occurring are to be filled by the governor. In case of the absence of the chief justice from any general term, the associate having the shortest time to serve is to preside, and in case one or both the associates are absent, the presiding justice is to select any justice or justices of the court to hold with him. The powers and jurisdiction of the existing general term are conferred on the new general terms. The concurrence of two justices shall be necessary to pronounce a decision.

If two shall not concur, a re-argument may be ordered. In case of such disagreement, when any one of the justices shall not be qualified to sit, the cause may be directed to be heard in another department. The associate justices of one department may sit in another department. The governor may, on request of a justice in any district, appoint justices to hold such circuits, etc., as have been assigned to those justices who shall be chosen to the general term; provided, however, that the justices in any district may make provision for holding such courts. At least one month before the expiration of 1871, the justices of each department are to appoint the times and places for circuits, special terms, etc.; and like appointments are to be made every two years. The justices of the supreme court are to receive an annual salary of six thousand dollars, and a per diem allowance not exceeding five dollars for expenses when absent from home engaged in holding general or special term, circuit, etc. Appeals are to be heard in the department in which the judgment or order appealed from is entered, unless two of the general term justices in such department shall be incapable of sitting on the appeal, in which case the appeal shall be ordered to be heard in some other department. All rules of the court now in force are to remain until abolished or altered by the general term justices, the chief judges of the superior courts of cities, the chief judge of the court of common pleas of New York and of Brooklyn, in convention assembled, in Albany. A convention of such justices and chief judges shall be held in Albany on the first Wednesday in August, 1870, and every two years thereafter, to revise, alter, abolish, and make rules. In any action which was referred to a justice of the supreme court, and was pending and undetermined on the first day of January, 1870, and in which testimony has been taken, the supreme court at special term may, in its discretion, order the evidence so taken, and the proceedings had, in such action to stand, and have the same force in the further prosecution of the action before the court, as if such evidence had been taken or proceedings had before the court.

OBITER DICTA.

Lawyers who give advice expect to be paid for it.

"Dry as the remainder biscuit after a voyage"—Fearne.

A prayer for discovery—that of Christopher Columbus.

"Favorable cases," says Lord Mansfield, "make bad precedents."

There was no public prosecutor at Rome; but we know of Othello, a tawny general at Venice.

Retaining a lawyer and the fee, too, is a "double retainer" not fully appreciated by the profession.

An indictment for "forging a bond whereby A was bound to B," was held bad, because A couldn't be bound by a forged bond.

An Alabama judge, being told that he should charge the jury, assessed them fifty cents each, and stopped the trial until they came down with the stamps.

Some lawyers for the sake of getting business trust their clients. So do their clients trust them; it is difficult to say which do the wildest credit business.

Mr. Bishop, in his "First Book of the Law," says it is a mistake to write "seisin," as though spelt with a "z," "seizin." But there are authorities for each mode of spelling.

A solicitor, whose prices were rather high for a moderate article of law, was remarking that he liked equity practice and felt perfectly at home in it. "Especially the charging part of a bill," added a brother quietly.

A young law student rather astonished his landlady one day at dinner by recommending her to send a piece of very rare beef "into equity." "For," said he, "that considers every thing done which ought to be done."

"Law," said John Horace Tooke, "ought to be not a luxury for the rich, but a remedy to be easily, cheaply and speedily obtained by the poor." Some one remarked that the English courts of justice are open to all. "So is the London tavern," was the reply.

A smart Yankee woman, being called into court as a witness, got out of patience at the questions put to her, and told the judge that she would leave the stand, for he was "raly one of the most inquisitive old gentlemen she had ever seen."

One of the best things ever said on the English bench was Baron Alderson's gentle reproof when a learned counsel of the exchequer spoke of a *nolle prosequi*, lengthening the penultimate syllable. "Consider, sir, that this is the last day of the term, and don't make things unnecessarily long."

"Will your honor commit me for contempt of court," said a lawyer, after a ruling against him, "for I entertain the utmost contempt for it?" "I cannot," said the judge, "for that would be a violation of law." "How so?" said the lawyer. "Because," replied the judge, "the law prohibits committing a nuisance."

A Cincinnati paper recently had an article with the following formidable heading: "Beginning, progress, and termination of a litigation; commencing with an action for seduction: followed by an attachment suit; then garnishee process; then prosecution under the bastardy act. A marriage taking place in the mean time, the proceeding changes to a suit for alimony, and ends in an amicable settlement."

A droll story is told about the "Hardwicke," a law-debating society, famous in the annals of the English bar. Some few years since the members of that learned fraternity assembled at their customary place of meeting—a large room in Anderson's hotel, Fleet street—to discuss a knotty question of law. The muster of young men was strong, and among them conspicuous for his advanced years, jovial, red nose and air of perplexity, sat an old gentleman, who was evidently a stranger to every lawyer present. Who was he? Who brought him? and like whispers floated around concerning the jolly old man, arrayed in blue coat and drab breeches, who took his snuff in silence and watched the proceedings with evident surprise and dissatisfaction. After listening to three speeches, this antique, jolly stranger arose, and, with much embarrassment, addressed the chair. "Mr. President," he said, "excuse me, but may I ask is this 'The Convivial Rabbits?'" A roar of laughter followed this inquiry from a "convivial rabbit" who, having mistaken the evening of the week, had wandered into the room in which his convivial fellow-clubsteri had held a meeting the evening previous. On receiving the President's assurance that the learned members of a law debating society were not "convivial rabbits," the elderly stranger buttoned his blue coat and beat a speedy retreat.

GENERAL TERM ABSTRACT.

SEVENTH DISTRICT.—MARCH TERM, 1870.

ARSON.

The defendant was indicted for arson in the third degree, and charged with setting fire to and burning in the night time a certain building "erected for the manufactory of woolen goods," "belonging to the Phœnix Mills Company, a corporation duly authorized," &c. Upon the trial it appeared by the certificate of organization that the name of the corporation was "The Phœnix Mills of Seneca Falls." It also appeared that the building was not completed so that it could be used at the time of the fire. It had been raised, covered with a roof, was inclosed on two sides and partly on the third, the floors were mostly laid, and the window frames all in but not the sash. The defendant on the trial offered himself as a witness in his own behalf, and was admitted and examined. The district attorney on the trial proved under defendant's objection by parol that the name by which the corporation was generally known at Seneca Falls, and spoken of, was that by which it was described in the indictment. Also the object and purpose for which the building was erected and in course of completion. The defendant, on his cross-examination, objected and declined to answer certain questions, on the ground that he could not be compelled to give evidence against himself, which objection was overruled. To these rulings the defendant severally excepted. The judge charged the jury that if the building which was set on fire, though not completed and ready for use as a manufactory, was erected, "and so far advanced in its construction as to have assumed form and character as a building, and to be properly denominated a building," it was the subject of arson within the statute. There was an exception to this part of the charge. *Held*, that the charge was correct. *Held*, also, that it was proper to prove by parol the name by which the corporation was generally known; also, that it was competent to prove for what purpose the building had been erected and was in process of completion. *Held*, further, that when a person on trial under an indictment against him voluntarily makes himself a witness in his own behalf, under chapter 678 of Session Laws of 1869, he waives the constitutional protection in his favor, and subjects himself to a cross-examination the same as any other witness. *People* v. *McGarry*. Opinion by JOHNSON, J.

ASSESSMENT AND TAXATION.

Certiorari to review assessment of surplus funds of *savings bank*. The return shows that prior to May 20th, 1867, the bank had $109,200 cash surplus, and on that day by resolution directed its treasurer to invest $100,000 of such surplus in United States Government bonds. On the 23d of May thereafter the treasurer, instead of purchasing that amount of bonds, transferred upon the bank books the sum of $100,000 of this cash surplus to the general funds of the bank, and from the latter fund $100,000 of United States government bonds belonging to that fund to the surplus fund. The assessors afterward assessed the bank for $109,100 surplus. The bank claimed that it should have been assessed for $9,200 surplus only; that the $100,000 having been invested in United States bonds was exempt. *Held*, that the entries upon the bank books by the treasurer did not constitute an investment under the resolution; that the bank was in the same situation precisely after the entry as before, and that the assessment was proper and valid. *People ex rel. Rochester Savings Bank* v. *Board of Assessors of City of Rochester*. Opinion by JOHNSON, J.

CHATTEL MORTGAGE.

The plaintiff was indorser and surety for one Green, and took a chattel mortgage from Green of the goods in question by way of security, containing the usual power to take possession and sell. The obligations were about

maturing, and the plaintiff, in pursuance of the power in the mortgage, and with the consent of Green, took possession of the goods, and was proceeding to sell the same to pay the debts. After he had been in possession for several days, the defendant, who was a sheriff, levied upon the goods by virtue of an execution issued to him on a judgment in favor of the creditors of the mortgagor, against such mortgagor. The action was to recover the possession of the goods. *Held*, that the mortgagor had, at the time of the levy, no interest in the goods which was the subject of levy and sale by execution, and that the action was well brought. *Nichols* v. *Mead*. Opinion by JOHNSON, J.

CONTRACT BY PAROL.

The defendant was a farmer, and in May, 1864, had a crop of hops growing upon his farm. The plaintiff's assignor on the 24th of that month asked the defendant if he would take fifteen cents per pound for his crop of hops that season, and the defendant replied that he would. The plaintiff's assignor then said the hops must be of first quality, to which the defendant replied yes. The former then took from his pocket five dollars and handed it to the latter, saying that he gave him that to bind the bargain. The defendant took the money and kept it, without any offer to return it. When the crop matured and was prepared for market, the defendant sold it to other parties, and refused to deliver it to the plaintiff, or any part of it, at the stipulated price. The plaintiff was the assignee of the purchaser. The crop produced seventeen bales, averaging 230 pounds to the bale, and the market price was thirty-five cents when sold by defendant. *Held*, that the contract was a valid and binding contract, and that the plaintiff was entitled to recover the difference between the stipulated price and the market price of the hops. —— v. ——. Opinion by JOHNSON, J.

CONVERSION OF PROPERTY BETWEEN TENANTS IN COMMON.

The plaintiff worked the defendant's farm on shares for one year, the plaintiff to have one-third and the defendant two-thirds of all crops raised when ready for use or market. At the expiration of the year, the plaintiff removed from the place, leaving the crop of oats raised in the barn threshed and in a pile, but not cleaned, and ready for market or division. A few days after, the plaintiff returned to the place for the purpose of cleaning up the oats, and dividing them according to the agreement. The defendant refused to allow him to clean up the oats or divide them, and ordered him off from the premises. The plaintiff returned several times, and insisted upon his right to clean up the oats, and sever and take away his share, and demanded his share, but the defendant refused and forbid his remaining or coming upon the premises. Immediately after this, and while the oats were in the barn in this condition, the plaintiff brought his action in a justice's court to recover the value of his share of the oats, where he recovered. The defendant thereupon appealed to the county court, where a trial was had, and the plaintiff there recovered. *Held*, on appeal to this court, that the action was well brought, and the plaintiff entitled to recover; that the plaintiff had the absolute and unqualified right to clean up the oats and sever his share and take it away, and that this right was superior in regard to property of that description, to the right of either tenant in common to retain possession of the whole, and that the refusal was a conversion of the plaintiff's share. Otherwise, had the refusal been to deliver the common property. *Chammon* v. *Lusk*. Opinion by JOHNSON, J.

INSURANCE.

The plaintiff purchased the premises, on which the insured building stood, of Mrs. Brown, with other premises, by a contract, which entitled him to a conveyance on making the payments as provided. He took possession, and made a portion of the payments, and then contracted to sell the portion on which the insured building stood to Curtis, and to make or procure a deed to Curtis, on his making the payments according to his contract. While thus in possession, and after his contract with Curtis, the plaintiff obtained the policy of insurance in question upon the building. The policy contained a provision that "if the assured, or any other person or parties, shall have existing during the continuance of this policy any other contract or agreement for insurance (whether valid or not), against loss or damage by fire, on the property hereby insured, not consented to by this company," etc., "then this insurance shall be void and of no effect." Curtis afterward, and without the knowledge or consent of the plaintiff, and without fulfilling his contract with him, went to Mrs. Brown and paid her the amount due on the property from the plaintiff, and took a conveyance to himself of the premises, and procured for and to himself an insurance upon the same building, while the plaintiff's policy was yet in force. *Held*, that the plaintiff had an insurable interest on the building, and that the same was not destroyed or prejudiced by the conveyance of the title by Mrs. Brown to Curtis in that manner. *Held*, also, that the provision in the policy was limited, and applicable only to the plaintiff's insurable interest, and that a third person who had a different and separate interest in the same building could not, by obtaining an insurance thereon, without the plaintiff's knowledge or consent, defeat and avoid the plaintiff's policy. *Acer* v. *The Merchants' Insurance Company of Hartford*. Opinion by JOHNSON J.

LIBEL.

The defendants being proprietors of an institution in the city of New York, known as a commercial agency, whose business was to obtain information concerning the responsibility and commercial standing as to credit of all merchants and traders throughout the United States and Canada—which information they published in a weekly paper, and distributed to the subscribers to such agency only, who were very numerous, under certain figures and cyphers—had published in their paper, and sent to their subscribers the names of the plaintiffs, with certain figures attached thereto, indicating that they were insolvent. The import of these figures could only be known to persons having the key, which was sent by the defendants only to their agents and subscribers. This weekly sheet was headed "Strictly Confidential." In an action by the plaintiffs for a libel founded upon this publication: *Held*, that such publication was not a privileged communication. *Sunderlin and another* v. *Bradstreet and others*. Opinion by JOHNSON, J.

PARTNERS.

The plaintiff and defendant were partners, in a single venture. The property was all disposed of and converted into money, which was received by the defendant. The parties then looked over the partnership account, ascertained the proportion due to each, and struck a balance between them. No express promise to pay was shown. Afterward the defendant refused to pay over plaintiff's share. On the trial of the action, which was in the nature of an action for money had and received by the defendant to plaintiff's use, no question was raised, or objection taken by the defendant, that no express promise to pay plaintiff's share had been proved. The only question litigated upon the trial was, whether the plaintiff was the defendant's partner in the transaction. Plaintiff had a verdict. *Held*, on motion for new trial, that the action was well brought, and the plaintiff entitled to recover. *Rainsford* v. *Rainsford*. Opinion by JOHNSON, J.

PROMISSORY NOTES.

The action was brought upon two promissory notes made by the defendants, payable to the order of Ball, Raff & Saxton. The complaint alleged that the payees of said notes, "before the maturity thereof, duly indorsed, assigned and transferred the same" to the plaintiff, who became and was the lawful owner and holder

thereof. The defendants, by way of defense, among other things, in a separate answer, alleged that the plaintiff was one of the payees of said notes, and other facts showing that the notes were without consideration, which was also averred, but there was no averment in the answer that the plaintiff had notice, or knowledge, of the facts, or the want of consideration. The plaintiff demurred to the answer, on the ground that it did not allege notice to the plaintiff of the want of consideration before the transfer. On appeal, from the order of the special term, sustaining the demurrer, — *Held*, that the plaintiff being one of the payees of the notes, the answer was sufficient without alleging notice to him, and that he was not — in the commercial sense — the bona fide indorser and holder of the notes, so as to render the averment of notice necessary to constitute a valid defense. That the indorsement and delivery, by the three payees, to the plaintiff, who was one of them, operated as an assignment only of the interest of the other two to the plaintiff. *Saxton* v. *Dodge and others*. Opinion by JOHNSON, J.

In another action brought by the same plaintiff and John Dewolt, are two other notes of the same class and arising out of the same transaction. The complaint, answer and demurrer were all the same as in the other action, except the additional plaintiff. The rule was held to be the same, and that Dewolt—by taking the notes as joint indorsee and holder, with Saxton, one of the payees —became subject to the same defense, without notice, or the averment of notice. *Saxton and Dewolt* v. *Dodge and others*. Opinion by JOHNSON, J.

SLANDER—EVIDENCE; AMENDMENT OF PLEADINGS.

The plaintiff was allowed upon the trial to prove a repetition by the defendant of the same slanderous charge on other occasions and subsequent to the commencement of the action, by way of showing the degree and extent of defendant's malice in making the charge. Defendant excepted. After the testimony was closed, and before the cause was summed up to the jury, the plaintiff's counsel asked leave to amend the complaint so that it might claim $1,000 damages instead of $500, as it then stood. The court allowed the amendment to be made, and the defendant excepted. The jury found a verdict for plaintiff of $850. *Held*, that the ruling was correct on both points. *Johnson* v. *Brown*. Opinion by JOHNSON, J.

TENANTS IN COMMON OF CROPS.

The plaintiff's assignor worked the defendant's farm on shares, under an agreement that he should have "one-third of all the crops raised on said farm *for one year*," and the defendant two-thirds, the latter to furnish all seed, and team, and the former to do the labor and deliver all the grain, etc., in the half bushel. The agreement was dated the first of April, and there was then a crop of winter wheat growing on the farm, which was excepted from the agreement. There was no other limitation as to time than that above quoted. In the fall of that year the plaintiff's assignor put in a crop of winter wheat, the defendant furnishing the seed and team, according to the agreement. In the spring of the next year the plaintiff purchased of the cropper, and took an assignment of, his interest and share of the crop, When the crop was ready to harvest the defendant harvested it, and converted it, and refused to allow the plaintiff to do the work or to have any share of the crop. The action was referred, and the referee held that the interest of the cropper terminated and became extinguished on the first of April next after the date of the agreement. *Held* on appeal, reversing the judgment, that the interest of the cropper continued until the crop matured, and did not cease and become extinguished at the expiration of the year from the date of the agreement. That the instrument was not a lease which created the relation of landlord and tenant, and that the terms of limitation in the agreement meant all crops grown or raised within one year from the time they were sown or planted, under the agreement.— *Armstrong* v. *Bicknell*. Opinion by JOHNSON, J.

WATER RIGHTS—REMEDY FOR INVASION.

Upon the state dam, belonging to the state prison at Auburn, the agent of the prison and the contractors there, using the power thereby created, had been in the habit of placing and using flush boards for the purpose of raising the head of water, varying in height or width, for a period of about thirty-five years before the commencement of this action. The effect of these flush boards was to set the water back upon the wheels of the plaintiffs' mill upon the stream above, and injured their water power. Whenever the plaintiffs or their grantors, during this period, complained of the back water thus occasioned, the agent of the prison or the contractors would either lower the flush boards or take them wholly away. This was done frequently up to within five or six years of the commencement of this action, since which time the agent and contractors have refused, upon request, either to lower or remove the flush boards, claiming the right to have them remain. At no period had the flush boards remained continuously for twenty years. The state purchased the premises on which the dam was built, but had no grant of any right to raise and set back the water. Shortly before the commencement of this action a freshet in the stream carried the flush boards wholly away, and before the defendants could replace them the plaintiffs brought their action, praying that the defendants might be perpetually enjoined and restrained from using flush boards on the dam to set back water upon the plaintiff's wheels and machinery. A temporary injunction was allowed. *Held*, that no right to use flush boards to raise the water and set it back upon the plaintiffs' premises had been acquired by user; and also *held*, that the remedy sought by the action was appropriate and the action maintainable. *Hall and another* v. *Augsbury and others*. Opinion by JOHNSON, J.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.*

CORPORATION.

1. *Powers of receiver.* — When a receiver of the property and effects of a corporation is appointed, and is qualified, he becomes, by the express terms of the statute, a trustee not only for the creditor upon whose application he was appointed, but for all the other creditors of the corporation. *Libby* v. *Rosekrans et al.*

2. *Directions to receiver.* — And where, upon the application of such receiver, directions are given by the court as to the manner of making a sale of the property of the corporation in his hands, such directions cannot be assailed in a collateral action, on the ground that they were in effect procured by a judgment creditor of the corporation who then was, and still is, a justice of the court giving the directions. *Ib.*

3. It does not follow, from that circumstance, that the creditor was not authorized to apply for an order of sale and directions as to the manner of conducting it; or that he could not draw the petition on which it was made, and the order itself, either before or after it was directed to be entered. *Ib.*

4. *Sale by receiver: setting aside.* — It is no ground for setting aside a sale of the property of a corporation, made by a receiver, that the creditor upon whose application the order of sale was obtained, being a justice of the court, was, by means of his official position, able to exercise an improper influence in the proceedings over the court; where it is not shown that his official position resulted in producing any different order or direction than

*From Hon. O. L. Barbour, and to appear in the 55th volume of his Reports.

the settled practice authorized the court to give, or than would have been given where any other person was interested in the proceedings to be taken. *Ib.*

DECEIT.

Action for.—An action of *tort* can be maintained against a person, or his personal representatives, for deceit in making false representations as to the solvency of a mercantile firm of which he was a member, although a judgment has been recovered against the firm (and of course against him jointly with the others) for the price of the goods sold on credit to the firm by the plaintiffs in consequence of misrepresentations. *Morgan et al.* v. *Skidmore, ex'r.*

DISORDERLY PERSONS.

1. *Review of proceedings against.*—The supreme court will not review, on certiorari, proceedings taken against an individual as a disorderly person, under the act of April 17, 1860, "in relation to police courts in the city of New York" (Laws of 1860, p. 1007), for threatening to abandon, and abandoning his wife. *Matter of Hook.*

2. Section four of that act provides that any appeal from, or amendment to, an order made by a magistrate in such proceedings, shall "be exclusively for the action of the court of special sessions." And if that court refuses to entertain jurisdiction in such a case, it may be compelled by mandamus to do so. *Ib.*

DIVORCE.

1. *Decree for.*—A decree for divorce should not direct the payment, by the defendant, of arrears of alimony previously ordered by the court. The plaintiff should be left to enforce the payment of such arrears in the ordinary way. *Hoffman* v. *Hoffman.*

2. In respect to permanent alimony, the better way is to direct a reference to ascertain the amount which should be allowed. Yet a decree of divorce will not be reversed, on appeal, because it orders the payment of a specified sum without a reference. *Ib.*

DONATIO MORTIS CAUSA.

1. *What will pass.*—Certificates of stock, and coupon government bonds will pass by delivery *mortis causa*, without any writing. *Walsh, Executor, etc.*, v. *Sexton.*

2. Thus, where the plaintiff's testatrix, during her last illness, having examined certain certificates of bank and railroad stock, and coupon government bonds, owned by her, sent for her husband, the defendant, and on his coming into the room she handed him the box containing the securities, with the key thereof, saying that she gave him the box and its contents; that they would be of use to him after her death; and the box and its contents were taken and retained by him: *Held*, that the title to the securities passed to the defendant, although no transfer of the stock was signed, and no power authorizing such transfer was executed by the testatrix. *Ib.*

FOREIGN COURTS.

1. *Effect of decrees of divorce in, as evidence.*—When the question arises in an action brought in this court, by a wife against her husband, for a divorce, *pro causa* adultery, as to the effect which shall be given here to a decree of divorce obtained in a circuit court of Indiana, by the husband against his wife, *as evidence*, it is exclusively a question as to the jurisdiction of the Indiana court to make the decree. *Hoffman* v. *Hoffman.*

2. In determining that question, in the second action, the court has nothing to do with any allegations of fraud in instituting the action in, or procuring the decree of, the Indiana court. *Ib.*

3. *Jurisdiction of.*—The fact that the defendant in the former action instituted a suit to set aside the decree in that action, for fraud, will not estop her, when plaintiff in the second action, from insisting, on the trial thereof, that the Indiana court never acquired jurisdiction of her person, so as to make a decree of divorce which the courts of this state are bound to regard as conclusive evidence of a decree valid as to her. *Ib.*

4. The courts of this state will not regard a service or notice of the pendency of an action, by publication in an Indiana newspaper, as giving a court of that state jurisdiction of a defendant who was, at the time, a resident of this state. *Ib.*

JUDGE.

Right to practice as attorney, etc.—Although, as a general rule, a justice of this court is prohibited from practice in it as an attorney or counselor, yet that prohibition does not extend to, or include, a proceeding where a justice is interested in the subject-matter of it. In such a case he is, by the express language of the statute, at liberty to act. *Libby* v. *Rosekrans.*

JUDGMENT.

1. *Modes of correcting errors in.*—The law provides but two modes of correcting errors in legal proceedings; one by *motion*, where the error is one of form, arising out of a failure to conform to the settled rules of practice of the court; the other by *appeal*, where the errors consist in the omission of the court itself to properly observe and apply the law affecting the rights involved in controversy in making its adjudication upon them. *Libby* v. *Rosekrans et al.*

2. Where, in actions upon contracts for the sale and purchase of land, the judgments ascertained the amounts prospectively to become due to the plaintiffs, respectively, for principal and interest, at the several times when the same were agreed to be paid by the defendant, and then directed that in case the same should, at those periods, remain unpaid, then the plaintiffs should have judgments for their recovery, and execution for their collection; *held*, that there was not only nothing improper in this disposition of the cases, but that, on the contrary, the correct practice relating to them was pursued. *Ib.*

3. *Held*, also, that even if the directions contained in such judgments were unwarranted by the law applicable to such cases, the error could not be corrected by means of an independent action against the plaintiffs in such judgments, brought by a stockholder in the corporation which was the defendant therein. *Ib.*

MASTER AND SERVANT.

1. *Master's liability for unskillfulness of servant.*—If a servant does, without special orders, an act of such a nature that he is justified in doing it, as between him and his master, without an express order, the master is liable for damages maintained by an individual in consequence of the act being done in an unskillful manner. *Gilmartin* v. *The Mayor, etc., of the City of New York.*

2. Thus, where the defendants' gardener, in attempting to take down a liberty pole, in a public park, which had become dangerous, did it so unskillfully that it was precipitated against a telegraph pole, which was thereby broken off and cast against the plaintiff's daughter, causing her death: *Held*, that the defendants were liable, although the gardener had received no express orders to remove the pole from the officer having charge of the public parks. *Ib.*

MUNICIPAL CORPORATION.

Injunctions against.—Where the charter of a railroad company in the city of New York not only prohibited the city corporation from doing any act to hinder, delay, or obstruct the construction, but also the operation, of the railroad, and made it incumbent upon the city authorities to do such acts as might be needful to promote the construction, and to *protect the operation* of the road; *held*, that an injunction would lie, at the suit of the railroad company, to restrain the city corporation from proceeding with the construction of certain sewers in said city, ordered by the Croton Aqueduct Board, under an act of the legislature; where the effect of their so proceeding

would be to compel the railroad company to remove its track to another part of the street, and to subject it to great inconvenience, hindrance, and delay in the operation of the road, and the public to a suspension of travel over it. *The Dry Dock, East Broadway, etc., Railroad Company* v. *The Mayor, etc., of New York.*

2. It is no answer to an application for an injunction, in such a case, that the building of sewers is beneficial to the public, and necessary to the health of the city; where it does not appear but that the sewers may be built without interfering with the plaintiffs. *Ib.*

PARTNERSHIP.

Remedy against estate of deceased partner. — The rule, that the creditors of a partnership will not be permitted to reach the individual estate of a deceased partner until all the separate creditors are satisfied, applies only to cases founded on the relation of debtor and creditor, and cannot interfere with the remedy against any individual, or his estate, as a wrong-doer. *Morgan et al.* v. *Skidmore, ex'r.*

PRACTICE.

Orders: how corrected. — If an order, directing the receiver of a corporation as to the manner in which he shall proceed in giving notice of, and conducting, a sale of real estate, is irregular or improvident, its correction should be sought by a motion before the court that made it. An independent action will not lie, for that purpose, even though the plaintiff was not a party to the proceeding in which the order was made. Such an order cannot be questioned in a collateral action brought by a stockholder of the corporation whose property is sold. *Libby* v. *Rosekrans.*

VENDOR AND PURCHASER.

1. Upon a sale of specific articles, the title vests in the purchaser; and that being so, it is well settled that the loss, if any, follows, or attaches to, the title. *Dexter* v. *Norton.*

2. The vendor becomes simply a bailee, and cannot, where there is no fault on his part, be liable by reason of the destruction of the bailment. *Ib.*

WITNESS.

1. *Corroboration.* — Proof that a witness had previously told to others the same story he testifies to is inadmissible for the purpose of corroborating his testimony. Hence the testimony of the plaintiff, showing that facts sworn to by a witness were previously communicated to him by the latter, can scarcely be regarded as any legal evidence to confirm the witness. *Butler* v. *Truslow.*

2. *Credibility.* — Where a referee stated, in his report, that there were many circumstances tending to weaken and disparage the testimony of a witness, yet that, in view of all the circumstances, he felt impelled to believe him *in a specified particular; held*, that this was a proper case for the application of the maxim, *Falsus in uno falsus in omnibus. Ib.*

3. Where the testimony of a witness was improbable, and inconsistent with the surrounding facts; was contradicted by the defendant and by the circumstances; the witness contradicted and impeached himself, by his writings and acts; all the defendant's witnesses contradicted him; and he was sustained by no witness and no circumstances; *held*, that it would be a mockery of justice to sustain a judgment founded upon his testimony. *Ib.*

SUPREME COURT OF WISCONSIN.*

(Continued from last week.)

INSURANCE.

Mistake of parties. — Plaintiff, by his agent, made an oral application for insurance upon furniture at his private room in a hotel, and the insurance agent, under a misapprehension, made out a written application for an insurance upon furniture in plaintiff's office in another building. Afterward plaintiff signed the application, paid the premium and received the policy, without noticing the mistake. The rate charged was *much less* than would have been charged for insuring the furniture at the hotel. In an action to reform the policy, etc., *Held*, that the minds of the parties never met, and there was no contract. *Ledyard* v. *Hartford Fire Ins. Co.*

INSURANCE COMPANY.

Right to transfer suit to federal court. — The fact that an insurance company, created by the laws of another state, does business in this state in conformity to its laws regulating the transaction of insurance business by foreign companies, and that its agents here are authorized to accept service of process from our state courts, does not deprive it of the right to transfer to the federal courts (under the 12th section of the Judiciary act of 1789) a suit commenced against it in a court of this state and by a citizen thereof.

(PAINE, J., is of opinion that so much of the Judiciary act as provides for the transfer of causes from state courts to the federal courts is invalid. COLE, J., though of the same opinion, acquiesces in the application of the act to this cause, to save loss and embarrassment to the parties. DIXON, C. J., holds the act valid.) *Knorr* v. *The Home Insurance Company of New York.*

JOINDER OF PARTIES.

1. *In action of tort.* — Owners in common of a mill, who have derived their respective rights under different conveyances, may join in an action of *tort* for a diversion of water from their mill, but cannot join in an action for breach of defendant's covenants in reference to such water. *Samuels et al.* v. *Blanchard et al.*

2. *When judgment will not be reversed.* — Where the summons was for a money demand on contract, but the allegations of the complaint, though apparently designed to state a cause of action on contract, are sufficient to show a joint cause of action to tort, and the cause was tried as such, judgment for plaintiffs will not be reversed on the ground that they could not join in the action as one on contract. *Ib.*

3. *How objection to be taken.* — Where the facts showing that plaintiffs could not join in the action as one on contract appeared on the face of the complaint, and the objection was not taken by demurrer, the appellate court will not assume that it was taken at the trial (against the statement of the respondent's counsel to the contrary), merely because there was a motion for a nonsuit, the grounds of which do not appear. *Ib.*

JURORS.

1. *Not to examine judge's minutes.* — Jurors should not examine the judge's minutes of evidence without the direction or consent of the court. *Graves* v. *Gans.*

2. But where it appears that, though this was done, the verdict was affected thereby only in being rendered more favorable to defendants, it should not be set aside on their motion. *Ib.*

JUSTICE'S COURT.

1. *Cannot admit deposition taken out of state.* — A justice's court cannot admit in evidence a deposition taken out of the state before a notary, although the adverse party had notice of the taking and opportunity for cross-examination. *Smith et al.* v. *Stringham.*

2. But where the cause is tried *de novo* on appeal from the justice, the appellate court has discretion to receive the evidence, under sec. 28, chap. 137, R. S. *Ib.*

LAND DAMAGE.

1. *On construction of railroad.*—1. Where part of a tract of land has been taken for a railroad, if the market value of the residue is reduced by reason of the road crossing it, the owner is entitled to damages for such depreciation. *Snyder et al.* v. *Western Union R. R. Co.*

*From Hon. O. M. Conover, State Reporter; to appear in Vol. 24, Wis. Reports.

2. In such case it is not error to ask witnesses, who are farmers owning lands in the vicinity, how much in their opinion plaintiff's land has been depreciated by such road crossing it. *Ib.*

3. Nor is it error to permit the witnesses to state the reasons for such depreciation, when the jury are instructed that they are to allow damages only for the actual reduction in the market value. *Ib.*

LEASE.

Demise for years.—By a certain instrument A and B lease to C and D, their heirs, etc., a certain amount of water at a certain dam, for four years; and after a covenant by lessees to pay a specified rent, and one by lessors to raise the dam, etc., and a stipulation that lessees might purchase the water in question at a specified price, a clause is added by which lessors "further covenant and agree that in case lessees shall not purchase the water as hereinbefore provided, and shall signify their wish to lessors, their heirs, etc., at the expiration of this lease, to have the same extended, they (lessors) hereby covenant and agree, for themselves, their heirs, etc., to extend the lease for the term of ninety-nine years; provided, always, that in case said lease shall be so extended," the lessees shall pay a certain annual rent. COLE, J., was of opinion that this was not a *demise* for a future term of ninety-nine years, to take effect at lessee's sole option, and on the giving of said notice, but was merely a *covenant* to renew. DIXON, C. J., was of the opposite opinion. *Orton* v. *Noonan & McNab.*

MANDAMUS.

1. *To award contract.*—Where the law requires a public work to be let to the lowest bidder, such bidder, after his bid has been rejected and the contract awarded to another, has no absolute right to a *mandamus* to compel the execution of a contract with him; and in this case the court refuses to complicate the matter by directing the court below to issue the writ. *State ex. rel Phelan et al.* v. *Board of Education of Fond du Lac.*

2. What the rights of *the public* may be in such a case not here determined. *Ib.*

MARRIED WOMAN.

1. *Action for trespass.*—A married woman may sue alone for a trespass to land of which she was in possession, claiming it as her separate property, although her husband lived with her on the land and cultivated it for her, he having no right to the land except what those facts gave him. *Boos* v. *Gomber.*

2. If, after proof of her possession and of the trespass, the fact that she is a married woman appears on the cross-examination, parol evidence is admissible on her part to explain the nature of her possession and of her husband's occupancy, although such evidence would not be admissible to prove her *title*, or the court may have no jurisdiction to try title to land. *Ib.*

MILL OWNERS.

1. *Right of owner.*—Where, by conveyances of water at a dam, a particular owner is entitled to a priority in the use of a specified *amount* of water, this must be held to imply that he is entitled to such a *head* of water as will enable him to make a beneficial use of that amount in propelling machinery. *Samuels et al.* v. *Blanchard et al.*

2. *Wrongful diversion.*—If in such case the head becomes so low that parties subsequent in right, by continuing to use the water, prevent such beneficial use by the party prior in right, they are liable as for a wrongful diversion. *Ib.*

MORTGAGE.

1. *Evidence that deed absolute was only mortgage.*—The evidence required before a deed absolute on its face will be adjudged to be only a mortgage should be clear and convincing, such as courts of equity formerly required in such cases, and equal in force to that upon which a deed will be reformed. *Kent* v. *Lasley et al.*

2. Whether, after the death of grantee, the unaided testimony of grantor alone, however intelligent and credible, should be held sufficient in such case, *quære. Ib.*

3. In this case grantee being dead, and the only evidence being that of grantor, which the court regards as vacillating and contradictory, and unsupported by any strong corroborating circumstance, a judgment giving full effect to the deed as an absolute conveyance, is affirmed. *Ib.*

4. *Subsequently acquired property.*—A railroad company mortgaged its line of road, including its "right of way, and the land occupied by the road, with the superstructure and tracks thereon," and all its rolling stock, etc., etc., "and all other personal property appertaining to said line of road and now belonging to said company, or hereafter to be acquired by it, and all rights thereto and interest therein; and also all the future right thereto, and interest therein, to be acquired by said company," with its franchises, etc., etc. A strip of plaintiff's land, occupied by the company for its road-bed at the date of said mortgage, was *subsequently* deeded to the company, and afterward defendant purchased the road under a foreclosure of said mortgage. *Held*, that said strip of land was covered by the mortgage, and defendant took the same free of the vendor's lien for unpaid purchase-money. *Pierce* v. *The Mil. & St. Paul Railway Co.*

MUNICIPAL CORPORATIONS.

1. *Power to levy tax.*—Where a city was authorized to build a harbor, issue its bonds for the price, and raise money by taxation to pay the interest and principal thereof as they should become due, but, on its failure to issue the bonds, the contractor obtained a money judgment for the amount, and the city had no property on which execution could be levied: *Held*, that the city council had the power, and would be compelled by *mandamus*, to levy and collect a tax to pay such judgment. *State ex rel. Hasbrouck* v. *City of Milwaukee.*

2. Whether a power in a municipal corporation to contract a debt necessarily carries with it the power to raise money by taxation for its payment, is not here decided. DIXON, C. J., is of the opinion that it does, where that is the only means which the debtor has of enforcing payment. *Ib.*

NATIONAL BANKS.

1. *Taxation of.*—Shares in national banks located in this state are subject to taxation by the state, although shares in the state banks are not taxed *eo nomine.* The decision in *Van Slyke* v. *The State*, 23 Wis. 665, adhered to. *Bagnall* v. *The State.*

2. Chapter 136, Laws of 1868, which provides "for the reassessment and collection of delinquent taxes of 1865 and 1866, on the shares of national banks in this state," is valid. *Ib.*

3. The tax levied by law upon the *capital* of the state is a full *equivalent* to that levied upon the *shares* of the national banks, under said chapter; and adequate provision is made by it to prevent the rate of taxation upon those shares being greater than upon other moneyed capital in this State. *Ib.*

4. An averment that the rate of taxation upon plaintiff's shares in a national bank in this state was greater than that assessed for "state tax" upon other moneyed capital in the hands of individual citizens of the city in which plaintiff resided, *held* insufficient to show the tax illegal; it not appearing that such rate was greater than that imposed upon such other moneyed capital for state, county, and municipal purposes. *Ib.*

NEGLIGENCE.

In crossing walk.—Where a crosswalk was in such a defective condition as would render the city liable for injuries resulting therefrom without contributory negligence, the court cannot hold, as a matter of law, that plaintiff

was guilty of negligence in attempting to pass over it with knowledge of its condition. *Kavanagh* v. *City of Janesville.*

NONSUIT.

When requisite proof. — Where a motion for a nonsuit is improperly denied, but the requisite proof is afterward supplied, the error is cured. *May et al.* v. *Buckeye Mutual Ins. Co.*

NOTE.

1. *Payable in specific articles.* — In an action upon a note payable in lumber, the court confined the evidence as to the value of the lumber to the time when the note became due, and the time to which payment was extended by oral arrangement. *Held*, that there was no error of which *defendants* could complain. *Graves* v. *Gans et al.*

2. There being no pretense that defendants' liability as makers of the note was not absolute, or that it was affected by the statute of frauds, their offer to show that it was given in payment for property delivered to a third party was wholly immaterial. *Ib.*

NOTICE.

To mortgagee of rights of equitable owner. — Where P., being the equitable owner of sixty acres of land, cleared, fenced, and cultivated, by a tenant, three-quarters of an acre thereof, the land being heavily timbered and in a sparsely settled country, and the neighbors generally understanding that it belonged to, and was occupied for P., *Held*, that this was such an open, visible, notorious, and unambiguous possession as constituted notice of P.'s rights to one who took a mortgage from the holder of the legal title. *Wicks* v. *Lake et al.*

RAILROAD COMPANY.

1. *Cause of action.* — An allegation in the complaint that plaintiff's horses having strayed upon defendant's track, without any fault of plaintiff, defendant "so carelessly and negligently *ran and managed* its locomotive and cars, and its railroad track, grounds *and fences*," that its said locomotive and cars ran over and killed said horses, states a cause of action for the negligent management of *the train*, but *not* one for injuries caused by defendant's neglect to maintain proper fences, in consequence whereof the horses strayed upon the track and were killed. *Antisdell* v. *Ch. & N. W. Railway Co.*

2. But, the bill of exceptions failing to state that it contains all the evidence, it must be presumed, in favor of the judgment, that there was evidence to sustain the cause of action stated, although the evidence contained in the bill bearing upon the question of negligence all relates to the condition of defendant's fences. *Ib.*

3. *Degree of diligence.* — Under the statute which requires railroad companies to fence their tracks and makes them absolutely liable for injuries to domestic animals straying thereupon in case of their neglect to do so, such companies are bound to exercise a *high degree of diligence* in keeping their fences in a safe condition. *Ib.*

4. *It seems* that if the company has a patrol passing along the track daily, and if, when informed of any defect in its fence, it at once makes the necessary repairs, this will discharge it from liability. *Ib.*

5. But it was not error for the court to refuse to instruct the jury in this case, that "defendant was required to exercise only *ordinary* care and diligence in maintaining the fence along its road." *Ib.*

6. *Examination of party.* — Under chapter 176, Laws of 1868, a party to an action may be examined as a witness on his own behalf without notice to the adverse party, although the latter is a corporation. *Delamatyr et al.* v. *M. and P. du Ch. R. R. Co.*

7. *Negligence in providing suitable platform.* — In an action against a railroad company for injury to the person, suffered by a passenger in descending from a car to the company's platform, the court, having fairly submitted to the jury whether the platform was a suitable one and the car properly drawn up to it, did not err in refusing to submit further the questions "whether defendant had any reasonable or probable ground to expect an accident to a passenger properly descending," etc., and whether it had, for a long time before the accident, used the same platform in the same condition and in connection with the same car, etc. *Ib.*

8. Where a railroad company, by its negligence, compels a passenger to choose between incurring some risk in leaving the train, and being exposed to other inconveniences to which it has no right to expose him, and he is injured in getting off under circumstances which would not prevent a person of ordinary prudence from doing so, the company is liable. *Ib.*

REFERENCE.

1. *Stipulation to refer.* — Where parties to an action stipulate that it may be referred to any one or two of certain persons named, as the plaintiff may elect, the defendant is not entitled to any notice of the election or of the order of reference, other than the notice to appear before the referee so appointed. *Andrews* v. *Elderkin.*

2. The judge of another circuit than that in which the action is pending may be appointed referee, if the parties so stipulate. *Ib.*

3. An objection that the trial before the referee was appointed to be held in an unsuitable place should be taken before the trial. *Ib.*

RESULTING TRUST.

1. *Recording deed in fraud of prior rights.* — One who procures and puts on record a deed of land in fraud of the rights of a prior grantee whose deed is not recorded becomes a trustee of the legal title for him. *Troy City Bank* v. *Wilcox.*

2. Where such title, after a transfer to an innocent purchaser, revests in such fraudulent grantee, the trust reattaches to it. *Ib.*

SERVICE BY PUBLICATION.

1. *Affidavit for publication of summons.* — An affidavit for publication of summons, which states that defendant cannot with due diligence be found in this state, need not show *what* diligence has been used. *Sueterlee* v. *Sir.*

2. Where the order of publication states that a cause of action exists in plaintiff's favor against defendant, founded upon contract, that is (by ch. 409, Laws of 1865) evidence of those facts; and it cannot be objected, on appeal from the judgment, that the *affidavit* does not show them. *Ib.*

3. Where, through inadvertence, the evidence of due service of summons by publication was not filed before appeal taken from the judgment, the circuit court (under sec. 38, ch. 125, R. S.) may allow it to be filed as of the day judgment was entered. *Ib.*

4. The appellant, in such case, would be allowed thereupon to dismiss his appeal without costs. *Ib.*

SUPPLEMENTARY PROCEEDINGS.

Examination of debtor's wife. — In supplementary proceedings, the judgment debtor's wife may be required to disclose whether she has property of the husband under her control, and may be attached as for a contempt for refusing to answer. *Petition of Mary J. O'Brien for a Habeas Corpus.*

SURETIES FOR PUBLIC OFFICE.

Liabilities for previous terms. — Where the office of county treasurer is held by the same person for two successive terms, the sureties on his bond for the second term are not liable for moneys which should have been in his hands as such treasurer at the commencement of that term, but which he had in fact converted during his first term. *Vivian* v. *Otis et al.*

TAX DEED.

1. *Annulled ejectment.* — The time of redemption of land from a tax sale having expired on Saturday, the clerk of

supervisors promised the owner's agent on Sunday following that he would not open his office the next day until the regular hour (8 A. M.), and would then give him a fair opportunity to redeem; but, by collusion with the agent of the holder of the tax certificate, he opened the office at six o'clock Monday morning, and executed the tax deed and had it upon record. *Held*, that on these facts the tax deed might not only be annulled in equity, but avoided, as fraudulent, in ejectment. *Mather* v. *Hutchinson*.

2. Whether a tax deed can be legally executed out of business hours, not determined. *Ib.*

3. Where the complaint in ejectment is in the ordinary form, and does not disclose the origin of plaintiff's title, defendant, under a general denial, may prove any facts which will defeat the title set up by plaintiff. *Ib.*

4. When facts as to which there is no conflict of testimony show the verdict to be clearly right, judgment thereupon will not be reversed for errors in the ruling of the court. *Ib.*

TOWNS.

1. *Construction of act creating city.*—Where an act, approved March 6th, 1868, to incorporate the city of River Falls, declared that a certain part of the *town* of that name should constitute such city, and that an election for municipal officers should be held on the first Monday of said month of April, upon a notice of at least two weeks—but said act was not published until April 1st, and no election was had nor organization of a city government effected: *Held*, that the district so designated continued to be a part of the *town* of River Falls, and its inhabitants were entitled to vote at the poll of said town at the next subsequent fall election. *State ex rel. Wise* v. *Button*.

2. Declarations in said act that from and after said first Monday of April the designated district should constitute the city of River Falls, and the connection between that district and the town should be dissolved for all town purposes, must be construed, with reference to the whole scope of the act, as intended to become fully operative only when the city organization should be effected. *Ib.*

VERDICT.

In equity cause tried by jury.—Where an equity cause is tried by a jury, the court should render a judgment against the verdict unsupported by the evidence. *Blair* v. *Dockery*.

WARRANTY.

1. *In bill of sale.*—Where a bill of sale contains some express warranties, oral proof of others is inadmissible. *Merriman* v. *Field*.

2. Thus, where a vendor of lumber executed to vendee a memorandum of the sale containing warranties of title and against incumbrances, vendee could not show an express oral warranty that the lumber was merchantable. *Ib.*

3. *Implied.*—But where vendor was the manufacturer, and vendee a lumber merchant, and the lumber at the time of sale was in rafts and incapable of inspection, there was an *implied* warranty that it was merchantable. *Ib.*

4. *What does not constitute.*—Plaintiff's assurances that trees sold by him to defendants were not injured by his manner of keeping them after taking them up and before packing them, held not to constitute a warranty, where defendants were present during the time, knew how the trees were kept, and after they were packed accepted a bill of sale, paid part of the purchase-money, and agreed in writing (which contained no reference to warranty) to pay the remainder on delivery of the trees. *Baker* v. *Henderson et al.*

5. After such acceptance of the bill of sale, and the execution of such agreement, defendants could not allege damages from delay in packing. *Ib.*

WILL.

1. *Advancement.*—A will contained the following provision: "I will unto my son D. W. all the value contained in three certain parcels of land conveyed to him by me by deed on the 10th of October, 1859, excepting and reserving the sum of $1,000 with interest, according to certain notes given by the said D. W.; which said sum of $1,000 is to be added to my personal estate." *Held*, that on its face this must be construed to mean that said land had been conveyed to D. W. by way of advancement, and not to be a bequest of money equal to the value of said land. *Mulford* v. *Coon, ex'r, etc.*

2. *Conditional bequest.*—A will, after certain absolute devises and bequests, proceeds: "And whereas I have entered into a contract to sell or lease a certain portion of my mineral lands to J. C. for a certain price, which is stipulated in a written agreement between J. C. and myself, now, if the said sale is consummated, I hereby make the following bequests." Here follow bequests to X. and Y. The sale to J. C. was never consummated; but, from other causes, the testator's estate largely increased in value after his death, so as to leave a large surplus after paying all debts, bequests, and legacies. *Held*, that upon these facts alone the court could not hold the conditional bequests to X. and Y. ever to have vested. *Yearnshaw's Appeal in re Last Will of McCoy*.

3. The will contained a further clause as follows: "And lastly, if the contract between J. C. and myself should be consummated, it is my opinion there will be a surplus after paying my debts and the bequests herein before made; if so, I desire that the same be divided between my legatees in the same ratio that I have already given them." *Held*, 1. That the condition herein defined is, simply that there shall be a surplus, and not that it shall arise in the manner suggested. 2. That taking this clause with that just mentioned, *the intention* of the testator must be held to have been, that X. and Y. should take in case of such a surplus; and the court should give effect to that intention. *Ib.*

4. *Intent of testator.*—The *intention* of a testator, as collected from the will, must prevail, whenever effect can be given to it. *Eastman v. Residuary Legatees, etc.*

5. A testator devised to his wife in fee one-third of all the real estate of which he should die seized, and bequeathed her one-half of his personal property. After certain other bequests, he bequeathed to his father and mother, and the survivor of them, the use and profits of the residue of his property, devising such residue of the real estate to the executor in trust for that purpose, and added: "If at the decease of my father and mother, the value of the real estate devised to my wife, added to the amount of personal property * * * * shall not be in the aggregate $25,000, then * * * I devise and bequeath unto her such sum as will make the aggregate sum derived from my estate $25,000." The executor was empowered to sell the real estate when he might deem best, and invest the proceeds, etc.; and residuary legatees were named. After probate of the will, the whole estate was inventoried and appraised according to the statute. Certain portions of the real property were partitioned between the wife and the executor shortly after, and other portions were sold and one-third of the purchase-money paid to her. Upon a settlement of the estate after the death of testator's parents, *Held*, that, in ascertaining whether the wife had received the full amount of $25,000, the value of the lands assigned to her must be determined as follows: 1. As to such lands as she then retained, she must be charged with their value *at the time of the death of the testator's parents*, and not at the death of testator or probate of the will. 2. As to lands sold by her before the death of testator's parents, she must be charged with the price obtained for them. *Ib.*

THE ENGLISH BAR AT HOME AND ABROAD.

Of the many bodies which stand in need of an occasional fillip to keep them up to their work, few require more attention than the Inns of Court. Nothing is further from our wishes than to join in the silly and often vulgar taunts which are not unfrequently directed against them. We bear no malice against their dinners; we have little doubt that the expenditure of their incomes can be accounted for without the disclosure of any mystery of iniquity. We are ever ready to look with indulgence, if not exactly with satisfaction, on their habit of hoarding up large sums of money, which are at last laid out in new halls or libraries, not, perhaps, materially better than the old ones. Having, however, made all these concessions, we cannot acquit them of a good deal of negligence in the discharge of a most important duty — the maintenance of the character of the English bar abroad and at home. Trite as the remark is, we must observe once more that that duty will never be satisfactorily performed till the bare fact that a man is a barrister is conclusive proof that he has gone through a careful education, and passed examinations which afford a real and searching test of that fact. We think it a matter of the highest importance, socially and politically, that no one who is not thoroughly well educated, both in general knowledge and in law, should be able to call himself a barrister. This proposition will, no doubt, sound heterodox and absurd to the governing bodies of most of the Inns of Court, but we believe it to be not merely true, but of the highest importance; though not for the reasons usually assigned.

We attach little importance to the object of protecting the public against incompetence; incompetent barristers in any land practically injure none but themselves We do not attach very much importance to the effect which, as many people suppose, would be produced upon the law itself by a more elaborate education of advocates. Practically, changes in the law, and those changes in public feelings which produce changes in the law, precede and cause changes in the education of lawyers. Nor do these educational changes make so much difference as many people suppose. A man with a taste for legal speculation will generally gratify it quite apart from his education; and no education will give such a taste to a man who has not got it.

The true object of an improved education among barristers is to keep up the credit of the profession itself in the eyes of the public, and to save the social prestige and political influence it still possesses.

It may, of course, be objected *in limine* that this object is not a good one; that the public has no interest in the existence of a privileged profession; that free trade should be the rule in law as in other things, and that the best arrangement for the public interest would be that the distinction between barristers and attorneys should be abolished; that all the professional rules which distinguish between the two classes should be obliterated, and that the division both of labor and of patronage should be left to find its own level apart from all artificial rules. This no doubt is a perfectly intelligible view. We do not share it, and we do not, on the present occasion at least, propose to discuss it. We simply ask the Inns of Court this question: Is it your view? Do you wish to see the bar as a distinct profession pass away? Should you like to have the general principle of free trade applied to you with uncompromising severity? If so, there is nothing to be said upon the subject, except that you are taking exactly the right course to obtain your wishes. Neglect, for a few years more, to give the bar a right to say: "We really are in a superior position; the members of our branch of the profession are in fact persons of high education, and have proved it by submitting to the application of stringent tests," and the public will most assuredly take the free trade view of the subject. On the other hand, the institution of hard examinations, compulsory in every case as a condition of being called to the bar, would give the profession a new lease of life. No one can have observed the course of public opinion in England with any degree of care, without seeing that in every department of life there is a strong and growing inclination to respect and defer to special knowledge and vigorous organization of whatever kind. There is to be seen on all sides a reaction against the extreme application of the old fashioned theories of free trade, and it is probable that institutions which are really prepared to justify their existence by the display of some degree of vital energy have a better chance of permanence at present than they have had for a great length of time. We have no doubt that by a decided and vigorous policy the inns of court might put the bar in the course of a very few years in a position which they might hold for generations. They might be able then to say, to all whom it might concern: "You perceive that, in point of fact, we are one of the most highly educated bodies of men in the country. We are, by training, and also by tradition and *esprit de corps*, the guardians of the laws of England, and of every thing which is sanctioned and defended by those laws. Will you break up such an institution?" The answer would most assuredly be "No;" and we are inclined to believe that the public ought to return that answer to the question, even if things remained in their present position. We do not, however, believe that they will remain as they are. They rather like the bar than not. They would like to have an excuse for allowing it to retain its present position, but the reforming or destroying hand will descend upon it sooner or later unless that excuse is provided.

Many English questions are best understood when they are looked at from a little distance, and we should strongly advise any bencher who dislikes the notion of compulsory examinations, and who prefers to see the English bar stand on what he regards as the solid ground of its real intrinsic merits, to ask some one who has had colonial experience what is thought of British barristers practicing out of the four seas. We are very much mistaken, if he would not find that almost every one, in a position to form an intelligent opinion on the subject, would tell him that the absence of any real test among men who are called to the bar in England lowers the character of the English bar in the colonies beyond all calculation. Here and there, no doubt, the colonial and the Indian bars are well supplied; but, in many instances, men come out with certificates of their call who know nothing whatever of their profession, and who certainly do not give a favorable impression of it to those who are obliged to form their opinions of it from a small number of specimens. Those who know nothing at all about law, and never had the faintest intention of knowing any thing about it, may, and under the existing system occasionally do, become barristers, and make use of their right to the title in a manner which would certainly not edify those who adorned them with it. The true lesson is to be learned nearer home. In plenty of English provincial towns barristers are settled who have no more right to be members of such profession than they have to be clergymen. We could mention more than one case in which retail tradesmen (in defiance of all rules and by signing false statements) were called to the bar. It is, indeed, notorious to any one who is acquainted with the lower ranks of the profession, that it has a very low rank indeed; and that what may be described as a hedge barrister is often in every way a less respectable person, morally, socially, and intellectually, than almost the worst attorney. These black sheep of the profession might all be kept out by a fence which it would cost nothing to raise and keep in repair. The same fence would, at the same time, keep out another kind of person who is no credit to the bar, though he often makes a good thing of it — the noisy, fluent, uneducated man who has not, and is not capable of obtaining, any real legal knowledge at all, and who often gets a

considerable share of practice by the exercise of talents which do a great deal more harm than good to the community. It is, for obvious reasons, impossible to give illustrations under this head; but any one who doubts what we say may easily satisfy himself of the truth of it by a very short attendance at Westminster Hall, the Old Bailey, and the Middlesex Sessions. He will see and hear various men of a good deal of ability there whom it would have been most desirable to have thrown out of the profession before they had developed the coarse talent, and acquired the rank experience, which fill their pockets with guineas, and which continually pervert justice and create scandal of every description.

We write with a feeling that it is hopeless to try to arouse the bodies which we address. They will never be persuaded to take the steps which would save their own position and that of the profession to which they belong, of which for the most part they are very justly and naturally proud. We have some hope, however, that Parliament may be wiser than the Inns of Court, and force them to take the measures which their own interest most imperatively requires if they will not see it.—*Pall Mall Gazette.*

NOVEL POINT.

The following novel point was presented the other day, in the case of *O'Donnell* v. *The Alleghany Valley Railroad*, in the tenth judicial district of Pennsylvania, Judge STERRETT holding special term:

The cause itself had obtained considerable celebrity, having been twice tried before in the district court, and as often reversed in the supreme court for errors of law. On the 2d of March, instant, it was progressing on a third trial. In maintaining the issue on his part, the plaintiff had to call a certain Edmund Liston. Soon after the witness had been sworn, it became apparent, from his eccentric behavior and incoherent answers, that he was *intoxicated* and disqualified to give evidence; and, at the suggestion of the court he was withdrawn, and admonished by the presiding judge "to collect his thoughts" before his recall next morning. Immediately upon his withdrawal the counsel for the plaintiff, Mr. Fulton, of Delaware, and Mr. Barclay, of Pennsylvania, offered to read the judge's notes of Liston's testimony, taken on the last trial. This was objected to by the counsel for the defendant, Messrs. Golden and Neale.

The next morning the witness was recalled, but being still intoxicated, and, in consequence, unfit to testify, at the suggestion of the court, he was again withdrawn. The plaintiff's counsel now again offered the judge's notes of his testimony, taken on the preceding trial. This being again objected to, the proposition was reduced to writing, in substantially the following form:

"It appearing to the court that Edmund Liston, a witness called on behalf of the plaintiff, is incapable of testifying by reason of intoxication, the plaintiff, therefore, offers the notes of his testimony, taken by the presiding judge on the last trial, to be accompanied by due proof of their genuineness and accuracy."

This was resisted by defendant's counsel, but, after argument, admitted, and a bill of exceptions sealed. The ground taken by plaintiff's counsel was, that the *reason* for admitting notes or deposition was that the witness could not be produced, or conveniently produced, so as to enable the party to obtain the benefit of his testimony at the time. That this being the principle, it mattered not from what cause the inability arose. That the common law was a system of general principles, which progressively enlarged and adapted itself to the every-day business of life, and not a code of specified and arbitrary rules, restricted and limited to already defined or adjudicated cases. That the test of the admissibility of this evidence was the plaintiff's ability to present it in a less objectionable form. That if the witness were *dead, insane,* or *out of the jurisdiction of the court,* there could be no question of the admissibility of the offer. That in the case at bar, it was as much out of the plaintiff's power to obtain the oral testimony of this witness as in any of the instances named.

The only answer to this was that the witness was *present in court*, and, therefore, notes of his former examination could not be received.

The court remarked that it was a novel case. That neither in its experience or reading had such a question come to its knowledge; but that, upon principle and analogy, it seemed admissible. It would, therefore, admit the evidence, and give the defendant an exception. Ruled accordingly.

THE NATIONAL BANKS AND THE USURY LAW.

In superior court of Buffalo, before Judge MASTEN, the *Third National Bank of Buffalo* v. *Van Vleck and Tilden.*

This was an action upon two promissory notes of $1,000 each discounted by the plaintiff. Defense, usury. The plaintiff is a national bank, organized under the act of congress. There was no material dispute as to the facts.

It was contended, on the part of the defendants, that the case was governed by the statute of this state, and hence that no recovery could be had upon the notes. That the whole debt was forfeited. That the act of congress did not declare that the statute of usury of this state should not apply to loans made in this state by national banks, and if it did, it would be unconstitutional. On the part of the plaintiff, it was contended that the case was governed entirely by the act of congress, by which the interest only was forfeited. The court ruled that the case was to be disposed of under the act of congress. That it having been established that congress has the constitutional power to establish national banks, it necessarily follows that it can establish the rate at which they may discount paper, and the effect of taking or reserving a greater rate, and ordered judgment for the plaintiff for the amount of the notes less the interest.

Lewis & Gurney, for plaintiff; B. H. Williams, Esq., for defendant.

TAXING NATIONAL BANK SHARES.

The following decision was rendered by the United States supreme court on the 28th ult.: "*The First National Bank of Louisville* v. *The State of Kentucky*—Error to the court of appeals of the State of Kentucky. The question in this case is whether a state may lay a tax on the shares of national banks, and enforce its collection through the bank. This court hold, Mr. Justice Miller delivering the opinion, that the property in a bank, called a share, is distinct from the capital of the bank, and that a share as the property of the shareholder may be taxed, although the stock of the bank may be all invested in United States securities. The law requiring the bank officers to pay the tax does not make it a tax on or against its stock. A national bank, as an instrument of the general government, may, within certain limits, be made liable to pay such a tax; otherwise an instrument might be so created as to invade the rights of a state. These banks are subject to state law, in respect of the tax on the shares of shareholders, and they may be compelled to pay it. They could be garnished for a personal debt of a stockholder, and to make them similarly responsible for the tax is the virtual effect of the state law. The judgment of the state court was affirmed; the chief justice dissented."

IMPRISONMENT FOR THE NON-PAYMENT OF MILITARY FINES.

Judge INGRAHAM, of the Supreme Court, First district, has just rendered a decision in the matter of Sinclair, holding that the law does not authorize imprisonment for the non-payment of fines, imposed by a court-martial for the non-performance of duty. The judge said, in substance: "Two questions are submitted: *First*—Does the statute authorize imprisonment for the non-payment of militia fines? and, *Second*—If it does, is the law constitutional? The act of 1862 authorizes the officer to issue a warrant directing, first, a levy on the goods and chattels of the delinquent; and, if the goods and chattels cannot be found to satisfy the same, then to take the body of such delinquent and convey him to the jail; and the jailer is directed to keep such person closely confined two days for two dollars, and two days for every additional dollar. By the statute of 1863, page 1268, section 225, this was amended,

and the authority to order the arrest of the delinquent and his committal was omitted, while section 226 directing the jailer to keep him safely was retained and limited the imprisonment to ten days. The difficulty arises, however, from these amendments, to find any authority for the officer serving the warrant to arrest the delinquent. No such authority is now given by the statute, nor can the officer issuing the warrant order such arrest. No other person has any such authority; and, unless specific authority for the arrest is given to the marshal, he would be a trespasser in so doing. It is urged that section 242 of the original act furnishes such authority. That section only authorizes the performance of the usual duties of marshals, and to execute the processes issued. It does not authorize the marshal to do an act which the warrant does not direct. But if there was any doubt on this point, I think it removed by the eighth section of the act of 1865. The first section amends the 226th section, and the eighth section repeals the 226th section entirely. Whether these two sections are to be taken together, or the latter one is to be considered as controlled by the former, I think it clear that the same is to be considered as of no avail in aiding the defective power in issuing the warrant. There is no such section now in force in the act of 1862, and, although amended by the act of 1865, by the same act it was repealed. The only rational construction of this legislation is, that the amendment of this section was overlooked when they found the whole section was inconsistent with the abolition of imprisonment for fines. I think there is no authority to arrest the petitioner, and that he must be discharged.

A NEW HAMPSHIRE JUDGE OF OLDEN TIME.

John Dudley, of Raymond, N. H., who was a judge in that state from 1785 to 1806, was a remarkable man. Having no legal education whatever, and but little learning of any kind, he yet possessed a discriminating mind, a retentive memory, a patience which no labor could tire, and integrity proof alike against threats and flattery. He was, says the Exeter *News Letter*, a resolute, strong-minded man, intent on doing substantial justice in every case, though often indifferent to the forms and requirements of law. He was, withal, very heedless of grammar, but never failed to make himself understood. "You may laugh," said the late Theophilus Parsons, "at his law, and ridicule his language, but Dudley is, after all, the best judge I ever knew in New Hampshire." A specimen of his style has been preserved in the following conclusion of one of his charges to the jury, grammatical peculiarities excepted:

"You have heard, gentlemen of the jury, what has been said in this case by the lawyers, the rascals; but no, I will not abuse them. It is their business to make a good case for their clients; they are paid for it, and they have done in this case well enough. But you and I, gentlemen of the jury, have something else to consider. They talk of law. Why, gentlemen, it is not law we want, but justice. They would govern us by the common law of England. Trust me, gentlemen, common sense is a much better guide for us—the common sense of Raymond, Epping, Exeter, and other towns which have sent us here to try this case between two of our neighbors. A clear head and an honest heart is worth more than all the lawyers.

"There was one good thing said at the bar. It was from Shakspeare, an English player, I believe. No matter. It's good enough almost to have been in the Bible. It is this: 'Be just and fear not.' That, gentlemen, is the law in this case, and law enough in any case. 'Be just and fear not.' It is our business to do justice between the parties, not by any quirks of the law out of Coke or Blackstone—books that I never read, and never will; but by common sense and common honesty as between man and man. That is our business, and the curse of God is upon us if we neglect or evade, or turn aside from it.

"And now, Mr. Sheriff, take out the jury; you, Mr. Foreman, do not keep us waiting with idle talk, of which there has been too much already, about matters which have nothing to do with the merits of the case. Give us an honest verdict, of which, as plain, common-sense men, you need not be ashamed."

Miss L. Barkalow of Brooklyn, a student of the St. Louis Law School, was recently admitted to practice, after undergoing a severe examination before Judge Knight of the Circuit Court, St. Louis. Miss Barkalow "is twenty-two; buxom, amiable and very intelligent."

A man named Harrison Lemon, who had just completed a term of fifteen years imprisonment in the Ohio penitentiary for grand larceny, was met at the door of his cell the other day, as he was about to leave the institution, by an officer, who arrested him on another charge of grand larceny.

TERMS OF THE SUPREME COURT FOR APRIL.

2d Monday, Circuit and Oyer and Terminer, Rockland, Pratt.
2d Monday, Circuit and Oyer and Terminer, Columbia, Miller.
2d Monday, Circuit and Oyer and Terminer, Wyoming, Barker.
2d Tuesday, Special Term, Chemung, Balcom.
3d Monday, Circuit and Oyer and Terminer, Newburgh, Gilbert.
3d Monday, Circuit and Oyer and Terminer, Ulster, Peckham.
3d Monday, Circuit and Oyer and Terminer, Schoharie, Miller.
3d Monday, Circuit and Oyer and Terminer, Cortland, Boardman.
3d Tuesday, Special Term, Onondaga, Morgan.
4th Monday, Circuit and Oyer and Terminer, Suffolk, Gilbert.
4th Monday, Circuit and Oyer and Terminer, Johnstown, Bockes.
4th Monday, Circuit and Oyer and Terminer, Livingston, Johnson.
4th Monday, Circuit and Oyer and Terminer, Wayne, Dwight.
4th Tuesday, Circuit and Oyer and Terminer, Lewis, Morgan.
Last Monday, Special Term, Ontario, J. C. Smith.
Last Tuesday, Special Term, Otsego, Murray.
Last Tuesday, Special Term, Albany, Hogeboom.

LEGAL NEWS.

Three ladies of Coldwater, Mich., are studying law.

Judge Busteed is dangerously ill again in Montgomery, Ala.

The prohibitory law in Iowa has been decided unconstitutional by a Davenport judge.

A Westchester justice recently sentenced a man to one month's imprisonment for stealing an umbrella.

It is estimated that there are over one hundred young ladies engaged in the study of the law in the United States.

Judge Dibble, the lately appointed circuit judge of Louisiana, was a private in a New York regiment during the late war, and lost a leg at Port Hudson.

A novel suit has been on trial in Old Lyme, Ct., involving the ownership of the bottom of a mill pond which had been flowed for over one hundred years.

A resident of St. Louis has brought a suit against his neighbor because the neighbor's seven sons "all play the trombone at unseasonable hours of the night."

An Indianapolis justice of the peace lately married a couple, adapting the service to modern times, by pronouncing them "man and wife until separated by law."

One of the passengers on the wrecked steamer Golden City has sued the Pacific Mail Steamship Company for $10,000 damages for the privations he endured.

The grand jury of the county of Laramie, Wyoming Territory, have given notice to persons carrying on business in Cheyenne, except druggists, that every person found doing business on Sunday will be liable to be indicted.

The lawyers of Newark, N. J., propose tendering a complimentary dinner to the Hon. Joseph P. Bradley, recently confirmed associate justice of the Supreme Court of the United States, and for that purpose the board of trade have offered their rooms.

The bill allowing Judge Watrous, of Texas, to resign, on account of physical disabilities, continuing his salary and authorizing the appointment of another judge, has passed both Houses at Washington, and is now before the President for his signature.

A juror in New Orleans, who was asked as to his having conscientious scruples against the infliction of capital punishment, was somewhat puzzled at first to answer or even understand the question, but, after pondering on the subject, arrived at the sensible conclusion that in his own case he should prefer some other punishment.

A certain judge, in a recent charge, described the jail of Warren county to be "the most infamous one in the State," and referring to the case of a criminal who escaped from it three successive times, remarked, that he would "instruct the jury that breaking out of such a jail as that did not create any presumption against the defendant, and should not prejudice his case." And he thought "that the breaking jail by said defendant was a reasonable and proper act."

Judge Paxson, of Philadelphia, the other day, in sentencing an aged man for an aggravated perjury, stated that the recent act of Assembly, enabling a party to a suit to testify in his own cause, had produced a frightful increase of perjury. He asserted that the most strenuous efforts are constantly made, by means of false oaths, to shield the burglar and assassin, and that it was not an uncommon occurrence for persons to come into the criminal courts completely encased in an armor of perjury.

The Philadelphia Supreme Court has decided a case brought by the State against the Philadelphia Saving Fund Society for $700,000 unclaimed deposits, which the Commonwealth claimed to have escheated on the ground that it consisted of deposits the owners of which had died leaving no lawful claimants to them. The decision says: "The proceedings to escheat surplus funds being illegal, both in its object and its modes, the judge at *nisi prius* was right in enjoining it. The act is contrary to law, and is prejudicial to the interests of the Society and its depositors. No one can doubt that an attempt to wrest from it its surplus funds with the apparent approbation of the court must impair it and curtail its business, and might subject it to the seizure of its deposits, forcing it either to suspend payment, or to impair its assets by sacrifices necessary to maintain its solvency."

NEW YORK STATUTES AT LARGE.*

CHAP. 37.

AN ACT to amend an act entitled "An act to provide for the sale and conveyance of any interest in real estate belonging to lunatics," passed April thirtieth, eighteen hundred and sixty-four.

PASSED March 2, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All the provisions of the act entitled "An act to provide for the sale and conveyance of any interest in real estate belonging to lunatics," passed April thirtieth, eighteen hundred and sixty-four, shall, as far as the same are applicable, be applied to the estates of idiots and persons of unsound mind, and to proceedings for the sale and conveyance of any interest in real estate belonging to them.

§ 2. This act shall take effect immediately.

CHAP. 38.

AN ACT to amend an act entitled "An act to amend title sixteen, chapter eight, part three of the Revised Statutes, relative to proceedings for the drainage of swamps, marshes and other low or wet lands, and for draining farm lands," passed May twelfth, eighteen hundred and sixty-nine.

PASSED March 2, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follow:

SECTION 1. The act entitled "An act to amend title sixteen, chapter eight, part three of the Revised Statutes, relative to proceedings for the drainage of swamps, marshes and other low or wet lands, and for draining farm lands," passed May twelfth, eighteen hundred and sixty-nine, is hereby amended by adding the following section to the same:

§ 19. If by death, resignation, removal from the county wherein the said lands are situated, inability to serve or any other cause, the office or any or all of said commissioners shall become vacant, the said county judge shall appoint a suitable person who shall be a freeholder residing in the county or counties wherein the lands are situated, and who shall not be interested in said lands nor in any of them, to fill every such vacancy; and every person so appointed shall be entitled to enter upon the discharge of the duties of such office as soon as he shall have filed his oath of office in the manner required in the third section of this act.

§ 2. This act shall take effect immediately.

CHAP. 49.

AN ACT to amend the act entitled "An act in relation to preferred causes in the Supreme Court and Court of Appeals," passed April fifth, eighteen hundred and sixty.

PASSED March 8, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section one of the act entitled "An act in relation to preferred causes in the Supreme Court and Court of Appeals," passed April fifth, eighteen hundred and sixty, is hereby amended so as to read as follows:

§ 1. Actions in which executors and administrators are sole plaintiffs or sole defendants, and actions for the construction of, or adjudication upon, a will, in which the administrators with such will annexed, or the executors of such will, are joined as plaintiffs or defendants with other parties, shall have a preference in the court of appeals and in the supreme court at the general, special and circuit terms thereof, over all actions except in criminal cases, and may be moved out of their order accordingly.

§ 2. This act shall take effect immediately.

CHAP. 78.

AN ACT to amend an act entitled "An act requiring compensation for causing death by wrongful act, neglect or default," passed December thirteenth, eighteen hundred and forty-seven.

PASSED March 16, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The second section of the act entitled "An act requiring compensation for causing death by wrongful act, neglect or default," is hereby amended so as to read as follows:

§ 2. Every such action shall be brought by and in the name of the personal representatives of such deceased person. And the amount recovered in every such action shall be for the exclusive benefit of the husband or widow and next of kin of such deceased person, and shall be distributed to such husband or widow and next of kin in the proportion now provided by law in relation to the distribution of personal property of persons dying intestate. And in every such action the jury may give such damages as they shall deem a fair and just compensation, not exceeding five thousand dollars, with reference to the pecuniary injuries resulting from such death to the husband or widow and next of kin of such deceased person. And the amount of damages recovered in any such action shall draw interest from the time of the death of such deceased person, which interest shall be added to the verdict and inserted in the entry of judgment in such action, provided that every such action shall be commenced within two years after the death of such deceased person. But nothing herein contained shall affect any suit or proceedings heretofore commenced and now pending in any of the courts of this state.

§ 2. This act shall take effect immediately.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the Secretary of State which is attached to the copy from which we print. — ED. L. J.

The Albany Law Journal.

Albany, April 16, 1870.

WARREN'S LAW STUDIES.*

The difficulties which beset the student in acquiring a knowledge of the law, are not met with in the study of any other subject. The vast accumulations of principles and arbitrary rules that constitute the body of our jurisprudence, would, even if they could be collected together into a consistent and orderly arrangement, present to the mind of the learner a task whose magnitude and complexity would dishearten him, and in most instances deter him from any attempt to master the science of the law. But such a task would be easy in comparison with that which must actually be undertaken by one who hopes to become eminent, or even to obtain a respectable standing at the bar. Between the youth entering upon the course of study required to fit him for his chosen profession and the accomplished lawyer, lie many years of intense and tedious mental labor — labor rendered doubly burdensome by the delay and uncertainty of its results. The world at large little know or comprehend the training through which that man has passed who can judiciously conduct the trial of an action at law. Unto them are shown the keen perception, the ready invention, the accurate memory, the mind rich with accumulated learning; but the long-continued and solitary reading, the intense application, and the elaborate and toilsome investigation are hidden. They admire and envy the great advocate; they congratulate him upon the place to which he has attained, and inquire what are its honors and its advantages. But they do not ask him concerning his journey thither — if the way was long and unpleasant; if there were any dangers thereon; if there were devious paths into which he and his fellow travelers sometimes wandered; if he passed any wrecks or ruins. Could they but know concerning these things, they would seek less eagerly for admittance to a profession whose prizes, however many and brilliant, are to be gained only through patience and self-sacrificing labor.

The chief obstacle standing in the way of every young man during the whole period of his legal apprenticeship, is the want of a good guide that will point out to him not only the law books he should read, but also the course of training he should undergo to qualify himself for each branch of his profession. Doubtless a living teacher could do this better than any book, but very few of those competent to properly instruct have time to spare from the duties of their business for such a purpose. Besides, the great expense of this method forbids its general adoption, and law studies must hereafter be pursued, as they have always been, chiefly under the student's own direction. The law schools indeed afford important assistance, but it is only through careful individual self-culture that the lawyer can be educated. It is not merely by the reading of books, by the copying of papers, by attendance upon court, or by the combination of all these, that he fits himself for the duties of his calling. His knowledge of general matters — of history, of politics, of science, his style of composition, his gesture, his voice, his memory must be cultivated. In fact, there is hardly any department of human culture that he can neglect. The perfect lawyer is the highest conceivable type of intelligent man. Liable to be called upon to act in the place of every man, he must contain within himself all that is essential, all that is excellent, in each. Existing indeed only in imagination, he is nevertheless the pattern each member of the profession should strive to imitate, being assured that the more nearly he approaches the pattern, the greater will be his chances of worldly success, to say nothing of the intellectual satisfaction that results from the practice of wisdom and virtue.

Many books have been written for the purpose of furnishing to students a guide to the study of legal science, but, so far as we have been able to discover, they have proved of little use to those for whom they were designed. To be sure, they each contained much that was valuable to the learner, but they usually failed to instruct him in precisely the two points upon which he wished to be enlightened. They neither told him what to do nor how to do it. Some would furnish him with a long list of books to be read, many of which his own good sense would tell him he had better let alone; and give him advice as to the character of his habits, intermingled with quotations from the law reports and the classics. Some would furnish a list of selections from various books (sometimes unpublished ones), to be read piecemeal. Some would contain a digest of elementary law, while others would be chiefly occupied with a panegyric upon the study of legal science. Each would be laid down, and the disappointed reader would, in his mind, pass upon it the judgment: "Thou art weighed in the balance and found wanting."

Fortunately, however, for the students at law in England and America, the subject was taken up by Mr. Samuel Warren, the result being the first edition of the treatise whose title heads this article. Perhaps among living men no person could have been selected better qualified for a work of this kind. As a lawyer he has since taken his stand among the first in England. He was the friend and associate of John William Smith, whose brilliant genius, whose classic style, whose massive acquirements, placed him at the head of English writers upon law, and almost at the head of the bar, before he was thirty-six. He was the trusted and intimate companion of Sir William Follett, who died attorney-general of England and the leader of the British bar. From the close and constant intercourse between these men and Mr. Warren, and from intimations made by him, we are led to believe that he received much assistance from them in the preparation of this work, and that it is rather the record of the experience and training of three eminent and accomplished barristers than the theoretical system of one.

*A Popular and Practical Introduction to Law Studies, by Samuel Warren, of the Inner Temple, D. C. L., F. R. S., one of Her Majesty's counsel, etc. Edited, with alterations and additions, by Isaac Grant Thompson, counsellor at law. Albany: John D. Parsons, Jr., 1870.

But it was not merely as a lawyer that this author was fitted for his work. As an essayist he ranked high, and as a novelist he was perhaps excelled by but one or two in England. As was to be expected, he produced a work which we believe is admitted to be the most readable law book ever printed. Written in an easy, pleasant style, it is filled with sound practical advice, just what the law student requires to direct him in the prosecution of his studies.

Some years subsequently, the first edition, although unusually large, having been exhausted, and a new edition being called for, the author re-wrote the entire work, altered its arrangement and added a large amount of new matter. The second edition was soon exhausted, and the work was, for some years, out of print, until Mr. Warren, at the urgent solicitation of the English bar, again revised the work, and a year or more ago a third edition, in two large volumes, was issued. Both the first and second editions were reprinted in the United States, but they have been for some years out of print.

The work before us is founded upon the three editions, selecting from each what appeared to the editor to be necessary for the American student. Which edition was followed, we confess ourselves unable to determine. We believe that the first (which is clearly the best) is almost wholly here. The second, in which the arrangement seems to be the principal improvement, is to some extent noticed. From the third, the production of the author's maturer years, we find many things reproduced here. The American editor, whose previous works have shown him to be competent to perform the task he has undertaken, has added numerous notes, some original, some selected, we think, from the sayings of such men as Webster, Choate and others. For the benefit of the American, as such a treatise would be of little use to the English, law student, there has been added a chapter on forensic eloquence. To those who desire to study the oratorical art we recommend the perusal of this chapter.

In order that those who have not met with Mr. Warren's writings may understand his style, we have selected at random some quotations from this work. To the English law student this would hardly be necessary, as this, his treatise, has become as familiar as "household words." To the general reader we need not recommend a production of the author of "The Diary of a Physician" and of "Ten Thousand a Year." We quote from page 68:

"*Ambition!* what shall be said of it? That the first fruits of a legitimate professional ambition will be the patience, sobriety and steadfastness of which so much has been already said. If we beget not *these*, it will be the mere will-o'-the-wisp that has led thousands out of their way into the dreary bogs and marshes of failure, there to sink

'Unseen, unpitied, hopeless!'

True legal ambition is an eminently calculating and practical quality. It disposes the student to apportion his strength to his task; to set his eyes upon worthy objects, and go about the attaining them, worthily; to look before he leaps. It deals with matter of fact alone, utterly discarding reliance on chance—a word banished from its vocabulary. It sets a fool speculating on possibilities; a wise man calculating probabilities. The one thinks, with vain sighs and wishes, on the *end* alone; the other, having steadily fixed his eyes on it, resolutely sets about considering the *means;* the one it makes passive, the other active. It is, in short, the balance-wheel in the well-regulated mental mechanism; a mere disturbing force in one ill-regulated. If the most eager and gifted of its votaries should deign to ask for a suggestion, it might be earnestly whispered in his ear: Be calm, calculating, long-sighted; think not of hop, step and jump, in the law, but rather gird up your loins for a long pilgrimage; for the prize is splendid, but distant. You cannot hasten the march of events, any more than the husbandman the course of vegetation. However anxious for his crops, however rich the soil, however propitious the weather, he must drop his seed into the ground and wait and watch till it makes its appearance in due season. So it is especially with the legal husbandman. Learn your profession thoroughly; do not attempt to become, as Lord Bacon has it, 'a lawyer *in haste;*' the thing, be assured, is impossible; learn slowly, and well, that which will so enable you to acquit yourself brilliantly, when "the occasion sudden" shall have arrived. A contrary method will mar all your prospects, rendering you turgid with conceit and presumption, and inflaming foolish friends with fallacious expectations."

And again from page 282:

"The plan of study heretofore sketched out may be so disposed, as to secure at once the opportunity of cultivating practical and theoretical knowledge; it will enable the pupil to illustrate the principles of pleading and practice by daily examples, and, by early disposing of those studies which are always the most disheartening and disgusting to a beginner, leave him at leisure to pursue those other and more recondite researches, by which alone the whole theory and principles of the law can be thoroughly understood. A clear and connected view, early obtained, of the course of an action—of the relations and connections between the different branches of pleading, practice, and evidence, will interest the young lawyer the more in those matters which put in motion the secret machinery of the courts, with which he has already been familiarized. Let him, therefore, in the words of Lord Coke, 'diligently apply himself to a timely and orderly course of reading—that, by searching into the arguments and reasons of the law, he may so bring them home to his own natural reason, that he may perfectly understand them as his own.'"

We have given these extracts not as an example of what the book contains, but merely to show the character of the author's composition.

What Blackstone is to the law of England, and Kent to the jurisprudence of America, Samuel Warren has, as we believe, by this, the crowning effort of his life, become to the study of the common law. To the young man entering the inns of court in England, we could give no better advice than to purchase and read thoroughly "Warren's Law Studies." To the young man here in our country anxious for civil honors, earnest in the pursuit of those distinctions, those favors, those rich rewards which surely follow him who has well trained himself for the profession of the law, we will likewise say that he will find here, certainly marked, the way through which he may pass to the country he is seeking. He will be led along no easy road, but taking this book as his guide and counselor, listening to and obeying its teachings, making it his constant companion and his preceptor, he will be certain to secure emolument and reputation and position.

Mrs. General Gaines has applied to the Legislature of Louisiana to pass an act enabling her to settle the New Orleans claims, which the courts have already decided in her favor.

LAW AND LAWYERS IN LITERATURE.*

XIV.

IRVING,

In the History of New York, records a wise judgment given in a lawsuit by Governor Wouter Von Twiller. Wandle Van Schoonhoven claimed a balance of account against Barent Bleecker. The governor despatched his constable for the defendant, armed with his jack-knife as summons, and his tobacco-box as warrant. The parties produced their books of account. "The sage Wouter took them one after the other, and having poised them in his hands, and attentively counted over the number of leaves, fell straightway into a very great doubt, and smoked for half an hour without saying a word," at length he gave it as his decision that, inasmuch as the books were of the same thickness and weight, the accounts were balanced, the parties should exchange receipts, and the constable pay the costs. This adjudication diffused general joy throughout New Amsterdam, and not another lawsuit took place during the whole of his administration.

The author records that the province was governed without laws, and recommends the example, on the ground that laws excite the obstinacy of men, and that, unless they were continually warned that certain things are wrong, they would do right out of pure ignorance, and because they knew no better.

CERVANTES.

Right here is a good place to skip over to the Island of Barataria, and speak of that other wise governor, Sancho Panza, who made a very judicious decision on a criminal complaint, which will always stand as a model for succeeding judges. A woman haled a man before the governor, complaining that he had ravished her. She told the usual story, unexpected attack, unavailing resistance, and final triumph of superior force. The defense was that the complainant consented. There were no other witnesses. Under modern administration, where women have no rights, the defendant would have been mulcted and imprisoned in short order. But Sancho was not of the nineteenth century. He asked the man if he had any money about him, and, being answered that he had twenty silver pieces, commanded him to give them to the woman, and ordered the latter to leave the court. She went, with thanks to this "second Daniel." Then Sancho directed the man to pursue her and take away the money from her. He went, and both soon returned into the governor's presence, the woman clamoring for fresh justice against the man for attempted robbery. "What, then," asked the governor, "did he take the money from you?" The woman replied that she was no such baby as to allow him to succeed, and the man confessed that he could not, with all his strength, accomplish the governor's purpose. Therefore the governor commanded the woman to return the silver, and banished her the realm, under pain of stripes; with the intimation that if she had been as careful of her chastity as of her money, she would never have lost it. The exquisite humor of this scene can be appreciated only by reading the chapter; it is too broad for quotation, without having first received the revisions of some such gentleman as Mr. Bowdler, who edited an expurgated Family Shakspeare. Peter Pindar has imitated this scene, but, as is not unusual in imitations, the humor is converted into deliberate vulgarity.

CHATTERTON,

I suspect, hints at the state of the law of libel under Mansfield, and at Mansfield, when he says, in "The Whore of Babylon:"

> "Complaints are libels, as the present age
> Are all instructed by a law-wise sage,
> Who, happy in his eloquence and fees,
> Advances to preferment by degrees;
> Trembles to think of such a daring step
> As from a tool to *Chancellor* to leap:
> But, lest his prudence should the law disgrace,
> He keeps a longing eye upon the mace."

He, at any rate, referred to Mansfield in the following passage from the same poem:

> "And who shall doubt and false conclusions draw
> Against the inquisitions of the law,
> With jailors, chains, and pillories must plead,
> And Mansfield's conscience settle right his creed.
> Is Mansfield's conscience, then, will Reason cry,
> A standard block to dress our notions by?
> Why, what a blunder has the fool let fall;—
> That Mansfield has no conscience, none at all."

COLERIDGE

Must have been suffering from an under-dose of opium when he wrote "The Devil's Thoughts," in which he says:

> "He saw a Lawyer killing a viper
> On a dung-hill hard by his own stable;
> And the Devil smiled, for it put him in mind
> Of Cain and his brother Abel."

There is some dispute as to whether Coleridge or

SOUTHEY

is entitled to the discredit of the foregoing. Southey was very fond of writing about the Devil, and of connecting him with lawyers. Thus, in "The Alderman's Funeral," in speaking of the dead man's donations to charity, he calls them

> "Retaining fees against the Last Assizes,
> When for the trusted talents, strict account,
> Shall be required from all, and the old Arch-Lawyer,
> Plead his own cause as plaintiff."

In this view Southey will have an easy term at the day of judgment, for he had but few talents to account for.

In "All for Love, or a Sinner well Saved," the poet represents Satan as claiming a human soul by virtue of a bond signed by the unhappy mortal:

> "Mine is he by a bond,
> Which holds him fast in law:
> I drew it myself for certainty;
> And sharper than me must the Lawyer be
> Who in it can find a flaw."

But Basil the Bishop defeats him by showing that the bond was framed with fraudulent intent:

> "This were enough; but more than this,
> A maxim, as thou knowest, it is,
> Whereof all laws partake,
> That no one may of his own wrong
> His own advantage make."

The Fiend gives up, beaten, and says to himself:

> "The Law thy calling ought to have been,
> With that wit so ready and tongue so free,
> To prove by reason, in reason's despite,
> That right is wrong, and wrong is right,
> And white is black, and black is white,—
> What a loss have I had in thee!"

There is something delightfully absurd in the idea of Southey, who has written so many dull and interminable poems, reprimanding the lawyers for their verbosity. But in "The Doctor" we find the following: "That crafty politician, who said the use of language is to conceal our thoughts, did not go further in his theory than the members of the legal profession in their practice; as every deed which comes from their hands may testify, and every court of law bears record. You employ them to express your meaning in a deed of conveyance, a marriage settlement, or a will; and they so smother it with words, so envelop it with technicalities, so bury it beneath redundancies of speech, that any meaning which is sought for may be picked out, to the confusion of that which you intended. Something, at length, comes to be contested; you go to a court of law to demand your right; or you are summoned into one to defend it. You ask for justice, and you receive a nice distinction — a forced construction, a verbal criticism. By such means you are defeated and plundered in a civil cause; and, in a criminal one, a slip of the pen in the indictment brings off the criminal scot free. As if slips of the pen in such cases were always accidental! But because judges are incorruptible (as, blessed be God, they still are, in this most corrupt nation), and because barristers are not to be suspected of ever intentionally betraying the cause which they are feed to defend, it is taken for granted that the same incorruptibility, and the same principled integrity, or gentlemanly sense of honor, which sometimes is its substitute, are to be found among all those persons who pass their miserable lives in quill-driving, day after day, from morning till night, at a scrivener's desk, or in an attorney's office!"

PEPYS.

The diarist, good Mr. Pepys, records that he went "to the office, where Mr. Prin come to meet about the Chest business; and, till company come, did discourse with me a good while in the garden about the laws of England, telling me the main faults in them;" (of course, that took a good while;) "and, among others, their obscurity of long statutes, which he is about to abstract out of all of a sort; and as he lives and parliaments come, get them put into laws, and the other statutes repealed, and then it will be a short work to know the law." What a pity Mr. Prin couldn't have been immortal! By a singular collocation, the only other topic touched upon in this paragraph is the Plague, which, he blesses God, "is decreased sixteen this week." I suppose the Mr. Prin referred to was William Prynne, who lost his ears on account of some ungallant reflections on Queen Henrietta Maria, in his screed against play-actors, entitled "Histrio-Mastix;" if this supposition is correct, and Pepys correctly reports him above, he certainly could well spare something from his ears.

PUCKLE.

Of James Puckle little is known save that he wrote a curious book, first published in 1711, entitled "The Club: in a Dialogue between Father and Son," with the motto, *in vino veritas*, in which various characters are described, alphabetically, and with but one character to each letter, by the Son, who tells his Father that he met them at the Club the night before, where they all got drunk; whereupon the father moralizes. The letter L affords an opportunity to describe a Lawyer. The other characters are Antiquary, Buffoon, Critic, Detractor, Envioso, Flatterer, Gamester, Hypocrite, Impertinent, Knave, Moroso, Newsmonger, Opiniator, Projector, Quack, Rake, Swearer, Traveler, Usurer, Wiseman, Xantippe, Youth, Zany. So we are placed among what cannot on the whole be called good company. The dialogue on Lawyer is as follows:

"*Son:* A wit of the law that made it as much his care and business to create feuds and animate differences, as the Vestal Virgins used to maintain the sacred fire, growing drunk, boasted himself an attorney. That he had a knack of improving trifles and frivolous contests into good fat causes, as he called them. That he could set man and wife at variance the first day of their marriage, and parents and children the last moment of their lives. That he seldom troubled his head with Coke upon Littleton; the law lay in a little compass; trials chiefly depended upon evidence, and let him alone to deal with witnesses."

The Father then tells the oyster story, better told by Boileau, and continues:

"Suppose it possible to fence against combination, subornation and false evidence; can any be certain the justice of his cause shall outweigh the subtilty of his adversary's counsel?

'Will not fear, favor, bribe and grudge,
The same cause several ways adjudge?
Do not some juries give their verdict,
As if they felt the cause, not heard it;
And witnesses, like watches, go
Just as they're set, too fast or slow?'

"The rich man that attempts at his charge to make all knaves honest will quickly see his error, or die a beggar; but the poor fool that rashly engages in a lawsuit, commits himself to the house of correction, where he must labor stoutly to pay his fees; in short, whoever flies to a knavish lawyer for succour, as the sheep to the bushes in a storm, must expect to leave a good part of his coat behind him. Yet, still it is the quacks in the law, like those in physic, make the remedy worse than the disease. According to the proverb, good right wants good assistance; and seeing Great Britain affords so many lawyers, whose learning and integrity render them the light and wonder of the age, he is doubly a fool, that to defend his right, applies himself to a scab."

The edition of Puckle's Club, from which I quote, is charmingly illustrated with wood-cuts, after designs by Thurston, and the passage cited is preceded by a vignette exhibiting "a limb of the law bribing a witness."

EARLE.

Another curious book is "Microcosmography; or, a Piece of the World Discovered, in Essays and Characters," by Doctor John Earle, Bishop of Salisbury, first published in 1628. Among the characters is "an Attorney:"

"His antient beginning was a blue coat, since a livery, and his hatching under a lawyer; whence, though but pen-feathered, he hath now nested for himself, and with his hoarded pence purchased an office. Two desks and a quire of paper set him up, where he now sits in state for all comers. We can call him no great author, yet he writes very much, and with the infamy

of the court is maintained in his libels. He has some smatch of a scholar, and yet uses Latin very hardly; and, lest it should accuse him, cuts it off in the midst, and will not let it speak out. He is, contrary to great men, maintained by his followers — that is, his poor country clients, that worship him more than their landlord, and be they never such churls, he looks for their courtesy. He first racks them soundly himself, and then delivers them to the lawyer for execution. His looks are very solicitous, importing much haste and dispatch, he is never without his hands full of business; that is — of paper. His skin becomes at last as dry as his parchment, and his face as intricate as the most winding cause. He talks statutes as fiercely as if he had mooted seven years in the inns of court, when all his skill is stuck in his girdle, or in his office window. Strife and wrangling have made him rich, and he is thankful to his benefactor, and nourishes it. If he live in a country village, he makes all his neighbors good subjects; for there shall be nothing done, but what there is law for. His business gives him not leave to think of his conscience, and when the time, or term of his life is going out, for dooms-day he is secure; for he hopes he has a trick to reverse judgment."

LA FONTAINE.

The twentieth Fable of the Second Book of La Fontaine contains a point of law derived, I infer, from Phædrus. The translation given below is Elizur Wright's, slightly modified:

"If what old story says of Æsop's true,
The oracle of Greece he was,
And more than Areopagus he knew,
With all its wisdom in the laws.
The following tale gives but a sample
Of what his fame has made so ample.
Three daughters shared a father's purse,
Of habits totally diverse.
The first, bewitched with drinks delicious,
The next, coquettish and capricious,
The third, supremely avaricious.
The sire, expectant of his fate,
Bequeathed his whole estate
In equal shares to them,
And to their mother just the same —
To her made payable when (and not before)
Each daughter should possess her part no more.
The father died. The females three
Were much in haste the will to see.
They read and read, but still
Saw not the willer's will.
For could it well be understood
That each of this sweet sisterhood,
When she possessed her part no more,
Should to her mother pony it o'er?
'Twas surely not so easy saying
How lack of means would help the paying.
What meant their honored father, then?
Th' affair was brought to legal men,
Who, after turning o'er the case,
Some hundred thousand different ways,
Threw down the learned bonnet,
Unable to decide upon it;
And then advised the heirs,
Without more thought, to adjust affairs.
As to the widow's share, the counsel say,
We hold it just the daughters each should pay
One-third to her upon demand,
Should she not choose to have it stand
Commuted as a life annuity,
Paid from her husband's death, with due congruity.
The thing thus ordered, the estate
Is duly cut in portions three,
And in the first they all agree,
To put the feasting lodges, plate,
Luxurious cooling mugs,
Enormous liquor jugs,
Rich cupboards, — built beneath the trellised vine, —
The stores of ancient, sweet Malvoisian wine,
The slaves to serve it at a sign;
In short, whatever in a great house,
There is of feasting apparatus.
The second part is made
Of what might help the jilting trade, —
The city house and furniture,
Genteel and exquisite, be sure,
The eunuchs, milliners, and laces,
The jewels, shawls and costly dresses.
The third is made of household stuff,
More vulgar, rude and rough —
Farms, fences, flocks, and fodder,
And men and beasts to turn the sod o'er.
This done, since it was thought
To give the parts by lot
Might suit, or it might not,
Each paid her share of fees dear,
And took the part that pleased her.
'Twas in great Athens town
Such judgment gave the gown.
And then the public voice
Applauded both the judgment and the choice,
But Æsop well was satisfied
The learned men had set aside,
In judging thus the testament,
The very gist of its intent.
The dead, quoth he, could he but know of it,
Would heap reproaches on such Attic wit.
What! men who proudly take their place
As sages of the human race,
Lack they the simple skill
To settle such a will?
This said, he undertook himself
The task of portioning the pelf;
And straightway gave each maid the part
The least according to her heart —
The gay coquette the drinking stuff;
The drinker next the farms and cattle;
And on the miser, rude and rough,
The robes and lace did Æsop settle;
For thus, he said, an early date
Would see the sisters alienate
Their several shares of the estate.
No motive now in maidenhood to tarry,
They all would seek, post haste, to marry;
And having each a splendid bait,
Each soon would find a fitting mate;
And leaving thus their father's goods intact,
Would to their mother pay them all in fact, —
Which of the testament
Was plainly the intent.
The people, who had thought a slave an ass,
Much wondered how it came to pass,
That one alone should have more sense
Than all their men of most pretense."

Among La Fontaine's Tales is one entitled "Le Juge de Mesle," of which I propose the following paraphrase:

"Two advocates, unable to agree,
Perplexed a plain provincial magistrate;
They so enwrapped the case in mystery,
He could conjecture naught of its true state.
Two straws he did select, of length unequal,
And offered to the parties, with close grip;
Defendant drew the long, and as a sequel,
Acquitted, gaily from the court did trip.
The other members of the court deride,
But he replies, My blame you must divide;
My judgment is no novelty in law,
For you at hazard frequently decide,
And never pull, nor even care, a straw."

The story of the Oyster and the Litigants has been so spiritedly told by La Fontaine that, although it has been so often told, I will venture to present it in Wright's excellent version:

"Two pilgrims on the sand espied
An oyster thrown up by the tide;
In hope both swallowed ocean's fruit,
But ere the fact there came dispute.
While one stooped down to take the prey,
The other pushed him quite away.
Said he, 'twere rather meet
To settle which shall eat.
Why, he who first the oyster saw,
Should be its eater by the law;
The other should but see him do it.
Replied his mate, if thus you view it,
Thank God the lucky eye is mine.
But I've an eye not worse than thine,
The other cried, and will be cursed,
If, too, I didn't see it first.
You saw it, did you? Grant it true,
I saw it, then, and felt it too.
Amidst this very sweet affair,
Arrived a person very big,
Yclept Sir Nincom Periwig.
They made him judge — to set the matter square.
Sir Nincom, with a solemn face,
Took up the oyster and the case;
In opening both, the first he swallowed,
And in due time his judgment followed.
Attend; the court awards you each a shell.
Cost free; depart in peace and use them well.
Foot up the cost of suits at law,
The leavings reckon, and award,
The cash you'll see Sir Nincom draw,
And leave the parties — purse and cards."

READING OF REPORTS.

Whether a *continuous* perusal of the reports should be attempted at all—and if so, whether the pupil should commence with the old ones, or read from the *latest* up to the old ones—is a question which need not long occupy our attention. There is such a prodigious amount of intricate and obsolete law in all the old reports, including even Coke, Plowden and Saunders, as renders it eminently unadvisable for the student to attempt a continuous perusal of them. It would be calculated only to bewilder, mislead and distract him from those practical studies to which chamber tuition will incessantly call his attention. There is, besides, something proverbially repulsive in the form and structure of our early reports; which, to say nothing of their dreary black letter, Norman French, and Dog-Latin, are stuffed with all manner of obscure pedantries, scholastic as well as legal, involving the simplest points in endless circumlocutions and useless subtleties. "The ancient reporters," says Chancellor Kent, "are going very fast, not only out of use, but out of date, and almost out of recollection, yet cannot be entirely neglected. The modern reports, and the latest of the modern, are the most useful, because they contain the last, and, it is to be presumed, most correct exposition of the law, and the most judicious application of abstract and eternal principles of right to the requirements of property. They are likewise accompanied by illustrations best adapted to the inquisitive and cultivated reason of the present age." Perhaps, therefore, the student, if desirous of a systematic study of the reports, cannot do better than adopt the suggestions of Mr. Raithby, and read from the latest reporters upward.

"In reading the reports," he observes, "I cannot help thinking you will find it most convenient to begin with the latest, referring, as you read, to the earlier cases, as they are cited and commented upon in the *judgments* of the case you are reading, always making a note of reference from the earlier to the later cases.

"The first thing to attend to in this branch of your reading is, a comprehension of the facts of the case; and I think it may be stated, as a general rule, that any report that does not present a clear and succinct statement of the facts on which the point for decision arises may be passed over; in the next place, read attentively the judgments of the court; and, lastly, such parts of the arguments of counsel as are commented upon by the court, and no other, except in a few instances, perhaps, for the sake of elucidation; for you will soon find your reading so voluminous as to demand the greatest attention, not less to the expense of time than of money.

"You will never consider your reading of any particular case complete, until you have also read and understood, and noted in the proper place, not only that particular case, but the statutes and cases referred to by the court in the judgment; and I should think you would find it useful, if, after having made yourself thoroughly acquainted with the facts of any given case and before you proceeded to judgment, you were now and then to compose an argument, either extemporaneous or written, and compare it with the arguments advanced by the counsel, but particularly with the judgment of the court. By this method you will have a chance of acquiring legal views, and a course of legal reasoning, which you will find in many instances to be essentially different from the common notions of mankind, and for want of which, many men of superior understanding have failed at the bar."

Every case in the current number of the reports must, of course, be read over with care proportioned to its importance; and it would be highly advantageous if the student were to associate with himself, in his task, some steady, intelligent friend. Their mutual suggestions would be both interesting and instructive. It is of the utmost importance that he should thus become accurately acquainted with the new decisions, which often effect very serious alterations, and of which it might be very dangerous to remain ignorant. This observation is at present of particular consequence taken up as the courts are with the construction of many new statutes and rules, entirely remodeling the law of practice, pleading and evidence. If the student be pressed for time, let him content himself with reading over the statement of facts, the qustions arising out of it, and the leading judgment; but he must not *lightly* omit perusing the arguments of counsel. He must also cast a careful eye over the short abstract of the pleadings which is often prefixed to the report; and if he find in them any thing worthy of remembrance, let him *make a note of it for future use.* He will often, by these means, find most timely and valuable assistance in his own practice. One hint more may be offered on this part of the subject—that the student should guard against an implicit reliance upon the *marginal abstracts* of the reporters. Learned and experienced though they, many of them, be, it is not to be expected that, in the very difficult task of extracting the essence of a long and intricate case, often with very little time at their disposal, they should escape sometimes very serious errors. The student would find it an admirable exercise to endeavor to frame *his own* marginal abstract of a case, and then compare it with that of the reporter. A little practice of this kind would soon enable him to detect the points of a case, to seize upon its true bearings; and this, as we have already seen, is one of the most distinguishing characteristics of what may be termed a judicial mind. The student should, however, not only thus *read* the reports, but should frame *exercises* upon them. Let him take a particular case either in the older or more recent reports, and copy out the statement of facts with which it commences; carefully abstaining from reading the marginal abstract, the arguments of counsel, or the judgments. Let him consider this as a case prepared originally for his own examination, and do his best. Let him rely upon it that his case is admirably stated—not a word wanting or thrown away, not a fact redundant or deficient—in short, there is every thing necessary to conduct him to a correct conclusion. If he cannot master it—if he feel himself at sea—that he cannot, after due diligence, discover the authorities, let him, as it were, *take the corks;* that is, let him copy from the bottom of the page the references to the cases cited by counsel. Having consulted and carefully considered these, let him read the arguments of the

counsel, to see how they used the authorities he has been examining. He must then close the book; and, after due consideration, write his opinion upon the whole case. He may then turn to the report, and read the opinions of the judges, where he will observe *their* masterly way of dealing with the case; the brevity, discrimination, acuteness, and learning they exhibited! By these means, our student makes himself the pupil of the judges themselves; the best of their labors, and those of experienced and skillful counsel, are his; he is early accustomed to the best mode of legal investigation; he has ever before his eyes the finest models of legal reasoning. Thus he will see exactly where and how far he strayed—his mischoice and misuse of the authorities. Thus will he be first driven to his own resources; then he may gradually enlighten himself by the hints and arguments of counsel; and, finally, be corrected or corroborated by judicial wisdom. Surely, this is a course worth pursuing! Is it not worth a little labor? Is it not calculated to rouse his attention, and keep up his interest? If he will but give this scheme a fair trial, he will not regret having listened to the suggestion.* *From Warren's Law Studies.*

LEGAL REFORM.

We remember once sitting down with a young gentleman for the purpose of teaching him to play cribbage. During the first game he was docile to an exemplary degree, and mastered the rudiments with facility. Upon the second, he began to suggest sundry changes in the method and rules of the play, which he was confident would be found to be great improvements. Knowing that he had never before in his life seen a cribbage board, it occurred to us then (and always does when we recall the incident), that a little more reserve on his part would not have been unbecoming the occasion.

Suggestions of legal reform in large part come from the younger members of the profession. It is natural that it should be so. When a student, we remember taking down a book designedly written to bring about a change in the law as it then stood. Our genial preceptor, knowing the character of the volume we had begun upon, quietly remarked: "Young man, you had better spend your time in finding out what the law is, and leave what it ought to be to others." We admitted he was pretty nearly right, but we always like to think we were not altogether wrong.

Students often wonder at some positive rule of law. So once in a while do old lawyers, for the matter of that. But beginners cannot in every instance feel the weight of the reason, or of the necessity which has given the law the shape that it has in certain cases. Old practitioners, never happening to think much about it, find no particular objection to urge against the rule that works comparatively well in practice. But there is many a legal fiction which both young and old accept with reluctance. If truth be sometimes stranger than fiction, it may be observed that it can never be stranger than an occasional legal fiction.

A young man lacks experience, an important, but not an indispensable requisite for a reformer. But to offset this, there is a freshness and fairness with which he comes to the study of legal principles; and he makes the acquaintance of positive rules of law under no prejudice. His judgment is not mature; but then, again, it is not controlled by a routine that sees no good in going out of the old beaten track. He believes that "*Stare decisis*," and "*Stare super vias antiquas*," are excellent maxims, but they are not to exclude all other wisdom. A lawyer who has been but a few years at the bar may have as clear and comprehensive a view of practice as one who is outside of the profession, or as a "non lawyer," to borrow Bentham's peculiar nomenclature. He enjoys the added advantage of a stand-point from within the profession. He may use the eyes of unprofessional observers, while he shares the feelings of every lawyer.

We say this much, because it is not unfrequently surmised when an argument in behalf of legal reform is brought forward, that it is only the effort of some tyro in the profession, who does not evince the respect he ought for the law which was good enough for his father before him; and that he will think better of it when he gets further along in business. The chances are much greater that he will not think of it at all, amid the engrossing cares of a successful practice.

Without disclosing whether we are ourselves gray-haired or not, we simply lay it down as our belief, that every suggestion of reform which occurs to a lawyer, old or young, if on examination it ripens into a conviction, ought to be brought to the notice of the profession. Discussion is needed. If there is any thing in the proposed change, it will not altogether die out of the thoughts of those who happen to have read or seen it. One may gain a fact, well worth preserving, from even an idle perusal of the paper that enwraps a bundle. The Arabs say: "Save every scrap of paper; a sentence from the Koran may be inscribed upon it." A new idea once broached silently does its work.

With this consideration in view, we hope every lover of his profession (and no one has a right to be in it who does not love it), will do what he can to promulgate any well digested scheme of improvement. Not mere fault finding, without the remedy, but plain practical suggestions, fortified by intelligible and precise reasons, will commend themselves to the profession everywhere. For although lawyers are conservative, it has never been charged against them that they decline to hold themselves open to conviction.

*Rufus Choate has left the following record of the plan of study pursued by him for the greater portion of his life:

"Let me record," says he, "a most happy method of legal study, by which I believe and feel that I am reviving my love of the law; enlarging my knowledge of it, and fitting myself, according to the precepts of the masters, for its forensic discussion. I can find, and have generally been able to find, an hour or two for legal study beyond and beside cases already under investigation. That time and that reading I have lost—no matter how. I have adopted the plan of taking a volume of Massachusetts Reports and of making a full brief of an argument on every question and in every case, examining all authorities; finding others, and carefully composing an argument as well reasoned as well expressed, as if I were going to-morrow to submit it to a bench of the first jurists. At the completion of each argument I arrange the proposition investigated in my legal, common-place book, and index them. Already I remark renewed interest in legal investigations, renewed power of recalling, arranging and adding to old acquisitions, increased activity and attention of mind, more thought, more effect, a deeper image on the memory, growing facility of expression. I confess delight, too, in adapting thus the lessons of the great teachers of rhetoric to the study of the law and of legal eloquence." T.

JOHN C. SPENCER.

II.

John C. Spencer was born at Hudson, N. Y., August 12th, 1786. He was a son of Ambrose Spencer, distinguished in the history of the state of New York as the able and gifted compeer of Schuyler, Hamilton, Burr, Jay, Clinton, Tompkins, and those other great men, whose elevated patriotism, whose vigorous and comprehensive minds, adapted them to that critical period in the history of the nation, which succeeded the adoption of the first constitution.

From his earliest years young Spencer was accustomed to the society of distinguished, learned and gifted men. His first knowledge of politics was drawn from witnessing those vindictive partisan contests inaugurated by Burr and Hamilton.

He inherited the great abilities, the inflexible will, and many of the imperfections of his father.

At a very early age, he was sent to the Hudson Academy, where his active mind exhibited itself in the rapid proficiency which he made in his studies. Three years at this school completed his preparatory course, and in the year 1799 he entered Union College. During his first year in that institution he was one of the disputants in a debate which took place in the presence of Dr. Nott, afterwards, and for many years, the distinguished president of that college. In the course of the discussion, he indicated that dominant taste for philosophic research, that happy faculty of bringing ancient parallels to bear on contemporary events, which distinguished him in after life. Such was the ability and tact which he exhibited on this occasion, that Dr. Nott conceived for him an admiration which resulted in a life-long friendship.

It is a singular circumstance that the last professional service ever performed by Mr. Spencer was in the defense of this early friend. The work which he did on that occasion was the offspring of the most disinterested friendship, prompted by those precious remembrances of the past so sacred to sensitive minds. The powerful legal gladiator had retired from the bar and from public life; but the appeal of his venerable friend reached him in his retreat, summoning him again to the forum, where his victorious logic exhibited the unimpaired powers of his intellect. But his victory was dearly won. Such was the ardor with which he entered that contest, such the mental labor which it forced upon upon him, that his health was greatly impaired, and he was soon hurried to the tomb.

No victory won amid the ambitious struggles of his youth or middle age, was more brilliant or more gratifying to him. But it was not the pleasure resulting from the triumph of professional success that gave such peculiar zest to this victory; it was the consciousness that he had aided in the triumph of a friend; that "it was a votive offering laid on the altar of friendship."

It may have called forth censure and criticism from cold and callous casuists, raised murmurs of reproach from defeated interests; but those who, amid the sordid policies, the pitiable selfishness of this wrong world, can appreciate generosity, can understand the emotions inspired by real friendship, will see in this last act of John C. Spencer all that is great in the hero, all that is magnanimous in the martyr.

While at college young Spencer was distinguished for close and thorough application to his studies, for the same thoughtful reserve, the same unpopular reticence, which marked his character as the lawyer, legislator, and cabinet minister. In July 1803, at the age of seventeen, he graduated with honor, and immediately commenced the study of law with his father.

Ambrose Spencer was then attorney-general of the State, in the plentitude of that political and professional career, which renders him a marked and striking character in the history of the state. An accurate reader of men, a keen discerner of those motives which prompt them to action, he could penetrate, by a kind of intuition, into their deeper and more hidden interests. Calm, sagacious, designing and ambitious, he possessed abilities which would have rendered him all powerful at the court of the Eleventh Louis, and elevated him to a high position in any age. Moved by a will of iron, and prompted by a determined nature, it is not strange that he attained a commanding influence in the age in which he lived.

He was a brother-in-law of DeWitt Clinton, whom he opposed, or with whom he coincided, as ambition or resentment dictated. That he often successfully opposed his illustrious and powerful brother-in-law, sufficiently attests the strength of his character and the power of his influence.

Amid the sharp political controversies of his day, he was often attacked through the press by able and powerful opponents, but as he wielded a gigantic pen, from whose point there flowed a subtile logic, a withering, though polished sarcasm, he was understood to be a dangerous foe in that field of warfare.

At the close of the year 1803 he was appointed by Governor George Clinton a justice of the supreme court, and some years later he was advanced to the dignity of chief justice of the state, a position which he held until after the convention of 1821. Thus, through the long period of over twenty years, he pronounced from the bench of the supreme court those opinions which have enriched the legal learning, not only of the state, but the nation, and characterized him as one of the ablest lawyers and most accomplished judges of his age.

As a writer, he aimed at no graces of language or ornamented diction, and yet his style was of almost crystalline purity—of inherent dignity, and replete with learning.

His manner while on the bench was grave, dignified, austere, stern, and decided, but always impartial. He permitted no familiar approach, no importunity from counsel. Lawyers who addressed him used the most respectful language, while he in turn observed a high-toned courtesy toward the bar. In demanding and observing these amenities, Judge SPENCER did not stand alone. The judges, as well as the lawyers, of that period, observed and maintained a dignity in the court room which rendered all present conscious that they were in the temple of justice.

Judge SPENCER doubted the propriety of innovation in the arrangement of the courts or in the administration of justice. Every encroachment upon the independence of the judiciary he regarded as a step taken toward the disintegration of our legal system and the destruction of our rights.

His imperious nature, his ambition — the means to which he sometimes resorted to gratify it — his unrelenting hatred to his enemies, were among his faults as a politician and legislator. None of these, however, affected him in the discharge of his judicial duties; and yet as a judge he was not entirely faultless. Such was Ambrose Spencer. From whatever point of view we may examine the character of this extraordinary man — whether as a scholar, lawyer, statesman or judge — although imperfections and errors will be observed — still he must be regarded as one of the great luminaries which have adorned the bench and the bar of the Empire State.

After pursuing his studies for some time with his father, young Spencer was appointed by Governor Tompkins his private secretary. He discharged the duties of this position so acceptably that he became an especial favorite with the governor for life. But, desiring to complete his legal studies, he returned to the office of his father before the expiration of Mr. Tompkins' official term. In 1807, when Mr. Madison was elected President of the United States, he was selected by the electoral college of the state to carry its vote to Washington, and before his return he made the acquaintance of the President elect — an acquaintance which through life was profitable and agreeable to both parties. Thus Mr. Spencer entered public life in his extreme youth, and continued in it until the shades of old age fell upon him.

After his return from Washington, he continued his legal studies without interruption until July, 1809, when he was called to the bar. Very soon after this event he was united by marriage to a daughter of James Scott Smith, a highly respectable citizen of New York city. Miss Smith was a young lady of rare accomplishments, possessing that high cast of character which eminently qualified her for the wife of John C. Spencer.

At this period Western New York began to attract the attention of the adventurous spirit of the east. It was then a comparatively uninhabited country; still the home and the hunting grounds of the aborigines. Among those who decided upon emigrating to that country, which promised so much to industry and enterprise, was Mr. Spencer. Accordingly, early in September, 1809, accompanied by his bride, he set out for the land of lakes and rivers. After a long and weary journey they reached Canandaigua. The charming country, enlivened by the beauties of early autumn, the prospect of its rapid advancement in cultivation and improvement, and the beautiful location of the village, determined him to make it his future home.

He was then in the twenty-fourth year of his age — in that period of life which intervenes between the effervescence of youth and the practicable energy of manhood. He possessed, however, those qualities of sagacity and learning which was beyond his years. With a few law books and fifteen dollars in money, he commenced that professional career which rendered his name memorable in the history of his native state.

The only boarding place which he could obtain in the village for himself and wife was in the family of a Mr. Bates, then the keeper of the county jail; and within a few days after their arrival at Canandaigua, they were comfortably domesticated in pleasant rooms in the Ontario county prison.

"I have brought you a long way from your home only to lodge you in jail at last," said Mr. Spencer, playfully, to his wife, on taking possession of their room. "Yes, but it will be a delightful captivity, since you are to share my prison with me; for you know, Spencer, that I am for the remainder of my life to play Ruth to your Boaz," was the pleasing reply.

Mr. Spencer soon rented an office, took possession, and arranged it. With some pride he affixed on its door his sign, with the words, "*J. C. Spencer, Attorney at Law*," on its surface. The next spring, through the undeviating kindness of the man who never forgot a friend, Daniel D. Tompkins, he was enabled to have the words, "*and master in chancery*," placed upon it.

A MINISTRY OF JUSTICE.

Closely connected with the arrangements for the more uniform administration of justice, which the lord chancellor has now in view, is the proposal which has, from time to time, been advocated of a MINISTRY OF JUSTICE. We published about a year ago several articles which contained a detailed scheme for the establishment of an office of this kind.

We now return to the subject, because the only chance of doing any practical good by the publication of such schemes lies in frequently directing the attention of the public to them, so that they may at last become common-place and familiar.

We understand by a ministry of justice a permanent department of state, established and maintained for the purpose of carrying out reforms of the law and gradually reducing it into a complete and systematic shape. It cannot be said that the subject is neglected; it would be more like the truth to say, that it attracts almost too much attention. Every sort of volunteer speculation is lavished upon the subject, and such speculation is of all degrees of value — some of it being very good, some serviceable in its way, and a great deal utterly wearisome and beside the purpose. It would also be most unjust to forget or to underrate the importance of the official contributions which have been, and are being, made to the subject. The drafting of important public acts for some years past has been admirably good, and has been conducted on really scientific principles, by men whose public services and conspicuous ability are perhaps not sufficiently well known to the public at large. There is every reason to hope that great progress has been made in the systematic and complete consolidation and renovation of the statute book itself, and that before long we shall see the statute law at least reduced to a complete and systematic form. But, good as all this is, it is far from being enough. It is in the nature of a cleansing of the Augean stables; but it leaves untouched the source of evil. It furnishes no security that the mischiefs which are now being removed by degrees will not begin to re-appear as soon as we have got rid of them. A well-imagined and properly constituted ministry of justice would give us this security. It would, in course of time, throw the law of the coun-

try into that which, no doubt, is its proper form — the form of a comprehensive and organized science, based upon, and, in its turn, influencing to the highest degree, the constitution and gradual development of human nature. In order to produce this result, it is necessary, in the first place, to recognize one or two important fundamental principles. The most important of all, is the principle that law is, and from the nature of the case always must and will be, a growing and shifting science.

It does not refer to a single state of facts, like the disposition and movements of the heavenly bodies, which is the subject-matter of astronomy; nor is it capable of being reduced to a set of abstract principles—like those of mathematics—which can be applied with unerring certainty to every new combination of facts which does or possibly can arise. It is merely a collective name for all the various rules which men have found it convenient to establish from time to time for the regulation of their different affairs; and it has all the completeness and scientific character of which it is capable, when it has been thrown into a shape which clearly displays the principles upon which these various rules depend, and the relations which exist between the different institutions which they regulate. As all the institutions among which we live are continually being altered and modified, it follows that, into however systematic and scientific a shape the law may have been thrown at a particular time, each modification which altered circumstances may require will diminish and, *pro tanto*, destroy that character, unless provision is made for its introduction into that part of the system to which it properly belongs, and for the modification of the other parts in such a manner as to preserve, as far as possible, the general effect of the whole. The law, in short, may be compared to a house to which continual additions are required for the sake of adapting it to altering circumstances. It is surely obvious that, unless these alterations are made by one and the same architect, and unless he is thoroughly acquainted with, and so to speak, penetrated by, the general design and spirit of the whole building, the result will be general confusion, and the destruction of all unity of design whatever; and this will ultimately make the building about as intricate and as unmeaning as a rabbit warren. What we wish to see in a ministry of justice is, a permanent establishment or staff of architects of this kind, fully in accord with the general spirit of the whole system, and creating and keeping up a perpetual official tradition as to the manner in which alterations should be made in it. Let us consider how this could be done. In the first place, all government bills ought to be drawn in an office so constituted. In the second place, all amendments proposed upon such bills in parliament ought to be referred to it to be reported upon from the judicial point of view, and such reports should be printed and laid before the houses of parliament for their information. We are much mistaken if the effect of this would not be to nip in the bud a considerable number of amendments, and to prevent the recurrence of many disgraceful pieces of botching and patchwork to be found in the statute book. In short, in a modified degree, and as far as would be consistent with the authority of parliament, a ministry of justice ought to resemble more or less the old Scotch lords of the articles, whose consent was necessary to the introduction of measures into the old Scotch parliament. There would, however, be one broad distinction. The lords of the articles exercised their discretion as to the measures proposed according to their view of the policy embodied therein. Such a body as we suggest would report only upon their merits or demerits as part of a system of jurisprudence, and these reports would be simply so much information supplied to parliament upon a technical matter of which members of parliament have not, and cannot be expected to have, any peculiar means of knowledge.

Besides superintending new statutes, a ministry of justice ought to be charged with the duty of continually revising the existing statute book. There is no real reason why the public should not do in an authoritative manner what private authors are continually doing as a professional or literary speculation. Every lawyer knows "Chitty's Statutes." It contains all acts of parliament of practical importance, arranged in the order of their subjects, the repealed sections and acts being omitted. A small supplement is published annually, and, at intervals of some years, perhaps six or eight, a new edition is published, in which all the repealed statutes are left out, and all the new matter is arranged in its proper place. The book thus grows in bulk to a certain extent, but not with a tenth part the rapidity of the Statutes at Large, to which a volume of many hundred pages is added regularly every year. Good as it is, "Chitty's Statutes" has, and can have, no authority at all. It is a mere handbook; but a ministry of justice might give us a book of the kind which would be authoritative, and would contain the whole working statute law.

Besides exercising this influence upon statutory legislation, such a body as we are describing might undertake duties equally important with regard to the common law. The "Law Reports," which are at present a mere private speculation supported by the subscriptions of barristers and attorneys, might be put under its superintendence, and it might, by degrees, codify such parts of the common law as are susceptible of such an arrangement. This, in a little time, would produce great simplification in the law, and thus avoid an immense amount of expense and uncertainty in forms too numerous and intricate to specify.

In addition to these operations, which would affect the body of the law itself, a properly constituted ministry of justice might discharge a variety of executive functions of the highest importance, which are now discharged imperfectly or not at all. Should a public prosecutor be appointed according to the scheme which we have suggested, or according to any other, he would naturally take a place in such a body. The function which is at present most irrationally thrown upon the home secretary, of acting as a court of appeal in certain criminal cases, and which is discharged by him in a manner which, in certain cases, creates public scandals of the worst kind, might be discharged easily and well by such a body, in a manner and upon principles to which we may

take an opportunity of referring upon another occasion; but, above all, such an office would be invaluable as a sort of counsel to the law officers of the crown. This would be a great object, even if the law officers were, as they ought to be, debarred from private practice. The work of advising government upon the legal aspect of all sorts of public questions is not only quite work enough for one man to do, but it is work for the due performance of which mere professional distinction affords a very imperfect security. It by no means follows that, because a man is an eminent advocate who has attained a distinguished parliamentary position, he is qualified to advise in matters, for instance, like the stoppage of the Alabama or the proclamation of martial law. He may or may not give a good opinion on such matters, and it must be conceded that, on the whole, governments usually are well enough advised as far as legal questions are concerned; but, if the attorney or solicitor-general had official advisers who would do for him what an under-secretary does for a secretary of state, there would be a far better security than there is at present for the soundness of his advice. In point of fact, the law officers have advisers of a sort, who are commonly known by the elegant name of "devils." There is *the* devil (*par excellence*), the charity devil, and, we believe, some others of minor importance. The mention of these gentlemen — of whom, notwithstanding their uncouth title, we wish to speak with every sort of respect — serves to introduce another observation. It may be asked: Who is sufficient for these things? If you want an office to discharge functions of such importance, where will you get people capable of filling it? The answer is, that we have got them already, and that all that the institution of such an office would involve would be the collection into one body of a number of *disjecta membra*, which, as matters stand, do certain parts of the work as well as any one need wish them to be done. Give them a little more dignity — more open and avowed responsibility and power, treat them less as the servants of ministers, to whom, in truth, they stand in the place of instructors, and they will do all that they do at present as well as they do it at present, besides a great deal more which at present they cannot do at all. If the question is asked, who is to draw government bills? the answer is, the same person who draws them now; unless, indeed, you can find some one who could do it better. Similar answers may be returned to the questions: Who is to consolidate and edit the statutes? Who is to advise the attorney-general? Who is to codify cases? Who is to be public prosecutor? All these functions are discharged by public servants or as private speculations; and they are done admirably well in many cases; in a thoroughly effective, competent manner in all. All that we want is to see these various rays brought together so as to converge in a single focus. Give the various persons whom we have mentioned or referred to a collective existence and a quasi-corporate responsibility, like that of the Indian council for instance, and they will be able to do ten times as much, and to manage it ten times as well, as they can at present, when they act individually, without getting any credit for their labors, and without any official position or character beyond that of clerks, responsible only to their immediate official superiors, and unknown to the public at large.

CURRENT TOPICS.

In fixing the salaries of judicial officers under the new constitutional provision, the legislature of New York seem disposed to allow surrogates about three-quarters as much salary as county judges. We think this can only result from an inadequate knowledge of the extent of the duties of the different offices. Except for chamber business, the county judge performs his duties at fixed terms, which he can arrange so as to reserve to himself vacations at such times as suit his own convenience. The county clerk is the clerk of his court, and no merely clerical work is devolved upon the judge. He has no books to keep charge of, and all papers in proceedings before him are prepared and presented by attorneys who practice in his court. A stenographer attends upon his court for the purpose of taking minutes, and every provision is made for relieving him from all unnecessary labor.

In thus affording aid to the county judge, as far as possible, we think the rules regulating the practice before him are wise. We want to see the surrogate treated with the same liberality. The practice in his court is more intricate than in the county courts. The questions presented to him frequently involve large amounts, and require the exercise of as great judicial experience and erudition as are required in any court in the state. To fill the office properly a man of ability is required. In many cases parties appear without counsel, and the duty of preparing all the papers is performed by the surrogate. The records are kept and cared for under his direct supervision. His clerk must be procured at his expense, and is in no sense an independent officer, who is responsible for his acts to the community at large. His office must be kept open at all times, and cannot be regulated by fixed terms. We insist that, considering the extent of the duties to be performed by the surrogate, and the importance of the questions to be decided by him, his salary should be made sufficiently large to command the services of an officer competent in all respects to satisfactorily perform the duties of the office. A niggardly salary can only result in incompetent officers, and more injury and loss to the estates brought into court, than will be compensated for by what is saved to the tax-payers.

The conventions to nominate judges for the court of appeals will meet in Rochester — the democratic on the 27th and the republican on the 28th of this month. These nominations should be controlled by the bar of the state, and if the members of the profession will interest themselves actively in the matter, the selection may be determined by them. The fact that the tenure of office has been extended to fourteen years, renders it peculiarly important that great care and circumspection should be exercised in these nominations. We have before expressed the opinion that the selections should be chiefly made from those who have had experience in the duties of a judge. There

are lawyers of undoubted ability anxious for the position, but the safer course to pursue is to select men who have been subjected to the test of experience on the bench and who have proved themselves eminent jurists as well as able lawyers. Such there are in the state, and such we hope will occupy the next court of appeals bench.

The article on "A Ministry of Justice," which we give in another column, contains some suggestions which are worthy of consideration in this state. A Bureau of Justice, or something of the kind, will be ultimately necessary here, to bring any sort of order out of the chaos and confusion into which hasty legislation is fast plunging our laws.

The decision of the United States supreme court permitting the legal tender question to be argued in the *Latham* case, has led to the belief that the decision in the Hepburn-Griswold case may be reversed, consequently the Hon. J. B. Beck, member of congress from Kentucky, has moved the court for the reopening of that case. The court has the motion under advisement. It is said that no decided case will be reopened unless it be requested by one of the concurring justices, and it therefore depends upon that contingency whether the case will be reopened.

Mr. Assemblyman Fields has introduced a bill, which provides as follows:

"Any attorney or counselor at law who heretofore acted, or may hereafter act, as attorney or counselor for any party to an action, suit, or proceeding, or who shall hereafter accept a retainer as counsel for any person, and who, in the course of such action, suit, or proceeding, or in any consultation with his client as counsel, has acquired or may acquire any information in confidence from such client, or has advised or hereafter shall advise any client that he may lawfully do any act or thing, and who shall hereafter use the information thus obtained in any action, suit, or proceeding, adverse to such client, or who shall appear as attorney or counsel in any action, suit, or proceeding brought against such client, or any of his or its agents or officers, for the purpose of obtaining any relief against him or them on the ground of the illegality of any action which such attorney or counsel shall have advised as aforesaid, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be punished by imprisonment in the county jail not exceeding one year, or by a fine not exceeding $1,000, or both."

It is certainly humiliating to believe that there is any necessity for the enactment of such a law to regulate the conduct of members of an honorable profession. We have the consolation of knowing, however, that the evils aimed at have been confined chiefly, if not entirely, to "the wars of the railroad kings."

We were in hopes, now that the United States supreme court has decided to hear arguments on the legal tender question, that the matter would be disposed of quickly, but the court seems to be as easy in the matter as a damsel of sixteen. It has three times in conference fixed the day for the hearing, and has as many times postponed it. The day is now fixed for Monday next. On the motion for the last postponement an interesting episode occurred in the court. The chief justice informed the attorney-general, that, according to his recollection, the case under consideration had been ordered to abide the decision in the case of *Hepburn* v. *Griswold;* and his recollection was backed by that of Justices CLIFFORD and NELSON, but it was stated by other justices that the recollection of the chief justice had not been deemed by the majority of the court sufficient ground to justify a refusal to hear the cases. It is now stated that Mr. Justice BRADLEY will not take part in the decision, inasmuch as he is interested in the issue, being a stockholder in the Camden and Amboy Railroad, and, until recently, counsel for that road. In that event, the decision of the case now before the court will probably stand four to four, and the Hepburn decision will escape the fate of being reversed.

A matter has arisen in the second judicial district of this state of importance to the general public, and we believe, not without interest to the profession. Some months since the Postmaster-General saw fit to direct postmasters to refuse to deliver and to send to the dead letter office all letters that they believed to be addressed to fictitious persons or firms. In obedience to this order, the postmaster at Williamsburgh detained certain letters containing money directed to various persons and firms, but which were called for by one person. An injunction was issued by Judge Cardozo forbidding the postmaster from forwarding the letters to Washington. A motion was made in the United States court in Brooklyn to set aside the order of Judge Cardozo. The result we have not learned. Without reference to the jurisdiction, which is the principal point urged, and which, we suppose, must be decided in favor of the postmaster, it seems to us that the order of the Postmaster-General is not only an outrage upon the sanctity of private correspondence, but is in violation of the law. The postal department was instituted, as we understand, for the purpose of conveying letters and papers, and not as a censor of public morals. If a knave can defraud a fool or another knave by advertising that he will, upon the receipt of one dollar, send the value of five dollars, it is not the duty of the public authorities to stand between the parties. Much less is it the duty of those who, by law, oversee the transportation of the communications of the people, to determine what packages shall reach the parties to whom they may be directed. The mails should be sacred, and it rests with the government to determine whether our postal service shall be like that of France and Austria, uncertain and dangerous to those who employ it, or like that of England, so excellent and careful that an open envelop containing money may pass around the world safely.

OBITER DICTA.

Labor limæ — filing demurrers.

Job must have been satisfied with his trials. He was never known to move for a new one.

Some lawyers seem to think judicature a tan-yard — clients' skins to be curried — the court the mill, and the thing "to work on their leather with" — *bark.*

Somebody speaks of a pettifogger who was never satisfied unless he was on the wrong side of a case with no merits.

If he had gone and "told his bondsmen how choleric" he was, would the action have been *information*, or *on the bond?*

The following collection letter is said to have had the desired effect:

"Sir: Claim *v.* You. In order to establish justice, insure domestic tranquillity, promote your general welfare, and secure the blessings of liberty to yourself and your posterity, I can be found at my office from 8 A. M. till 5 P. M."

It is odd to see what poor stuff passes sometimes for wit. Here is a specimen of a story often told: "A lawyer, being sick, made his last will, giving all his estate to fools and madmen. Being asked the reason for so doing, he said: 'From such I *had* it and to such I *give it* again.'" We wonder if the point of the testator's sanity was raised upon that will?

One day an "ornamental judge" was harnessing up to go to Concord to attend court, when his horse kicked him, and the injury was so serious that a messenger was dispatched to announce his inability to be present. He arrived breathless in the presence of Judge ——, who was sitting alone in open court. "Judge Jones—wants me to say—your honor—he can't come—he's ben *kicked sensible* by a horse."

"Well, if that's the case," quietly responded Judge ——, "we must get along without him." And then, bending over to the clerk, he added, in a whisper that was loud enough to attract the attention of the whole bar: "Wouldn't it be well enough to send that horse down to kick the other judge?"

In New Hampshire, twenty years ago, "side judges" were in fashion. They were usually honest farmers of good common sense, but with an entire absence of legal knowledge, and they sat one on each side of a *bona fide* judge. It was thought their practical everyday information might assist that portion of the court which knew any law; at any rate, there they were, with the name and dignity of "judge," if not with full judicial powers.

"One hot afternoon, in the middle of a prosy case," said Judge ——, who never was enthusiastic over the old system, "I turned to the only other occupant of the bench who was awake, and remarked: 'This is a pine bench we are sitting on, isn't it?' He said he rather thought it was, and that was the only opinion I ever heard him pronounce."

Mr. Justice Maule would occasionally talk to the jury in a style that they could not well misunderstand. He once said: "Gentlemen, the learned counsel is perfectly right in his law; there is *some* evidence upon that point; but he's a lawyer, and you're not, and you do not know what he means by some evidence; so I'll tell you. Suppose there was an action on a bill of exchange, and six people swore they saw the defendant accept it; and six others swore they heard him say he should have to pay it, and six others knew him intimately and swore to his handwriting; and suppose on the other side they called a poor old man, who had been at school with the defendant forty years before, and had not seen him since, and he said he rather thought the acceptance was not his writing, why there'd be *some* evidence that it was not, and that's what Mr. —— means in this case."

The following from a young lawyer in Cincinnati is not bad:

An old darkey, very much in distress, came into my office the other day and wanted to hear "what de law told him on dat subjeck." It seems he had made a will, and given his house to a young and enterprising colored man. The latter, without waiting for the old gentleman's demise, sold the house. The sable patriarch was rather startled at that, but the chief burden of his complaint seemed to be, that it went at too low a figure. The purchaser agreed with the anticipating devisee to let him off from the bargain on payment of a handsome bonus. When the aged proprietor heard of it, he came to me and wanted to know whether he "war boun' to raise dat money." We thought, in view of the Fifteenth Amendment, we were safe in telling him he was n't."

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF IOWA.*

AMENDMENT.

1. *Rule under the statute.* — Under the liberal provisions of our statute, to *allow* amendments, is the *rule*, to refuse them the exception. *Pride* v. *Wormwood.*

2. *Rule exemplified.* — In an action commenced on a contract not mature, the petition alleged that the defendant was about to dispose of his property with intent to defraud his creditors, and ask an attachment. There was no allegation that nothing but time was wanting to fix an absolute indebtedness. To this petition defendant answered without demurring or otherwise attacking its sufficiency. Subsequently, and after the contract under which the suit was brought had matured, the parties proceeded to trial upon the issues joined; and after the introduction of some testimony by the plaintiff, he offered an amendment to his petition, to the effect that, at the time of commencing his action, defendant was about to dispose of his property with intent to defraud his creditors; that nothing but time was then wanting to fix an absolute indebtedness; that since the commencement of the action the time for performance had expired, and that plaintiff had now a complete cause of action. Judgment was prayed as in the original petition. In asking this amendment plaintiff offered to submit to such terms as to costs or continuance as might be imposed. The court refused to allow the amendment, and instructed the jury to find for the defendant. *Held*, that the ruling was erroneous. *Ib.*

APPEAL.

1. *From railroad right of way assessment.* — In the absence of any statutory direction as to the manner of taking an appeal from the assessment of damages for right of way, it seems that any act of the party usually required in cases of appeal from one tribunal to another is sufficient. *Robertson* v. *The Eldorado R. R. & Coal Co.*

2. It is accordingly *held* that notice of appeal to the opposite party is sufficient. And it seems that in case of appeal by the land owner no bond is necessary. But if one should be held necessary, the omission to file it would not operate to dismiss the appeal, as in such case the court could require one to be filed. *Ib.*

3. *Failure to file papers.* — The failure of the officer to file papers until the first day of the next term after the appeal was taken, constitutes no sufficient ground for dismissing the appeal. *Ib.*

4. *Failure to pay docket fee: rule of court.* — A rule of the district court to which a cause was appealed, provided, that if the filing fee was not paid before noon on the first day of the term, the appellee might pay the same, and on motion have the appeal dismissed or judgment affirmed. *Held*, where the filing fee was not paid by the appellant until after noon of the first day of the term, but before the filing of a motion of the appellee to affirm, that the motion was properly overruled. *Ib.*

5. *Notice: service on railroad director: appearance.* — *Semble*, that service of notice of appeal upon a director of a railroad company is sufficient under section 2825 of the Revision. But if not, an appearance by the appellee to

* From E. H. Stiles, Esq., Reporter. To appear in 27th Iowa.

object to the service would operate as a general appearance, and cure the defect. *Ib.*

6. *From general term.* — The general term is an intermediate appellate tribunal provided by law for a substantial purpose, and causes taken on appeal thereto should be there argued, examined, and decided with appropriate and befitting care. An affirmance by consent with a view to an ultimate appeal to the supreme court ought not to be allowed by the general term. *Roads* v. *Garman.*

7. *As to who appeals.* — Where the supersedeas bond in an appeal to the supreme court from a judgment against two defendants, recited that one of the defendants, naming him, had appealed, without referring to the other defendant, and the notice of the appeal was headed as that of the plaintiff against the defendant alone who was mentioned in the supersedeas, but the body of the notice used the plural — defendants — it was *held*, that the defendants mentioned in the supersedeas and in the heading of the notice, alone appealed. *Webster* v. *The Cedar Rapids and St. Paul R. R. Co.*

8. *Correction of excessive judgment: defective petition.* — The objection that a judgment is excessive will not be considered by the supreme court on appeal, until a motion has been made to correct the error in the court below, and there overruled. *Ib.*

9. So, too, of the objection that the petition in an action where defendants made default was so defective that it failed to show any cause of action, and that the judgment thereon was, therefore, erroneous. *Ib.*

BANKRUPTCY.

1. *Foreign state insolvent laws: discharge under.* — A discharge under a state insolvent law will not discharge a debt due a citizen of another state, unless the latter appears and voluntarily submits to the jurisdiction of the court, by becoming a party to the proceeding or claiming a dividend thereunder; and this is the case irrespective of the form of the debt, or where the contract was entered into, or where it was to be performed. *Hawley* v. *Hunt.*

2. The place of making or place of performance is wholly immaterial in all cases where the creditor is not a citizen of the state granting the discharge. Citizenship of the parties, and not the place of the making or the place fixed for the performance of the contract, is the controlling element. *Ib.*

3. *Application of principles.* — Where judgments were rendered against a debtor in the state of New York, and these judgments were afterward assigned to a citizen of this state, it was *held* that a subsequent discharge of the debtor, under the insolvent laws of New York, constituted no bar to a suit on the judgments. *Ib.*

4. *Validity of state insolvent laws.* — The doctrine recognized that state insolvent laws are invalid as respects subsequent contracts. The course of decision upon the principles herein announced shown, and the authorities collated, by DILLON, Ch. J. *Ib.*

BILL OF EXCEPTIONS.

1. *Certification of evidence.* — The supreme court will not review the finding of the court below on the facts, under a bill of exceptions which states that the evidence is given in substance, and that no other material evidence was heard by the court. It should be stated that *all* of the evidence is certified. *McKenzie, adm'x,* v. *Kitler.*

BOND.

1. *Requisites of.* — A bond for the delivery or return of property is not invalid because it fails to recite the time, terms or conditions upon which the delivery or return is to be made. *Huntington* v. *Fisher.*

2. *For security of persons not named: privity.* — Where a bond, given for the primary security of one person, also contains a clause intended for the security of another, suit may be brought by the latter, though not named in the bond, if he sustains an injury in consequence of a breach thereof. Rev. 2787, 2757. *Ib.*

CONSTITUTIONAL LAW.

1. *Repeal of banking acts.* — **Section 5, article 8, of the new constitution, which declares that no act of the general assembly, authorizing or creating corporations or associations with banking powers, nor amendments thereto, shall take effect until the same shall have been submitted to, and received a majority vote of, the people, does not apply to, nor operate as a limitation upon, the *repealing* power of the legislature. *Morseman* v. *Younkin et al.***

2. It was accordingly *held*, **that the 4th section of chapter 153, laws of 1868, repealing section 1598 of the Revision, which was a part of the general banking law, and which authorized the taxation of the capital instead of the shares of banks organized under the State law, was authorized and valid, it having received the two-thirds vote of the legislature, required in such cases by section 12, article 8, of the new constitution.** *Ib.*

CONTINUANCE.

In actions of right: discretion. — **While, under the statute,** continuances in actions for the recovery of real property may be granted for reasons of less importance than in ordinary civil actions, yet, even in such cases, **the action** of the court below in overruling a motion for continuance will not be disturbed where there **is no showing of** affirmative error, or abuse of discretion confided to the court deciding upon applications of this character. *Corwin* v. *Griffin.*

CONTRACTS.

1. *Sealed instruments: defenses.* — **By our statute, the distinction** which the common law made between simple contracts and those under seal is abolished, **and want of** consideration, either in whole or in part, **may now be** shown as a defense in all actions upon instruments made after the passage of such statute, whether made in this state or elsewhere. — *Williams* v. *Haines.*

2. *Law of forum.* — It is accordingly *held*, **in an action** upon a sealed instrument executed in another state, where the common-law rule as to sealed instruments prevailed, and where the consideration, **if the action had** there been brought, would not have been inquirable into, that our law would govern as that of the forum, **and that** the defense of want of consideration might be made. *Ib.*

3. *Remedy: constitutional law.* — **Our statute allowing** such defects to sealed instruments is one relating to the remedy, and does not impair the obligation of the contract. *Ib.*

CRIMINAL LAW.

1. *False pretense; promise.* — **While a false promise will** not sustain the charge of obtaining property, etc., under false pretenses, yet the fact that **a promise is combined** with the false pretense, does not destroy the criminality of the act; and if both blend together and jointly act upon the mind of the defrauded person, it is sufficient. *The State* v. *Dowe.*

2. *Rule applied.* — In a prosecution for obtaining the signature of the prosecutor to a receipt, which under our statute is the subject of forgery, by false pretense, the indictment charged that the defendant went to the prosecutor and pretended that he had come to pay a debt due from him to the prosecutor, and that by reason of such false pretense the prosecutor was induced to execute a receipt to the defendant for the amount of his debt, which the defendant took into his possession and carried away, without paying him any part of the debt. The indictment further alleged that defendant had not come to pay the prosecutor as pretended. *Held*, that the indictment was sufficient. *Ib.*

3. *Indictment; perjury.* — **An indictment for perjury is** sufficient under section 4650 of the Revision, when the act charged as to the offense is stated with such a degree of certainty and in such manner as to enable a person of common understanding to know what is intended and the court to pronounce judgment. *The State* v. *Schill.*

4. *Perjury; indictment.*—In an indictment for perjury for false swearing in a criminal investigation before a grand jury, it is not necessary to allege that the party charged with the offense that was under investigation before the grand jury, was or was not guilty thereof, nor the facts constituting such offense. *Ib.*

5. *Perjury before grand jury.*—Perjury may be committed by wilfully giving false testimony of a material character before a grand jury. *Ib.*

6. *Change of venue.*—An application for a change of venue in a criminal cause is intrusted by the statute to the district court, in the exercise of a sound discretion, and the supreme court will not interfere with its action unless it is shown that such discretion has been improperly exercised. It was accordingly *held*, that the action of the court below in refusing an application for a change, based upon the uncorroborated affidavit of the defendant of the prejudice of the judge, was not erroneous. *The State* v. *Freeman.*

7. *Appeal; reduction of fine.*—The power given to the supreme court, section 4295 of the Revision, to reduce the punishment in a criminal cause, should be exercised only in cases where the court below has manifestly visited too severe a penalty, one disproportioned to the degree of guilt, as shown by the proof. *Ib.*

DAMAGES.

1. *Interest on.*—The general rule that interest cannot be recovered on unliquidated damages, has been much modified by modern decisions; and it seems that under the rule as now understood, and the provisions of our statute, Revision, § 1787, interest is recoverable on the value of property lost by a bailee, from the date of such loss. *Mole* v. *The Chicago and N. W. R. R. Co.*

2. *Seduction.*—A verdict of $2,500 damages for the seduction of an unmarried woman was held not excessive in the present case. *Gray* v. *Bean.*

EASEMENT.

1. *Extent of; construction.*—While the rule is, that an easement appurtenant to an estate is so to every part thereof, whatever the subdivision at the time or subsequently: Yet the servient estate is not to be burdened to a greater extent than was contemplated or intended at the creation of the easement. And this intention is to be derived from the natural construction of the language used in the instrument, construed in the light of the surrounding circumstances. *Brassart* v. *Corbett.*

2. *Right of way.*—A right of way through certain premises, reserved to the grantor of a portion of them, cannot be enlarged as against the first grantee by a reference, contained in a subsequent deed of a another portion, to the effect that the right extends to a certain point, which is, in fact, beyond that fixed in the reservation. *Ib.*

3. A right of way was reserved through the servient estate *to* a certain boundary line. *Held*, under the circumstances of the present case, that the way should not be extended *along* such line after reaching it. *Ib.*

EQUITY.

Mistake in written contract.—To establish a mistake in a written contract, it should be made out by the testimony beyond fair and reasonable controvery, and if the proofs are doubtful and unsatisfactory, or if the mistake is not clearly shown, equity will not interfere. *Tafts & Colby* v. *Larned.*

ESTOPPEL.

1. *In pais; failure to disclose liens.*—An agent of the owner of real estate met a person holding liens and incumbrances thereon, for the purpose of paying and discharging the same. The agent asked for an exhibit of all liens and claims held by the creditor against the land, and was informed by the latter that he had none other than those exhibited. These were paid by the agent, who again inquired if all liens were settled, and received an answer in the affirmative. The creditor at the time of this settlement held a certificate of tax sale which he did not exhibit, and upon which he subsequently obtained a tax deed for the land. *Held*, that he was estopped by the facts connected with the settlement from asserting title under this deed. *Davidson* v. *Follett.*

2. It was further *held*, that whether the owner or his agent in fact knew that the taxes were unpaid for the year for which the land was sold, was immaterial, as under the circumstances the creditor was bound to disclose this lien, and if he did not he would be concluded from afterwards setting it up. *Ib.*

EVIDENCE.

1. *Error without prejudice.*—The admission of irrelevant and unimportant testimony which could not have had the effect of prejudicing the right of the party objecting, will not be regarded as sufficient to justify a reversal. *McKenzie, admx.* v. *Kitler.*

2. *Admissions of administrator; statute construed.*—Section 2393 of the Revision which provides that an administrator shall not admit claims until the claimants have sworn to their correctness, and that the same rule shall apply to payments or set-offs, was not intended to abrogate the general rule admitting in evidence the declarations and admissions of parties to the record. It is accordingly *held*, that the admissions of an administrator as to the amount of payments that had been made on a note held by the estate, were admissible in an action wherein he was a party. *Ib.*

3. *Parol to vary written instrument; pleading.*—Evidence of a contemporaneous verbal agreement that the maker of a promissory note should, at his option, have time for payment beyond that fixed in the note itself, is not admissible; and an answer setting up such agreement as a defense is demurrable. *Stucksleger* v. *Smith.*

FRAUDULENT CONVEYANCE.

Delivery for record by grantor.—The fact that the grantor in a deed delivered the same to the recorder for the purpose of having it recorded, may be a circumstance tending to show fraud in the transaction; but that fact alone would not, as a matter of law, render the deed fraudulent; nor would it sustain a verdict of a jury to that effect. *Ward* v. *Wehman et al.*

GARNISHMENT.

Of payee of promissory note; pleading.—The pendency of a garnishment proceeding against the maker of a promissory note does not constitute matter for a plea in bar to a recovery on the note in a suit by an assignee thereof who received it after due and after garnishment of the maker. But such a defense may be pleaded in abatement; and the issue thereon should be submitted to the jury, that their verdict thereon may be distinguished from one upon matter pleaded in bar. Rev., sec. 3124. *Chise* v. *Freeborn.*

(*Concluded next week.*)

TERMS OF THE SUPREME COURT FOR APRIL.

3d Monday, Circuit and Oyer and Terminer, Newburgh, Gilbert.
3d Monday, Circuit and Oyer and Terminer, Ulster, Peckham.
3d Monday, Circuit and Oyer and Terminer, Schoharie, Miller.
3d Monday, Circuit and Oyer and Terminer, Cortland, Boardman.
3d Tuesday, Special Term, Onondaga, Morgan.
4th Monday, Circuit and Oyer and Terminer, Suffolk, Gilbert.
4th Monday, Circuit and Oyer and Terminer, Johnstown, Bockes.
4th Monday, Circuit and Oyer and Terminer, Livingston, Johnson.
4th Monday, Circuit and Oyer and Terminer, Wayne, Dwight.
4th Tuesday, Circuit and Oyer and Terminer, Lewis, Morgan.
Last Monday, Special Term, Ontario, J. C. Smith.
Last Tuesday, Special Term, Otsego, Murray.
Last Tuesday, Special Term, Albany, Hogeboom.

COURT OF APPEALS ABSTRACT.

Freeman et al. v. *Charter Fire and Marine Ins. Co.*

The defendants demurred to a complaint on the ground that it did not make out a cause of action in behalf of the plaintiffs. The complaint alleged a valid contract by the defendants with the plaintiffs, insuring them by name, on account of whom it might concern, against loss or damage by fire, on a certain vessel; the loss of the vessel and the furnishing of proofs of loss, and a full compliance with all the conditions of the policy. The defendants claimed that the plaintiffs, having no interest in the vessel, could not maintain an action, as they were not the parties in interest. *Held*, that the action was well brought and the complaint sufficient; that such was the law before the code, and that the code had in no respect changed the common-law rule, and that the plaintiffs were trustees of an express trust within the meaning of section 113 of the code, and could sustain the action as such. Opinion by MASON, J.

Quinn, Adm'r, etc., v. *Lloyd.*

Held, that, if an adverse party desires to object to evidence of transactions with a party's intestate, he must do so in season, and not wait till he learns what they are, and then, if they bear unfavorably on his case, move to strike them out. Opinion by WOODRUFF, J.

Wolf v. *Goodline Fire Ins. Co.*

Where the supreme court had reversed an order for a new trial, on the ground that the verdict was the result of a compromise, and was rendered because the jury thought it better for the litigants and for the public that the controversy should be terminated by the verdict which they rendered than that it should be prolonged by a disagreement, and that, for this reason, while some of the jurors were convinced that fraud was established, and others thought it was not, they agreed to find a verdict which was consistent with the views of neither, and that the verdict could be sustained,—

WOODRUFF, J., who delivered the opinion of the court, used the following language:

"This view of the duty of jurors, and of their right to find a verdict which their own consciences tell them is not according to the evidence, seems to me mischievous in the highest degree. If the rule entitling the parties to the unanimous concurrence of twelve jurors in the verdict is a bad rule, let it be abrogated, but while it remains the rule, approved by the experience of centuries, and maintained in its integrity still as the just and reasonable protection of the citizen, whether charged with crime or pursued for alleged claims upon his property, it should not be practically abrogated, and that by judicial approval.

"It is saying that the juror who has sworn to find a verdict according to the evidence, and whose conscience is satisfied by the evidence that a fraud has been committed, may concur in a verdict contrary to the evidence and against his oath, and he may do so because he thinks it better for the litigants that the controversy be terminated by an unjust verdict than that it be longer protracted. With this consideration the jury have nothing to do, and in this form I am sure the learned judge, by whom the opinion was pronounced, would not approve it; and yet it seems to me the plain meaning of the language he employed. Its danger, and its clear withdrawal of the protection furnished by a jury trial, is most manifest if it be supposed to form part of the instruction of the judge to a jury on the trial of an indictment, to wit: That, though the evidence did not satisfy all of them of the guilt of the prisoner of *any* crime, they might compromise the matter with such jurors as deemed the evidence to establish the grossest offense by consenting to a verdict of guilty of one less atrocious.

"The opinion below intimates that such a compromise may be proper where damages are unliquidated. I know of no ground on which a juror may be relieved from his oath to find a verdict according to the evidence in one case rather than another. And if, where vindictive or exemplary damages are proper, and rest to some extent in the discretion of a jury, there is large room for the jury to defer to the views of each other, and conscientiously yield their first impressions to the influence of discussion, this is not such a case. Here the rule of damages was single and certain, to wit: the amount of the loss.

"In any case there is room, and very often there is a necessity, that jurors should confer without pride of opinion, with a disposition to yield first impressions to the influence of mutual comparison of views and just and proper discussion of the proofs; and on such conference unanimity often results and accords with the conscientious convictions of each. If it do not, then the jurors ought to disagree. If the language of the opinion of the court below was found in an instruction to the jury, it should be pronounced erroneous, and a verdict rendered in pursuance of such an instruction should be set aside; and yet if the observations are just, and are a true and legal exposition of the duty or the privilege of jurors, it would be quite proper so to instruct them, and practically receive a verdict in favor of six, or even two, jurors, in the form of a verdict of the whole; for under such an instruction polling the jury would be of no avail, since, in accordance with the instruction, each juror could say it his verdict, though rendered against the evidence."

BANKRUPTCY ABSTRACT.

ARREST.

Property which had been conveyed by a bankrupt in fraud of creditors prior to the passage of the bankrupt law, is to be regarded as vested in the assignee in bankruptcy, by force of that act, and by virtue of the proceedings thereunder.

The bankrupt, therefore, cannot be arrested in proceedings under the act of 1831, of this state, known as the "Stilwell act," by a creditor seeking to reach the property of the bankrupt.

The primary object of civil proceedings under the Stilwell act, is not the punishment of the debtor, but the collection of the creditor's judgment; and therefore such proceedings are in direct conflict with the bankrupt law, as respects all property which passed to the assignee in bankruptcy. N. Y. Com. Pleas, *Goodwin* v. *Sharkey*, 3 Bankrupt Reg. 138.

BURDEN OF PROOF.

Where assignees in bankruptcy impeached a transaction involving a transfer by the bankrupts of a mortgage and promissory notes to holders of their check, if it be shown to have been made out of the ordinary course of business, it is *prima facie* evidence of fraud, and the burden of proof is cast upon the defendant to show the validity of the transaction. U. S. Dis. Ct., S. D. of N. Y., *Collins and another, assignees, &c.*, v. *Bell et al.*, 3 Bankrupt Reg. 146.

DISTRIBUTION.

In the distribution of the assets of the bankrupt, derived from the collection of a promissory note, a creditor whose claim is in judgment has no priority, and will share *pro rata* with the other creditors. U. S. Dis. Ct., S. D. of Georgia. *In re Erwin and another*, 3 Bankrupt Reg. 142.

FAILURE TO FILE SCHEDULE.

Where a member of a bankrupt firm had failed to file schedule of his personal property, *Held*, The other members would not, on that account, be refused a discharge. U. S. Dis. Ct., S. D. of N. Y. *In re Scofield et al.*, 2 Bankrupt Reg. 137.

FRAUD.

The petition of the bankrupt was filed May 19, 1868. In January of that year he conveyed two parcels of land, and a fractional share in three several schooners to his wife. *Held*, That the conveyances were made after his insolvency became known to him, that he thereby committed a fraud under the act, and that his discharge must be refused. U. S. Dis. Ct. of Mass. *In re Adams.*, 3 Bankrupt Reg. 139.

CREDITOR HOLDING SECURITIES.

The rule in bankruptcy, that a creditor, having security for his debt, is to be admitted as a creditor only for the balance of his debt, after deducting the value of his security, is not founded in the principles of equity.

The obligation of the debtor being the principal, and the pledge, the collateral or incident, the creditor has the right to resort to the debtor in the first instance, retaining the pledge for any deficiency which he may be unable to collect of his debtor.

The rule, that one having a lien upon two funds, must so act as not to disappoint the just expectations of another having a lien on one of them only, is founded in social duty, and is never enforced to the prejudice of the double fund creditor.

Equity does not, upon the maxim that "equality is equity," deprive creditors of the fruits of diligence, but it favors and rewards diligence, and gives to creditors their full legal rights. And it does not treat those rights as varied by the accidents of insolvency or of death.

Therefore, in the settlement of insolvent estates, equity allows the creditor to prove and take a dividend on his whole debt, without regard to any collateral security he may hold.

R., being insolvent, assigned all of his property to the defendants "in trust to convert the same into money, and divide the same equally among all of his creditors, in proportion to the amounts owing by him to them respectively." The property was only sufficient to pay about thirty-five cents on the dollar. The plaintiffs were creditors of R., and held stocks which he had pledged to them, amounting in value to about twenty per cent of R.'s indebtedness to them. *Held*, That the plaintiffs were entitled to a dividend upon the whole amount of their debt, without regard to the stocks pledged. Buffalo Super. Ct., *Jervis* v. *Smith*, 3 Bankrupt Reg. 150.

JURISDICTION.

Individual creditors of members of a firm duly adjudged bankrupts, on petition of one of the firm, applied to the court to set aside the adjudication, because of absence of certain jurisdictional averments in the petition.

Held, the questions involved in such application can properly be raised only by the creditors opposing the bankrupts' application for discharge, at the proper time.

Want of jurisdiction is good ground to refuse a discharge. A discharge granted without jurisdiction is no discharge. U. S. Dis. Ct., S. D. of N. Y., *In re John R. Penn.*, 3 Bankrupt Reg. 145.

PROVING CLAIM.

A creditor may prove a claim based on a debt existing at the time of proceedings commenced in bankruptcy, notwithstanding he may, in a suit to recover the same, have obtained judgment thereafter.

The debt is not so merged in the judgment as to deprive the creditor of the right to prove it. U. S. Dis. Ct., S. D. of N. Y., *In re Stephen Brown*, 3 Bankrupt Reg. 145.

PREFERENCE BY MORTGAGE.

Debtors, merchants, knew themselves to be insolvent, but represented to creditors on debts past due that they were solvent. The creditors, however, exacted as security a chattel mortgage, dated May 9, 1868, on a large portion of debtors' goods, and, on a failure to receive payment of an installment thereunder, took possession on the 15th of July, 1868, under the mortgage, sold the goods, and applied the proceeds. Thereafter, on August 3, 1868, debtors filed petition in bankruptcy, and were duly adjudged bankrupts. Assignee in bankruptcy brought action against creditors to recover the value of the goods so sold.

Held, said mortgage was, within the meaning of section 35 of the statute, made by the bankrupts with a view to give a preference.

The creditors had reasonable cause to believe that their debtors were insolvent when the mortgage was made, and it constituted a fraudulent preference. U. S. Cir. Ct., E. D. of Mich., *In re Frederick E. Driggs, Assignee, etc.*, v. *Moore, Foote & Co.*, 3 Bankrupt Reg. 149.

PEOPLE *v.* FERO.

The story of the defendant as to the manner in which his wife came to her death, in November, 1868, at Davenport, in this state, was published in almost every paper in the country. His claim that he was awakened about two o'clock in the morning by some one feeling under his pillow for his money, and that reaching up with one of his hands he grasped a pistol which was discharged by the robber (the ball entering his wife's head just above the ear), seemed to be contradicted by the claim, on the part of the prosecution, that extensive bruises were found, on *post mortem*, on both sides of the head, accompanied by extensive fractures of the skull upon both sides. The defense, upon the trial, claimed that there were, in fact, no bruises, and that the fractures were caused by the pistol ball (that opposite its entry by *contre coup*) or by the manner in which the skull cap was removed at the *post mortem*. The defendant was acquitted.

The April number of the *Psychological Journal* contains an elaborate article by Dr. C. H. Porter, of this city, upon the *medico*-legal questions in the case, wherein he shows the difference between bruises, suggillations, infiltrations of tissues with blood, the danger of the two latter being mistaken for bruises, and the methods by which the difference can be determined. He also discusses at length fractures by *contre coup* at points distant from injuries, the danger of injuries to the skull during removal, and the importance of certainty that alleged injuries to it were not so produced. The article is illustrated by cuts of the skull of the deceased, and of deceased subjects experimented upon with pistol balls by Dr. Porter and others.

The author is concededly one of the ablest, most careful, and conscientious professors of medical jurisprudence in the Union, and his skill as a physician and a chemist is not surpassed by any gentleman of his age in the state. His candor and integrity of character entitle his statements and his experiments to great consideration and respect. The article is written with an ability and a research which must render it of great value to the legal and the medical professions on account of the numerous authorities cited and the experiments by Drs. Porter and Boulware, given in detail to determine whether there were in fact bruises and whether such extensive fractures might have been caused by the pistol ball or in the removal of the skull cap. It will undoubtedly be considered a standard authority upon the subjects treated of. It illustrates the difference between a trial where the court and the jury have the benefit of the experiments and the testimony of such an industrious and able expert as the doctor shows himself, by the article in question, to be, and one where they have not. The *Psychological Journal* contains many articles of interest to gentlemen of the bar engaged in the trial of criminal causes.

An Edinburg justice decided that a mutual relief society was not responsible for the funeral expenses of a member who committed suicide.

MR. O'CONOR AND THE NEW YORK CODE.

The Columbia (S. C.) *Guardian* publishes an interesting letter from Charles O'Conor, one of the leading members of the New York bar, on the code. Messrs. Pope & Haskell, of Columbia, to whom the letter was addressed, in a note to the *Guardian*, say:

In our trouble about "the new code" of practice which has so completely upturned all of our previous habits of thought, and with it the wisdom and learning of ages, we took the liberty of writing a short letter to Mr. O'Conor, of New York, asking the advice of him, as a gentleman of great learning and ability, what books of practice, under the New York code (of which ours is a mere copy), he would recommend to us for use. We could not rely upon the recommendations of publishers, and we were profoundly ignorant of the first step and the first requisite to the commencement of a suit — we beg pardon, "an action." Mr. O'Conor has kindly sent us a letter, which is so suggestive to the profession throughout the state, that we submit it to you for publication.

Mr. O'Conor's letter is as follows:

NEW YORK, March 14, 1870.

GENTLEMEN — Your letter of the 9th instant reached me in my chamber, just recovering from a spell of illness. I am obliged to answer through an amanuensis, and without recourse to any books. It is probable, however, that memory will suffice as well as if I could have recourse to books.

Our code was adopted in the year 1848. It has been added to and amended or varied at nearly every session of our legislature since that time. One natural consequence of this continual fluctuation is, that, in looking at decisions of our courts, giving a construction to any part of it, close attention must be paid to chronology, and the state of the code at the time the decision was made, or that the question arose, must be closely attended to, else the comment may be a source of error instead of a useful guide. I say this, because I presume your copyist copied the last edition of our code, though, indeed, this may be an unwarrantable presumption, and your first step in the pursuit of exact knowledge on the complicated subject referred to should be to ascertain precisely what edition he did transcribe.

We have thirty-three judges, each authorized to hold a supreme court of original jurisdiction. We have eight district supreme courts, called general terms, sitting for larger sections of territory, having appellate jurisdiction from the single judge courts sitting in their respective districts; hence, of course, a multitude of jarring decisions on points of practice. No interlocutory appeals are allowed to the court of last resort, and consequently mere questions of pleading and practice rarely come in review in that court. So we have no common arbiter to reconcile conflicting determinations in the general terms.

I must add to this that we have three cotemporaneous sets of reports; the same case is therefore often reported twice, or even thrice. Two of these series of reports are called "Practice Reports," and profess to devote themselves to reporting decisions on practice only. The third is regarded as our "General State Reports," and as giving all decisions of the supreme court deemed proper to be reported. I think this only means all the decisions of the supreme court that this particular reporter happens to have got hold of. These three series are: Barbour's Supreme Court Reports, 54 volumes; Abbott's Practice Reports, 19 volumes, N. S. 6; Howard's Practice Reports, 37 volumes.

Besides these courts and reporters, we have had in New York a city court, of much respectability, consisting of three judges, called the court of common pleas, and another, of equal respectability, consisting of six judges, called the superior court. Strictly speaking, there is no appeal from either of these two courts on points of practice; each has its own reporter, and I do not know that the decisions of either are less respected or respectable than those of the supreme court. Should you desire the volumes containing their decisions, it would extend your purchase alone twenty-five volumes.

The books that may be called books of practice under the code, or rather the only ones I ever have used, are Abbott's Annotated edition of the Code, and Howard's Annotated edition of the Code.

In ordering them, or either of them, you should be careful to call for the latest edition. If you order only one of them, you should probably prefer Abbott's. This gentleman is in active practice; therein, I think, differing from Mr. Howard. And he has published other law works, indicating especial attention to legal subjects on his part, say "A Digest of New York Reports," in six or seven volumes, and what he calls "A National Digest," not yet completed, but which has reached its fourth volume. "Abbott's Forms or Precedents" would be found useful.

There are some two or three publications called "Books of Practice under the Code," framed from the book-making ideas, which dictated such books of practice as "Sellon, Impey, Tidd," etc. It has always seemed to me that a book of this sort could scarcely be useful where all the details of practice down to the length of a notice of trial were expressly regulated by positive statute. I do not own any of them, have never looked into one of them, and imagine that their value must be slight indeed. I do not remember the names of the authors.

It may be that a copy of our "Session Laws," from 1848 to this time, would conduce to making your library perfect; it would facilitate investigations in the matter of chronology, before suggested. Whether you procure them or not, I would advise you to order a copy of the small pocket edition of the code without notes. All the law booksellers here have it. It is useful in prescribing the code alone, without the enormous mass of notes which encumber the annotated editions; and it contains this very useful feature: At the commencement of each section which has been at any time altered, it states the date of each alteration.

The code purports to be framed by three commissioners appointed for the purpose. Common fame asserts, and without contradiction, that I am aware of, from any quarter, that Mr. David Dudley Field, who was one of them, drew the whole instrument, and may properly be regarded as its sole author. I have reason to believe that a very large proportion of the subsequent amendments were framed by him, or at least were passed after consultation with him by the respective committees, who from time to time reported those amendments to the legislature. Mr. Field was, when the code was adopted, ever since has been, and now is, a counsellor at law in full and active practice in this city. It would seem highly probable that to him numerous inquiries must have been addressed, similar to those coming from you, to which I am now responding. I think it not unlikely that he has long since prepared a full and instructive form of answer to all such inquiries, and for this reason, and because he must necessarily understand the subject much better than I do, it might be well that you should address him on the subject. No harm or inconvenience can result, for you will at least receive a courteous reply.

The code has elicited, and is now the subject of, much conflict in opinion. As far as I can at present recollect, all the judges who have thought fit to commit themselves on the subject, have manifested, in a greater or less degree, a lack of respect for the design, the execution, and the effect. One of the most able and temperate of them has stated that much of the code was framed for the mere purpose of change in modes and of gratifying its author's fancy, even where the form or mode itself could not be changed by making a change in the name, an achievement which, of course, is never impracticable. I think no careful and well-informed investigator would be likely to dispute this.

When the code was adopted, our constitution required that the trial by jury in all cases in which it had been theretofore used, should remain inviolate. When the code mingled, or allowed to be joined in one pleading, claims theretofore cognizable at law only with, claims cognizable in equity, it followed that the case must be tried by jury; the first branch because the constitution required it, and the second because there was no constitutional impediment; and however inconvenient, no actual impracticability in submitting an equity case to a jury. You will see by looking at the code that it does not in terms provide for this express case of mixture, but it does in terms quite sufficient for the purpose of obeying the constitutional rule, designate the cases which must be tried by jury, unless parties otherwise consent. The courts, by decision, have dealt with the cases of mixture in conformity with my suggestion above stated, and I think the effect of the decisions is that where, at the close of the testimony, in a case brought before a jury, there is no common law case, the judge may dismiss the jury, and assuming the office and duties of a chancellor, may decide any equity case that is presented by the evidence.

My personal views as to the value of the code are of no importance, and need not be stated. All the lawyers who have been admitted to practice in this state for the last twenty years are conversant with the code, and, of course, are not experts in the old common-law practice and pleading. Most of them are entirely ignorant of it, and you may well imagine that the code could not easily be displaced by any attempt at reaction. The courts of the United States do not recognize the code, but adhere to the old practice, with its settled distinction between law and equity. This circumstance often leads to much confusion, as you may see illustrated in some reported decisions of the United States supreme court. It is truly laughable to one conversant with both systems to see the blunders into which lawyers of great ability, who have come to the bar within the last ten or fifteen years, sometimes fall into framing a declaration, plea, or subsequent pleading at common law, in the circuit court of the United States.

There is very little in the code which is new in principle, or in respect to which, as a substantial novelty, the authors could claim the doubtful merit of invention. The notion of mingling legal and equitable claims or defenses in one suit, in order to prevent the suitor from being turned out of the temple of justice merely because he had entered at the wrong door, had shortly before been very broadly and distinctly developed in a high place, and was in fact the seed from which sprang the code—the commissioners merely executed it. I think the code contains, as I best recollect at this moment, only one thing which can be called new in principle, and this is an at-

tempt at an absolute impossibility in prescribing the rule of pleading. It declares in substance and effect that you shall not plead, as in the old system, the conclusions in law or in reason from the facts of the case, and at the same time it prohibits you from stating or detailing the evidence merely on which you rely. You are required to state the "facts" which that evidence conduces to prove. Here, under the name of "facts," we find some things require to be stated which are neither in the vulgar sense of the word the mere fact, or transaction, or event, which did occur and can be proven by direct evidence, and are not the general, rational or legal conclusions from such fact, transaction or event.

Now, according to my conception, it requires somebody much more wise or more subtle than myself, or any special pleader I have ever been acquainted with, to define or find out what it is that should be stated in a regular pleading drawn in compliance with this requisite of the code. I am not aware that any one has ever attempted to do it. The common practice in this state is to tell your story precisely as your client tells it to you, just as any old woman in trouble for the first time would narrate her grievances, and to annex by way of schedules, respectively marked A, B, C, &c., copies of any papers or documents that you may imagine would help your case. This is most emphatically a fair description of all the pleadings which come from the office of the chief codifier himself *A demurrer to any pleading under the code is a very dangerous step*, because it is utterly impossible for the keenest investigator to determine in most cases what any other reader than himself will understand to be the import of the pleadings if it be demurred to.

You may well imagine under these circumstances that, except in the very commonest and very simplest of cases, there are no precedents which would be of use to one beginning to draw pleadings under the code. Its idea seems to be that every vulgar ignoramus, upon reading them, will, from their conformity to his own helter-skelter manner of thinking and writing, think them quite sensible and intelligible, and that a person of opposite character and habits shall always be unable to comprehend what they mean, and consequently be forced to conclude that he must suspend judgment on their merits until the trial, and that if the parties then make out a case or a defense, the pleadings may then and there, or afterwards, be amended, as occasion may require.

I do not know that I can add any useful suggestions, and am, gentlemen, yours truly,

CHARLES O'CONOR.

To Pope & Haskell, Esqs., Attorneys at Law, Columbia, S. C.

REPORTS OF THE COURT OF APPEALS.

In *McNiel* v. *Tenth National Bank* (55 Barb. 66) Mr. Justice POTTER, delivering the opinion of the general term in the fourth district, says of *Crocker* v. *Crocker* (31 N. Y. 507), that it is unskillfully reported, and calculated to mislead the profession; that the statement of the case and the leading opinion, which was adopted by the whole court, is omitted in the report, and an opinion, arriving at the same conclusion, but not read on the consultation, is reported; that, though there is nothing in the reported opinion in *conflict* with what was decided, the report *entirely fails to present the whole view and the real point of any value in the case.* "The point decided was, that S. Crocker was made to account for this secret trust to the plaintiff, and all the pledgees and mortgagees who took such stock as security, with knowledge of the secret trust, were held not to be *bona fide* holders thereof, and were also held to account to the plaintiff; but all such pledgees and mortgagees as held without notice of the secret trust were protected, for the reason that the plaintiff, by implication of law, having authorized the transfer, repeated use and pledging of the stock to raise money by S. Crocker, with apparent ownership upon the books in his name, could not, as against such *bona fide* holders, hold them liable to account."

Judge Emerson, a prominent western jurist, died at his residence in Johnson county, Illinois, of pneumonia, a few days ago.

LEGAL NEWS.

A thief stole the judge's overcoat at Norfolk, Va., while a murder case attracted the attention of the audience.

A Nevada judge the other day fined himself five dollars for being late — probably for the benefit of the court.

William F. Day, a well-known lawyer, died on the 6th instant, at the supper table at his home, in Elizabeth, N. J.

The bill to authorize county judges to enter nunneries, and ascertain whether women are confined therein against their will, has been defeated in the Pennsylvania legislature.

A San Francisco judge said recently, in admitting the testimony of a Chinaman, that he would admit the testimony of a dog if he had apparently been wronged and were capable of telling his story about it.

In the house of representatives, at Washington, last week, Judge Scofield, of Pennsylvania, introduced a bill to equalize the salaries of the district judges of the district courts of the United States for the Eastern and Western districts of Pennsylvania.

Harvard College has three law professors; University of Virginia, two; University of Michigan, four; University of New York, two; University of Chicago, two; University of Pennsylvania, three; and University of Iowa, four.

The supreme court of Mexico has decided adversely on the claim of Messrs. Norton & Whitcomb, who furnished money to General Santa Anna in 1866, while he was in New York, and received as security all the property of Santa Anna in Mexico.

A wife in Michigan has recovered, under the provisions of the prohibitory liquor law of that state, money paid by her husband during the past six years to a saloon keeper for liquors, on the ground that the money was paid without consideration, liquor not being property.

John Powers, who murdered a Catholic priest in Bellefontaine, Ohio, last November, has been acquitted on the charge of insanity. It was testified on the trial that he was known in Buffalo as "Crazy Jack;" that he once thought he had been changed into a statue; that he imagined he had a big fly in his stomach, etc.

The superior court of Chicago has decided that a promissory note given by a candidate for public office to a rival candidate, the consideration being that the receiver of the note shall withdraw from the candidacy, is void, for the reason that such a contract is contrary to public policy, and of a character tending to debauch public morals.

A retired French lawyer, living in the country, about a year ago sent his son to Paris to study law. Recently he paid a visit to his hopeful scion at the capital. After dinner, father and son took a stroll through the streets, looking at the various fine buildings. Finally, they stood in front of a very remarkable and characteristic building. "What building is this, my son?" inquired the father. "I don't know, papa," replied the son, "but I will ask the sergeant de ville, who is standing behind us." The sergeant informed them that it was the Law school, where the young man was believed to have attended lectures for a year past

An important question is now pending in the court of claims, namely; At what time did the president's proclamation of June 24, 1865, in regard to commercial intercouse (removing restrictions in certain portions of the South) take effect? The 24th of June of that year was Saturday, and although the proclamation bore that date, it was not published until the Tuesday morning following. The material interest involved in the question is with regard to cotton, the treasury agents having, *after* date of the proclamation, made numerous seizures, being ignorant of or not having been officially advised of its issuance through the proper department. The intention is to appeal the question to the supreme court of the United States, and in order

definitely to determine when the proclamation took effect, whether on the 24th of June, 1865, or on the 27th of that month. If this tribunal should decide that the proclamation took effect on the 24th of June, then the seizure of cotton after that date was illegal, and, therefore, restitution to the owners would be made. Arguments will take place on the question and witnesses be examined during this or the following month.

Some years ago Mr. Childs, late deputy of Mr. Bailey (at that time residing in Concord, N. H.), had made a contract with the Penobscot and Kennebec railroad to build a number of bridges in Maine for that road. In discharge of his part of the contract he had made large expenditures and engagements, and had several bridges in process of construction, when the railroad corporation found it necessary to suspend work, and, unfortunately for Mr. Childs, also found itself unable to pay, and the directors could not agree with him upon the value of his services. Mr. Childs found himself exceedingly embarrassed, and had finally to resort to a suit at law, which was brought in Portland. Mr. C. T. Russell, of Boston, and Judge HOAR (now attorney-general) were the leading counsel for Childs; and Mr. H. W. Paine, of Boston, and L. M. Morrill (now U. S. senator) were in defense. Judge CURTIS was on the bench. As the case was full of complications and computations, several days were occupied, and many experts were examined before the jury. In his charge, Judge CURTIS sought to caution the jury against giving too great weight to the opinions of witnesses, however expert, as opposed to the actual *data* furnished in the case. In his charge the judge pronounced the first vowel in the *data* more broadly than Maine backwoodsmen were accustomed to hearing it. The jury retired, and the court adjourned for dinner. On reassembling some hours after, the jury were still out. Lawyers, as is usual in such cases, were gathered in knots in the bar. Judge CURTIS was impatient, because he wanted to return to Boston on the evening train, and Mr. Hoar was chagrined at thought of a disagreement. Mr. Paine came up to him and said: "Judge, what is the matter with your jury?" Hoar looked over his spectacles and said, in a very benignant way: "Oh, the jury is all right; the marshal says they have found a verdict for Childs, but they are now hunting 'arter Curtis's darter,' to bring her in." Upon this the laugh was loud enough to reach the ears of court. Judge CURTIS took the joke and really laughed, sent for the jury, gave them some additional instructions, and in a few minutes they returned with a verdict for Childs of some $35,000, as I now remember it. But it was of no use. The corporation had so plastered its road-bed and running material with mortgages that Mr. Childs realized nothing.

NEW YORK STATUTES AT LARGE.*

CHAP. 92.

AN ACT to amend an act entitled "An act to secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," passed April thirteenth, eighteen hundred and sixty.

PASSED March 25, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four of the act entitled "An act to secure to creditors a just division of the estates of debtors who convey to assignees for the benefit of creditors," passed April 13th, 1860, is hereby amended so as to read as follows: After the lapse of one year from the date of such assignment, the county judge of the county where such inventory is filed shall, upon the petition of any creditor or creditors of such debtor, or upon the petition of any surety or sureties, or any other person interested in said estate, have power to issue a citation or summons, compelling such assignee or assignees to appear before him and show cause why an account of the trust fund created by any such an assignment shall not be made, and to decree payment of such creditors' just proportional part of such fund; and such county judge shall also have the same power and jurisdiction to compel such accounting as is now possessed by surrogates in relation to the estate of deceased persons; and also power to examine the parties to such assignment and other persons, on oath, in relation to such assignment and accounting, and all matters connected therewith, and to compel their attendance for that purpose; and the parties interested in such accounting shall have the same rights to appeal from any order or decree of such judge in the premises as is now given from the decrees of surrogates in relation to the accounts of executors and administrators.

§ 2. This act shall take effect immediately.

CHAP. 124.

AN ACT to amend an act entitled "An act to provide for the formation of societies for the prevention of horse stealing," passed April twenty-two, eighteen hundred and sixty-two.

PASSED March 30, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section two of an act entitled "An act to provide for the formation of societies for the prevention of horse stealing," passed April 22d, 1862, is hereby amended so as to read as follows:

§ 2. Upon filing a certificate as aforesaid, the persons who shall have signed and acknowledged such certificate, and their associates and successors, shall thereupon, by virtue of this act, be a body politic and corporate, by the name stated in such certificate, and by that name they and their successors shall and may have succession, and shall be persons in law capable of suing and being sued, and they and their successors may have and use a common seal. And they and their successors by their corporate name shall in law be capable of taking, receiving, purchasing and holding, for the purpose of their incorporation, and for no other purpose, personal estate to the amount of three thousand dollars; to make by-laws for the management of its affairs not inconsistent with the constitution and laws of this state or of the United States; to elect and appoint the officers and agents of such society for the management of its business, and to allow them a suitable compensation.

§ 2. This act shall take effect immediately.

CHAP. 125.

AN ACT to amend section one hundred and three of article five of title one of chapter sixteen of the first part of the Revised Statutes "Relative to Highways and Bridges."

PASSED March 30, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section one hundred and three of article five of title one of chapter sixteen of the first part of the Revised Statutes is hereby amended so as to read as follows:

§ 103. In every case where a highway shall have been laid out or ascertained, described and entered of record in the town clerk's office, and the same has been or shall be encroached upon by fences erected by any occupant of the land through or by which such highway runs, the commissioners of highways of the town shall, if in their opinion it be deemed necessary, order such fences to be removed, so that such highway may be of the breadth originally intended. The commissioners making the order shall cause the same to be reduced to writing and signed. They shall also give notice in writing to the occupant of the land to remove fences within sixty days. Every such order and notice shall specify the breadth of the road originally intended, the extent of the encroachment, and the place or places in which the same shall be.

§ 2. This act shall take effect immediately.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the Secretary of State which is attached to the copy from which we print. — ED. L. J.

The Albany Law Journal.

Albany, April 23, 1870.

TRIAL BY ORDEAL.

The superstitions of our ancestors appear almost incredible to the enlightened spirit of the nineteenth century. And yet many of them were solemnly entertained and defended by the wise men of the past, and formed, in fact, a part of the economy of the age. Among these were trials by ordeal, which, in one form or another, were recognized by every nation. Foolishly absurd as they seem to us, they were grave and solemn facts but a few centuries ago. In these, as in many other things, the tragedy of yesterday is the comedy of to-day.

These trials by ordeal were founded on the belief, from which many men of the present day have not advanced very far — that God would interfere, by a special providence, to confound the wicked and sustain the innocent; that all the laws of nature would be suspended to vindicate the truth whenever required. These trials were distinguished by the appellation of *judicium Dei*, and were principally by boiling water, by cold water, by fire, by lot, by the cross, by the corpse of the murdered person, by the eucharist, by the holy bread, or by battle.

The *trial by boiling water* was most in use among the Germans, and was prescribed by the laws of the people as well as by the capitularies of their kings. The accused person, subjected to this trial, was required to remain with a priest in prayer for three days and three nights; to drink nothing but water, and to eat nothing but bread, salt, and herbs; all intercourse with his wife was forbidden during the period. On the day appointed for the trial, he repaired, clad in mourning, to the church appointed for the ceremony. There the priests administered to him the communion, blessed and exorcised the water which was required to be boiling, and this was to be attested by suitable persons named for the purpose; after which the accused plunged his naked arm into the water up to the elbow to bring up a ring or stone from the bottom of the caldron. As soon as his hand was drawn forth, the judge wrapped it in a linen cloth and sealed it with his seal, which no one could remove until three days after. If at the end of that time there remained no marks of burning, the accused was declared innocent; otherwise he was considered guilty, and suffered punishment.

This form of trial long continued in force; and, though proscribed by Popes Gregory the Great and Stephen V., was again established in 1436 by a decree of the council of the city of Hanover. The Salic law, which prescribed the trial by boiling water, required the accuser to maintain the fire under the caldron from the day of accusation to that of the trial—a period of fourteen days.

The trial by cold water was preceded by a multitude of ceremonies. The accused was condemned to a previous fast, was then conducted to the church, and there called upon for the last time to speak the truth; the communion was then administered, together with a portion of the water destined for the trial. After these preliminaries, he was thrown into the water, and if he floated therein without any exertion on his part, he was deemed guilty, but if he sunk he was acquitted. This form of trial was employed as late as the last century to discover witches, by throwing the accused into a pool of water, and drowning them to establish their innocence. Tacitus tells us that the Scythians and Celts adopted this trial to determine the legitimacy of their children. The new born children were placed upon a shield and launched upon the river. If they floated their legitimacy was established, but if they sank they were the children of adultery.

The *trial by fire* was conducted in various ways, among which that by burning plough-shares was very common. By this mode the accused was condemned to walk barefooted and blindfolded over nine, twelve or fifteen red hot plough-shares placed lengthwise, one foot apart. If, at the end of three days, his feet displayed any marks of burning he was adjudged guilty. Convictions by this method were very certain as may well be supposed, neither the gods nor insanity coming to the rescue. However, in this manner, Blackstone informs us, that it is recorded that Queen Emma, the mother of Edward the Confessor, cleared her character when suspected of familiarity with Alwyn, Bishop of Winchester.

Another mode of *trial by fire* was by "burning iron." The accused was required to take in his naked hand a red hot iron of one, two or three pounds weight, and was adjudged innocent if three days after he retained no traces of burning. In the eastern empire the emperor Theodore Lascaris sought to discover the magician who had brought on his sickness by causing all suspected persons to handle hot iron. He must have found a large number in conspiracy against him. Historians mention many other modes of ordeal by fire. Sometimes the accused was compelled to walk upon burning coals or to carry them in his bosom; sometimes clad in a shirt spread over with wax he was obliged to pass over blazing piles of wood, and at other times his innocence was established if he came out unscathed after having been three times thrown into the fire. Books were also frequently submitted to the test of fire to determine their veracity or inspiration.

The *trial by lot* was sometimes resorted to in cases of murder to discover the guilty person. The nearest relation to him that had been murdered might designate seven persons whom he suspected of the crime. These were conducted to the church, where two rods wrapped in linen, upon one of which was marked a cross, were laid upon the altar. A priest or a child was designated to select, and if the rod marked with the cross was chosen, the seven accused persons stood acquitted; but, if the other was chosen, each of the accused marked his name and a particular sign upon a separate rod wrapped in linen, which was then laid upon the altar. The priest or child then took these rods in succession from the altar, and he whose rod remained last was presumed to be guilty.

The *trial by the cross* was conducted by requiring the accused and accuser to hold their arms raised before a cross while the priest said mass, and he who first let them fall was considered in the wrong.

The *trial by the holy bread*, known among the *Anglo-Saxons* as *corsned*, or "accursed slice," was performed by thrusting a piece of bread or cheese into the throat of the accused, who was considered guilty if he swallowed it with difficulty or was obliged to reject it.

This *corsned* is described by Blackstone as follows: "A piece of cheese or bread of about an ounce weight, which was consecrated with a form of exorcism, desiring the Almighty that it might cause convulsions and paleness and find no passage if the man was really guilty, but might turn to health and nourishment if he was innocent, as the water of jealousy among the Jews was by God's special appointment to cause the belly to swell and the thigh to rot if the woman was guilty of adultery. This *corsned* was then given to the suspected person, who at the same time also received the holy sacrament, if indeed the *corsned* was not, as some have suspected, the sacramental bread itself, till the subsequent invention of transubstantiation preserved it from profane uses with a more profound respect than formerly. Historians tell us that Godwin, Earl of Kent, in the reign of King Edward, the confessor, abjuring the death of the king's brother, at last appealed to his *corsned per buccellam deglutiendam abjuravit*, which stuck in his throat and killed him. This custom has long since been gradually abolished, though the remembrance of it still subsists in certain phrases of abjuration retained among the common people."

Blackstone cites a somewhat similar manner of deciding lawsuits which prevailed in the kingdom of Monomotapa. The witness for the plaintiff chewed the bark of a tree having emetic qualities, which, being sufficiently masticated, was infused in water and given to the defendant to drink. If it had on him an effect similar to that supposed to have been produced by Jonah on the whale, he was condemned, otherwise he stood acquitted. This form of trial might not be illy adapted to some classes of litigation at the present day.

The *trial by the corpse* was resorted to in cases of homicide to discover the guilty party. The body of the murdered man was placed upon a bier, and all suspected persons were required to touch it. The belief was that it would bleed or exhibit some change or movement the moment the guilty person laid hand upon it. This form of trial remained in use in some parts of Germany almost to our own time, and it is no extraordinary thing, even at this day, to hear, among the ignorant, expressions of faith in this method of testing guilt.

The trial by duel or battle is described at length by Blackstone, book IV, page 346.

BAR STORIES, OLD AND NEW.

II.

In a former paper on this subject mention was made of interruptions of counsel by the presiding judge. In Lord Kingsdown's Recollections of the Bar the practice is referred to, both for the sake of showing how excusable it is in a judge, pestered to death by arguments, to put in a word which he thinks will tend to shorten, if not elucidate, the case; and how irritating it is to counsel to be obliged to suffer these interruptions. "I never felt," says Lord Kingsdown, "the full force till I sat myself at the judicial committee (of the privy council), on an observation made many years ago by my old friend, Sir William Alexander: 'Nobody knows how much energy it requires in a judge to hold his tongue.' It was a saying of Lord Lyndhurst's, that it was one of the functions of a judge to make it disagreeable to counsel to talk nonsense." On the other hand, it requires almost as much energy in counsel to refrain from abuse when persistently interrupted or ignored by the judge. Sir John Leach, when vice-chancellor, prided himself upon the rapidity with which he knocked off cases that stood for hearing in his court; and so sure was he that he knew by intuition the arguments which would be used, that he would often refuse to hear counsel on the other side, frequently giving his decision on the opening of the plaintiff's case. Mr. Rose said, in answer to some one who was speculating as to what Sir John would do when he had got through the cause list in his court, "Do? why he will hear the other side;" and Lord Kingsdown remarks that there was ample foundation for the witticism.

Lord Eldon, who was chancellor over Sir John Leach, was a contrast to him in every way; always heard a case right through from beginning to end, and was patient to a degree under the inflictions of counsel's speeches; though his mind was frequently made up at the beginning of the case, he would still hear all the arguments. He used to say, half in jest, half in earnest, that when the defendants had failed in satisfying him that the plaintiff was wrong, the plaintiff's counsel often succeeded in doing so in his reply.

There are one or two capital stories in Phillips' Life of Curran, and there are some more which rest, like the common law, unwritten, in the breast of the judges, showing how Lord Norbury's inveterate habit of interrupting counsel was several times checked by Curran and a few like him—how many were they, I wonder? Space will not allow of the transcription of the stories, which, however, with many other good anecdotes, happily told, readers should see in the book I mentioned.

Lord Chief Justice J—— was o'ergiven to interrupting, and would anticipate the arguments of counsel and the verdicts of the juries in the most troublesome way possible. One day Mr. M——, in a clearly losing case, having been interrupted many times in the course of his speech, lost his temper and flung down his brief, remarking that if he was to be interrupted like that he must decline to go on with the case. The judge tried to soothe the wounded spirit of the counsel, and urged him to proceed, but no inducements could avail, Mr. M—— remaining in dudgeon, and replying only, that it was quite clear to every one in the court that his lordship had made up his mind in the matter. The judge assured him again and again, with many apologies for having interrupted him, that he had not made up his mind, and added, when he found Mr. M—— still angry and still obstinate, "but I believe I am the only man in the court who has not done so."

The Mr. Rose mentioned above had a large practice in the chancery courts. One day the reporter of Lord

Eldon's decisions asked him to report a case for him. When the reporter got his note book back, he found the following *jeu d' esprit*, in which the characteristics of certain leading counsel were adroitly hit off; and the chancellor's notorious and vexatious — Horace Twiss calls it his conscientious — habit of reserving judgment until certain doubts had been cleared up, was also pointedly indicated:

"1. Mr. Leach
Made a speech,
Angry, neat and wrong.
2. Mr. Hart,
On the other part,
Was heavy, dull and long.
3. Mr. Parker
Made the case darker,
Which was dark enough without.
4. Mr. Cooke
Cited his book,
And the chancellor said 'I doubt.'"

Lord Campbell says that a short time after this it happened that Mr. Rose was engaged in a case before Lord Eldon, about which there was no doubt as to the propriety of a decree against Mr. Rose's client. Judgment was at once given by Lord Eldon, who went carefully into the whole question before him, and ended by saying to Mr. Rose: "For these reasons judgment must be against you; and in this case, Mr. Rose, the chancellor does not doubt."

Erskine's was, perhaps, the most remarkable case known of a young counsel springing suddenly into practice by means of a "cause celebre," but Lord Kingsdown furnishes in his own case another proof of how much of what is called "accident" contributes to a man's success. A relative of Mr. Pemberton (afterward Lord Kingsdown), Sir Robert Leigh, who had had no communication with the counsel's family for some years, and was unfriendly disposed toward it, had a suit in chancery, which was put down for hearing in the rolls court. Sir Robert was very angry when he found that Mr. Bickersteth, the senior practitioner in the rolls court, was retained on the other side; but his anger was still greater when he was told that his young relative was next in point of business, and must be retained for him. He said he was a "mere boy," and that the case was sacrificed. There were certain difficulties in the way of a decree for Sir Robert, which Mr. Pemberton knew of, and he hoped, as the only chance for his client, that the other side did not know about them also. In point of fact, they did not present themselves; but Mr. Sharpe, one of the counsel for the plaintiff (Sir Robert Leigh was defendant), having made a violent attack upon Sir Robert's grandfather, Mr. Pemberton smothered the case in replying upon this point, and, rather against his expectation, obtained a decree. The result of this was an intimacy between Sir Robert and his kinsman, and the execution of a will by the former, giving Mr. Pemberton Leigh, as he thereafter styled himself, a fortune of from twelve to fourteen thousand pounds a year. Lord Kingsdown says in his Recollections: "If the cause had come on for hearing some months earlier, or been set down in another court, I should probably have had nothing to do with it. If Bickersteth had not already been retained for the plaintiff, no doubt I should have been his counsel, and should have been obliged, probably, to make the observations which gave so much offense to Sir Robert when made by Sharpe. At all events, I must have contended against his interest, and probably might have defeated him by observing the blot to which I have alluded, and which he would naturally have considered as a mere trick. In any event, the chance is that I should have lost, or have failed to gain, some twelve or fourteen thousand pounds a year."

There are many amusing anecdotes of Lord Thurlow and the bar, but unfortunately some of the best among them are not fit for eyes polite. Thurlow's rough habit of speech, and his custom of interlarding his judicial language with oaths, was reckoned indecent, in an age when all men swore, even in ladies' presence. But swearing, except upon the court Testament, has gone quite into disuse now-a-days, though the writer remembers an occasion when a learned judge, still living, relieved his feelings with an expletive, and left his court, on being, as he considered, insulted by one of his junior brethren of the bench.

The peculiar and intimate relation between the bench and the bar, which is essential to the proper administration of justice, necessitates the maintenance of great mutual respect, and the observance of ever ceremonious courtesies on either side; yet it must be within the experience of every barrister that these salutary rules have been disregarded. There is one court in the metropolis which is notorious for its bear-gardenish aspect when it happens, as it does periodically, that judge and counsel cannot agree. Very considerable license is allowed, and rightly allowed, to counsel in the conduct of cases. They may, presumably in the interests of justice — too often, it is to be feared, in the smaller interests of their clients — even go the length of blasting reputations as blameless, certainly, as their own, and of making comments which elsewhere would be deemed, and would be, perfectly unjustifiable. The etiquette of the bar, as well as the power of commitment in the judge, restrain counsel from aspersing the character or questioning rudely the decision of the court; but in respect, or rather in disrespect, of other persons, there is almost complete license. It is the duty of a judge to interpose when a witness is suffering too much at the hands of counsel; and it lies in him also to check language which palpably exceeds the bounds of propriety.

Of course this liberty in the counsel confers upon the witness or other person subjected to mental vivisection the liberty of retorting, so the hits be full and fair, and unaccompanied by flippancy. On one occasion the writer remembers an Irish barrister who was anxious to discredit a witness, tormenting him beyond measure in his attempts to ascertain why the witness had not sooner given information of a robbery which he saw committed. "Did you not see a policeman?" asked the counsel. "Yes, I did," said the witness. "Then why did you not tell him of the robbery?" Pressed upon this point, and badgered so that he lost all patience, the witness, who had a good reason for not having done as it was thought he should have done, said, "Because he was only a great big fool of an Irishman, and I knew it would not be of any use to tell him."

Of Judge Jeffreys it might well be expected that any courteous rule as between bar and bench would be broken through. He was almost as much a terror

to counsel and attorneys as to witnesses; prisoners, of course, looked upon him as the fiend incarnate. Mr. Wallop, who defended Richard Baxter, was arguing against the opinion expressed by the court upon some point, when the chief justice observed: "Mr. Wallop, I observe that you are in all these dirty causes, and were it not for you gentlemen of the long robe, who should have more wit and honesty than to support these factious knaves by the chin, we should not be at the pass we are at." Mr. Wallop's junior, having urged another point already argued by his leader, was interrupted with: "Lord, sir! you must be cackling, too. We told you your objection was very ingenious. That must not make you troublesome. You cannot lay an egg but you must be cackling over it."

The present Lord St. Leonards, when only plain Mr. Sugden, was continually annoyed by being checked, like a bondman, from the bench, on which his former rival, Sir John Leach, sat. The judge's temper was so crabbed that he took the slighest expression of feeling from Mr. Sugden as meant for a personal insult to himself; and on one occasion the testy old man called the leading members of the bar into his private room, in order to announce to them his intention of committing Mr. Sugden to prison for contempt of court — a course from which he was with difficulty dissuaded.

Erskine once got a crusher from the speaker of the house of commons, when he appeared in support of a petition at the bar of the house. He had been allowing himself a good deal of latitude in his speech, for which he was once or twice called to order by the speaker, and, resuming his address, said: "At this late hour, sir, the house ought not to enter upon the consideration of so important a subject." Whereupon the speaker said: "Sir, it does not become counsel at the bar to intimate when this house adjourn. The house will govern its own proceedings as it thinks proper; and, unless you wish to make some further observations for your client, you may withdraw."

Once, at Guilford summer assizes, the writer remembers the reply of the judge in crown court to a blundering counsel who had annoyed him by asking, again and again, questions upon the admissibility of certain evidence adduced in a trial. His lordship had refrained from answering the queries put to him, and the counsel, having for the third or fourth time renewed them, received this answer, which came with chilling effect upon all within the court: "Her majesty and the house of lords are the only persons entitled to ask me any legal questions."

LAW AND LAWYERS IN LITERATURE.*

XV.

COWPER.

The "Report of an Adjudged Case, not to be found in any of the Books," is an amiable satire. The character of the case and the organization of the court are stated in the first two stanzas:

"Between Nose and Eyes a strange contest arose,
The spectacles set them unhappily wrong;
The point in dispute was, as all the world knows,
To which the said spectacles ought to belong.

So Tongue was the lawyer, and argued the cause,
With a great deal of skill and a wig full of learning;
While chief baron Ear sat to balance the laws,
So famed for his talent in nicely discerning."

After submitting the arguments in favor of the title of the Nose,

"Then shifting his side (as a lawyer knows how),
He pleaded again in behalf of the Eyes."

The result was that

"His lordship decreed, with a grave solemn tone,
Decisive and clear, without one if or but,
That whenever the Nose put his spectacles on,
By daylight or candle-light, Eyes should be shut!"

Cowper was articled to an attorney, and an occupant of chambers in the inner temple for a number of years as a student at law. To this he pleasantly refers in one of his letters, which are among the most charming in the language: "I know less of the law than a country attorney; yet sometimes I think I have almost as much business. My former connection with the profession has got wind, and though I earnestly profess, and protest, and proclaim it abroad, that I know nothing of the matter, they cannot be persuaded to believe that a head once endowed with a legal periwig can ever be deficient in those natural endowments it is supposed to cover." "Indeed, if two of the wisest in the science of jurisprudence may give opposite opinions on the same point, which does not unfrequently happen, it seems to be a matter of indifference, whether a man answers by rule or at a venture. He that stumbles upon the right side of the question is just as useful to his client as he that arrives at the same end by regular approaches, and is conducted to the mark he aims at by the greatest authorities."

The case of the Spectacles was originally written in another letter to a lawyer, and was thus prefaced: "Happy is the man who knows just enough of the law as to make himself a little merry now and then with the solemnity of judicial proceedings. I have heard of common law judgments before now; indeed, have been present at the delivery of some, that, according to my poor apprehension, while they paid the utmost respect to the letter of the statute, have departed widely from the spirit of it, and being governed entirely by the point of law, have left equity, reason and common sense behind them, at an infinite distance. You will judge whether the following report of a case, drawn up by myself, be not a proof and illustration of this satirical assertion."

The poet plumed himself so on this case that he sent it to another correspondent, with the suggestion that poetical reports of law cases are desirable, for the reasons that they would be more commonly deposited in the memory; divested of the law's infinite circumlocution, they would become surprisingly intelligible in comparison with their present obscurity; "and, lastly, they would, by this means, be rendered susceptible of musical embellishment, and instead of being quoted in the country with that dull monotony so wearisome to by-standers, frequently lulling even the justices themselves to sleep, might be rehearsed in recitation, which would have an admirable effect in keeping the attention fixed and lively, and could not fail to disperse that heavy atmosphere of sadness and gravity which hangs over the jurisprudence of our country." He then relates a story of a lawyer

who undertook to put Coke into metre, and cites the following sample of his skill:

"Tenant in fee
Simple is he,
And need not quake nor quiver,
Who hath his lands
Free from demands
To him and his heirs forever."

This reminds me of some rules for purchasing lands, found in a book printed in 1586, entitled "A Booke of the Arte and Manner how to plant and Graffe all sortes of trees:"

"Who so wil be wise in purchasing,
Let him consider these points following:
First see that the lande be cleare,
In title of the sellar,
And that it stand in no danger
Of no woman's dowrie.
See whether the tenure be bond or free,
And release of every feoffee.
See that the sellar be of age,
And that it lie not in morgage.
Whether a tail be thereof found,
And whether it stand in statute bound.
Consider what service longeth thereto,
And what quit rent thereout must go.
And if it be come of a wedded woman,
Think thou then on covert baron.
And if you may in any wise,
Make your charter with warrantise,
To thee, thine heires, assignes also,
Thus should a wise purchaser do."

Of a piece with this law learning is the following "Canons of Descent:

1. Estates go to the issue (*item*)
Of him last seized *in infinitum;*
Like cow-tails, downward, straight they tend,
But never, lineally, ascend:
2. This gives that preference to males
At which a lady justly rails.
3. Of two males, in the same degree,
The eldest, only, heir shall be:
With females we this order break,
And let them all together take.
4. When one his worldly strife hath ended,
Those who are lineally descended
From him, as to his claims and riches,
Shall stand precisely in his breeches.
5. When lineal descendants fail,
Collaterals the land may nail;
So that they be (and that a bore is)
De sanguine progenitoris.
6. The heir collateral, d'ye see,
Next kinsman of whole blood must be.
7. And of collaterals the male
Stocks are preferred to the female;
Unless the land come from a woman,
And then her heirs shall yield to no man."

Or this:

"A woman, having settlement,
Married a man with none,
The question was, he being dead,
If that she *had* was gone?
Quoth Sir John Pratt, her settlement
Suspended did remain,
Living the husband—but, him dead,
It doth *revive again.*"

(Chorus of puisne judges):

"Living the husband—but, him dead,
It doth revive again."

Let no one scoff at such improving exercises. John Scott, afterward Lord Eldon, is said to have amused himself by turning pieces of poetry into the form of legal instruments, and actually to have converted the ballad of "Chevy Chase" into the shape and style of a bill of chancery. What would we not give to possess it?

Cowper's idea of "musical embellishment" would do very well if we were always sure of so mellifluous a reporter. As to the music which should accompany the decisions, a course of rules would naturally be adopted, and the technical machinery of the law made to conform to the new state of things. In choosing the *key*, judgments upon the rights of infants would be set in the *minor*, and courts-martial would be conducted in the *major*. Causes involving small amounts of money should be dashed off in a *presto* movement, but large estates—especially where the costs come out of the fund—should be inquired into at the deliberate pace of an *adagio*. Personal actions—such as slander, assault and battery, and particularly breach of promise of marriage—ought to be treated in *flats*. Musical terms might be used to describe legal process and remedies. For instance: An order appointing a receiver might appropriately be indicated by a *hold;* a stay of proceedings by a *rest;* an order of arrest by a *slur;* while a re-argument might properly be called a *repeat* or *da capo*—back to the beginning. The fund in litigation would generally be *diminuendo*, and the costs *crescendo*, to the end. The course of some litigations, in which one judge enjoins another, would be described by a passage full of *accidentals*. Famous music already written could be adapted to various necessities of the law. Thus an argument on the law of descent could well be illustrated by the music of the opera of "Orpheus:" a trial for murder by poisoning could be preluded by the strains of "Lucrezia Borgia;" a bill of discovery would be adequately set to an air from "La Somnambula," in which groping in sleep and darkness is so thrillingly described; those pleas of insanity which inevitably accompany the defense of people who avenge their own domestic grievances, would fitly be conveyed in the harmonies of "Hamlet;" and the ease with which the marriage relation is dissolved in some parts of our favored country would be admirably set out by the melodious story of "Don Pasquale."

Cowper gives the following translation of a Latin poem by Vincent Bourne, entitled "The Cause Won:"

"Two neighbors furiously dispute;
A field the subject of the suit.
Trivial the spot, yet such the rage
With which the combatants engage,
'Twere hard to tell who covets most
The prize—at whatsoever cost.
The pleadings swell. Words still suffice:
No single word but has its price.
No term but yields some fair pretense
For novel and increased expense.
Defendant thus becomes a name
Which he that bore it may disclaim,
Since both in one description blended
Are plaintiffs—when the suit is ended."

The same idea is expressed in the following:

"Unhappy Chremes, neighbor to a peer,
Kept half his lordship's sheep, and half his deer;
Each day his gates thrown down, his fences broke,
And injur'd still the more the more he spoke;
At last resolved his potent foe to awe,
And guard his right, by statute and by law,
A suit in chancery the wretch begun,
Nine happy terms through bill and answer run,
Obtain'd his cause and costs, and was undone."

MOLIERE.

The great comedist of France entertained the same idea of smoothing the asperities of the law by the charms of music and poetry. In his play entitled "Monsieur de Pourceaugnac; or, Squire Lubberly," the hero, an advocate of Limoges, becomes a prey to all sorts of practical jokes; and, among other things, is threatened with a prosecution for bigamy. Sbrigani, the engineer of all the mischiefs against the simple-minded squire, tells him, "in this country, justice is as rigorous as the devil against that sort of crime."

"*Lubberly:* Ay! but, though there should be an Information, Citation, Decree, and Judgment obtained by Surprize, Default, and Contumacy, I've a way, by disputing the Jurisdiction of the Court, to gain Time, and bring about the Means of invalidating the Prosecution.

Sbrigani: Why, this is talking of it in all the terms, and 'tis plain that you are of the profession, sir.

Lubberly: I? Not at all; I—I am a gentleman.

Sbrigani: Certainly, to talk thus, you must have studied the practice.

Lubberly: No, it's nothing but common sense, which makes me conclude I shall always be admitted to justify myself by facts, and that I cannot be condemned upon a simple accusation, without a re-examination and a confrontation with the parties.

Sbrigani: This is finer still.

Lubberly: These words come from me without my knowledge.

Sbrigani: Methinks the common sense of a gentleman may go so far as to conceive what is right, and the order of justice, but not to know the very terms of quibbling.

Lubberly: These are some words I have remembered by reading romances."

Would that I could find these romances! They conclude to seek legal advice, and Sbrigani offers to conduct him to a couple of very able men, but warns him not to be surprised at their manner of speaking: "They have contracted at the bar a certain habit of declaiming, which appears like singing, and you'll take all they say to you for music."

Then ensues the scene with the lawyers. First counselor, drawling out his words:

"In case of Po-li-ga-my,
Hanging 's what the laws decree."

Second counselor, speaking very fast:

"What you've done
Is clear and plain;
And in that case
'Tis very full
What the law says.
Consult our authors,
Legislators and glossators,
Justinian, Papinian,
Ulpian, Tribonian,
Fernand, Rebuffe, John Imolus,
Paul, Castro, Julian, Bartholus,
Jason, Alciat, and Cuja,
That able man, you'll find they say,
In th' case of Poligamy,
Hanging the laws decree."

Second counselor sings:

"All people that are civilized,
And well advised,
French, English, Hollanders,
Danes, Swedes, and Polanders,
Flemings, Spanish, Portuguese,
Italians, Germans, all of these,
Herein you'll find
Are of a mind.
In the case of Poligamy
Hanging the laws decree."

First counsellor sings:

"In the case of Poligamy,
Hanging the laws decree."

This would be a good tune for our government to sing to Governor Young, of Utah.

I think we lawyers ought to be grateful that Moliere did not write about our profession so much as he did about the physicians. The following, from "La Malade Imaginaire," will sufficiently explain my reason for thinking so. Argan desires to will his property to his wife, but Bonnefoy, the notary, tells him that cannot be done. "Custom is against it. If you were in a country of statute law, it might be done; but at Paris, and in countries for the most part governed by custom, 'tis what can't be, and the disposition would be null. All the advantage that a man and woman joined by wedlock, can give each to the other, is by mutual gift during life; moreover, there must be no children, either of the two conjuncts, or of one of them, at the decease of the first that dies. *Argan:* Then 'tis a very impertinent custom that a husband can't leave any thing to a wife, by whom he's tenderly beloved, and who takes so much care of him. I should desire to consult my counselor to see what I could do. *Bonnefoy:* 'Tis not to counsel that you must apply, for they are commonly severe in these points, and imagine it a great crime to dispose of any thing contrary to law. They are difficult people, and are ignorant of the by-ways of conscience. There are other persons to consult who are much fitter to accommodate you; who have expedients of passing gently over the law, and of making that just which is not allowed; who know how to smooth the difficulties of an affair, and to find means of eluding custom by some indirect advantage. Without that, where should we always be? There must be a facility in things, otherwise we should do nothing, and I would not give a sous for our business." Argan then asks how he can give his estate to his wife and deprive his children of it? Bonnefoy replies: "You must secretly choose an intimate friend of your wife's, to whom you may bequeath, in due form by your will, all that you can, and this friend shall afterward give up all to her. You may further sign a great many bonds without suspicion, payable to several creditors, who shall lend their names to your wife, and shall put into her hands a declaration that what they had done in it was only to serve her. You may likewise in your life-time put into her hands ready money or bills which you may have payable to the bearer."

In "L'Ecole des Femmes," our poet explains the law of jointures and settlements, through the mouth of a notary: "The law says the husband that is to be, shall settle upon the wife that is to be, the third part of her portion; but the law signifies nothing at all; you may do a great deal more than that if you've a mind to. As for the presents to be made, let them agree together. I say the husband that is to be may jointure the wife that is to be just as he thinks fit. He may give her so much, and more, if he loves her greatly, and is desirous to oblige her, and that by way of jointure or settlement, as they call it, to be lost, and go away entirely to the right heirs of the wife that is to be, upon her decease; or else, according to the statute, as people have a mind; or as a gift, by deed in form, which may be made either single or mutual. Wherefore do you shrug? Talk I like a fool, or don't I understand the manner of a contract? Who is it can teach me? Nobody, I presume. Don't I know that when they are married, they have in law an equal right to all movables, moneys, immovables, and acquisitions, unless they give it up by an act of renunciation? Don't I know that a third part of the portion of the wife that is to be becomes in common," etc.

TERENCE

Has his joke on the lawyers in Thormio, the Parasite. He makes a father consult three lawyers together as

to the feasibility of setting aside a judgment of the court upon certain affairs of his son. One advises him the decree will certainly be reversed; another that it assuredly cannot be reversed; and the third declares it an intricate question, and that he needs time to deliberate. The questioner leaves in despair, saying he is much more at a loss than before.

BISHOP SHERLOCK,

In his "Trial of the Witnesses," submits to a jury the Scripture account of the resurrection of Christ. The arguments on both sides are given in the form of speeches of counsel on the trial of an indictment for perjury. The jury having deliberated:

"*Judge:* 'What say you? Are the Apostles guilty of giving false evidence in the case of the resurrection of Jesus, or not guilty?' *Foreman:* 'Not guilty.' *Judge:* 'Very well; and now, gentlemen, I resign my commission, and am your humble servant.' The company then rose up, and were beginning to pay their compliments to the judge and the counsel, but were interrupted by a gentleman who went up to the judge and offered him a fee. 'What is this?' says the judge. 'A fee, sir,' said the gentleman. 'A fee to a judge is a bribe,' said the judge. 'True, sir,' said the gentleman, 'but you have resigned your commission, and will not be the first judge that has come from the bench to the bar, without any diminution of honour. Now Lazarus's case is to come on next, and this fee is to retain you on his side.'"

SHIRLEY

Has a "Moral dressed in dramatic ornament," entitled "Honoria and Mammon." These names describe two female characters, representing honor and riches. Phantasm, servant of Mammon, proposes to Traverse, a lawyer, an introduction to his mistress with a design of making a match between them, telling him, "I have no mind the city would, your client, sir, should break his back with burden of his gold." A sort of legal love-scene ensues between the lady and the lawyer:

"*Traverse:* * * * * I can court you
In a more legal way, and in the name
Of love and law, arrest you, thus. [*Embraces her.*]

Mammon: Arrest me?

Trav. And hold you fast imprisoned in my arms,
Without or bail or mainprize.

Mam. This does well.

Trav. I can do better yet, and put in such
A declaration, madam, as shall startle
Your merriest blood.

Mam. I may put in my answer.

Trav. Then comes my replication, to which
You may rejoin.—*Curral lex!*
Shall we join issue presently?'

In view of his approaching alliance, the lawyer says:

"Since fame spread my intended marriage
With lady Mammon, methinks the people
Look on me with another face of fear
And admiration: in my thoughts I see
Myself already in the throne of law."

To make sure of the lady he confines her to his house. Just then a doctor comes, informing Traverse that he is attending Alworthy, a sick scholar, in love with Honoria, and her guest, and describing the latter lady in glowing terms, wonders that the lawyer has never sought her, saying:

"Men that are eminent in law are wont
To be ambitious of Honour.
Trav.: It is a maxim in our politics,
A judge destroys a mighty practicer;
When they grow rich and lazy, they are rife
For Honour."

At length the lawyer is so inflamed by the doctor's description, that he consents to accompany him, disguised as a physician, to the lady's house, and once there, is so much pleased with her that he craves possession of her person, and offers, if the doctor will advocate his claims, to give him gold and do all his law business for nothing. The doctor thereupon says:

"I now suspect the lawyer is short-liv'd;
Men of his robe are seldom guilty of
These restitutions."

Traverse, pretending that Alworthy is dead, gets Honoria's person in his possession, and proposes to make her his wife, and Mammon his concubine. But Mammon escapes, and Honoria, resisting all the lawyer's violence and proffers of money, is finally released by Conquest, who himself vainly tries to prevail on her to become his, and then to induce Traverse to kill Alworthy; the lawyer resists, and is rewarded with the friendship of the lady and her lover. The allegory is too apparent to need explanation.

In "Chabot" there is some tall argumentation on the part of an advocate employed to impeach the chancellor on account of his corrupt and unjust prosecution of the admiral Chabot. He starts off: "It hath been said, and will be said again, and may truly be justified, *omnia ex lite fieri.* It was the position of philosophers, and now proved by a more philosophical sect, the lawyers, that *omnia ex lite fiant*, we are all made by law — made, I say, and worthily, if we be just; if we be unjust, marr'd; though in marring some there is necessity of making others, for, if one fall by the law, ten to one but another is made by the execution of the law, since the corruption of one must conclude the generation of another, though not always in the same profession; the corruption of an apothecary may be the generation of a doctor of physic; the corruption of an alderman may be the generation of a country justice," etc. The treasurer interrupts him, and beseeches him to "leave all digressions, and speak of the chancellor." He then abuses the chancellor most roundly, even commenting unfavorably on his personal appearance. The treasurer interrupts him again, saying: "Your tongue was guilty of no such character when he sat judge upon the admiral; a pious, incorrupt man, a faithful and fortunate servant to his king; and one of the greatest honors that ever the admiral received was, that he had so noble and just a judge; this must imply a strange volubility in your tongue or conscience." To this the lawyer replies in the following master-piece of sophistry: "He was then a judge, and in *cathedra*, in which he could not err; it may be your lordships' cases; out of the chair and seat of justice he hath his frailties, is loosed, and exposed to the conditions of other human natures; so every judge, your lordships are not ignorant, hath a kind of privilege, while he is in his state, office, and being; and although he may, *quoad se*, internally and privately, be guilty of bribery of justice, yet *quoad nos*, and in public, he is an upright and innocent judge. We are to take no notice,—

nay, we deserved to suffer, if we should detect or stain him; for in that we disparage the office, which is the king's, and may be our own; but once removed from his place by just dishonor of the king, he is no more a judge, but a common person, whom the law takes hold on, and we are then to forget what he hath been, and without partiality to strip and lay him open to the world, a counterfeit and corrupt judge," etc.

PUBLICATION OF NOTICES.

Theoretically, each party to a suit must be in court before any step can be taken by which his rights are affected. In many cases the defendant is only constructively present: he has been notified by publication in a newspaper. In general, where the defendant is out of the state, or his last and usual place of abode is alleged to be unknown to the plaintiff, this is the only method adopted of completing service upon him. In some instances the court, in addition to publication, orders that a copy of the notice be mailed to the last known address of the defendant.

The degree of strictness exercised in these important preliminary proceedings varies in different parts of the country. Sometimes the applicant for an order of notice is allowed considerable latitude in the choice of a paper in which he wishes it to appear. This privilege, one readily sees, is likely to be abused, and not unfrequently (where it is desirable to keep the proceedings comparatively secret) an obscure sheet, of small circulation, is selected, and almost nobody sees or hears of the advertisement. It has been whispered, we do not know with what truth, that the real intentions of the law, in this respect, have been scandalously evaded in some western divorce suits, although perhaps the parties have complied with the letter of the statute.

At all events, justice demands that every reasonable effort be expended to inform a party that his interests are about to be a subject of a judicial decree. If practicable, the court requires personal notice; if not, a substitute for it should be as fair and honest an approximation to actual notice as diligent inquiry and good faith can insure. There are other notices, such as those in bankruptcy and probate proceedings, in foreclosures of mortgages and judicial sales, which the public are interested in having widely circulated, or at least in having published regularly and systematically.

The system which is generally adopted at present of leaving the matter in the discretion of the court, or of one of the parties, is susceptible, we think, of some improvements. In our large cities a plan is feasible, and well worth considering, of a recognized organ of official — that is, legal—notices. Some such suggestion has been acted upon in the Maryland legislature, we believe, but at present writing we know not with what result.

Let the court select some one journal, with a view to making it a permanent official medium by which legal notices in its jurisdiction are to be made public, and both bar and clients would recognize its advantages. The former would have at hand a convenient record, while all could apprise themselves readily of the movements of the other side.

It may be urged that, by publishing a notice in one or two daily newspapers, of general circulation, the interested party or his friends would be more likely to see it, or hear of it. True, and it would be well, therefore, in the case of many notices, to insert them in general newspapers as well as in the official organ.

As a further precaution, why not print a list merely of names of all parties interested (like advertised letters remaining in the post-office), in several newspapers of extensive circulation? Whatever additional expedients may be resorted to, we believe that a plan embodying the idea of a regular, complete, and official advertiser would better guard the interests of absent defendants, and widen the circle of public information where it is most needed.

In smaller cities and towns the official paper might be identified with some general publication already established. The court might see fit to suggest a county or state record. These are matters of practical detail, which it is not our object to enlarge upon. Suffice it to say, that the main idea we have suggested is not altogether a novel one; but we do not know that it has ever been put to the test of an experiment. We would like to see it tried; in the meanwhile we will await some better suggestions upon this important practical topic.

CURRENT TOPICS.

On Wednesday and Thursday of next week are to be held in Rochester the conventions for the nomination of candidates for the court of appeals bench. No one is more deeply interested in the selection of capable, competent men than are the members of the legal profession, and we urge upon them to see to it that only such are selected. Party passions and prejudices should be ignored, and the best men chosen, whether they be democrats or republicans. As was to be expected, the political papers of the state are making strenuous efforts to further the ends of the followers of their several political idols, but the profession should understand the necessity of putting aside all partisan considerations in a matter of this character. Our courts can be the organs or exponents of neither party, but must stand like the mountain top, calm and unmoved, above the storms that rage beneath.

The New York *Times*, and the *Independent*, have been making strenuous efforts to demonstrate the inconsistency between Chase, the secretary of the treasury, and Chase, the chief justice. In a recent article the *Times*, in speaking of the legal tender decision and the chief justice, says:

"As secretary of the treasury, in an emergency of the country, the most momentous to which it had ever been exposed, he officially stated to congress that the legal tender measure was indispensably necessary to success—in other words, that the rebellion could not have been put down without it. It does not require to be stated that in his intercourse with congress, the official oath of the secretary of the treasury applies."

From statements such as this the argument is drawn that Mr. Chase, in making his decision in the Hepburn-Griswold case, acted in direct opposition to his advice to congress. The fact is, however, that he did

no such thing. The constitutionality or necessity of the legal tender act were neither directly nor indirectly passed upon in the recent decision. The chief justice may then have held, and still hold, the legal tender act to have been indispensable to the suppression of the rebellion; but it does not follow that he should either then or now have construed it as applicable to debts contracted prior to its passage. It is very possible that it was essential to the preservation of the nation that a currency should be provided that should be a legal tender for debts, but to hold that the safety of the nation depended upon its being made a legal tender for prior contracted debts is simply nonsense.

On Monday last the judiciary committee of the assembly reported the bill to reorganize the supreme court. Mr. Alvord moved to recommit the bill, with instructions to amend by providing for the appointment by the justices of a reporter of the decisions of the court. Mr. Fields, of the committee, opposed the motion. He "thought he saw the object of the amendment. It was to remove a democratic reporter of the supreme court, already in office, and put a republican in his place. It was not obligatory upon the judges to take this course. The court already had a reporter, provided for by the action of the legislature of 1869." The motion to recommit was lost. The remarks of Mr. Fields and the course of the assembly are certainly extraordinary. The twenty-third section of the sixth article of the constitution expressly declares that "the legislature shall provide for the speedy publication of all statutes, and also for the appointment by the justices of the supreme court designated to hold general term, of a reporter of the decisions of that court." Here is a direct injunction of the constitution, which Mr. Fields and his co-laborers propose to disregard for the purpose of keeping in office a political favorite. It is of considerable importance that the judges should have the power of selecting some person deemed by them competent to report their decisions, and it was the express intention of the constitution that they should have such power, but the party loaves and fishes, however small, are not to be jeopardized for any such considerations.

"Have we a supreme court reporter among us?" is a conundrum that we are unable to solve, since it is in effect recorded somewhere, that "by their fruits shall ye know them." Mr. Lansing has now enjoyed the titles of that office for nearly a year, and his "fruits" may be represented not inaptly by that algebraic sign for an unknown quantity, "x." We are by no means advocates for an unnecessary publication of law-books, but we submit that reasonable diligence and promptness in reporting the decisions of the supreme court are of importance to the profession of the state. Mr. Lansing has exhibited neither. We are very safe in saying that from five to seven hundred opinions have been delivered at general term since he received the appointment, and moderate industry and energy on his part would have enabled him to select from that number at least one volume of cases of sufficient importance to be entitled to a place in the reports. We understand that Mr. Lansing is a candidate for renomination, but we believe that the judges can make a better selection. We presume that Mr. Barbour would accept the position, and we are sure that he would give far greater satisfaction to the profession. He has acted, unofficially, as reporter for several years, and, notwithstanding the numerous difficulties and embarrassments that must of necessity beset an unofficial reporter, has performed his work with a reasonable degree of success. Freed from these difficulties and embarrassments, as he would be were he the authorized reporter, we have no doubt that he would discharge the duties of the position in a very satisfactory manner. His acknowledged ability and legal attainments, and his long experience in the business, certainly qualify him to do the work well.

We are told that Mr. Lansing has a volume now going through the press. We believe it has been performing that pilgrimage for some months. How much longer it is to continue must depend on the rapidity with which he furnishes "copy," and the alacrity with which he gets through the "proofs." We look forward to its appearance with "great expectations," as, from the length of time he has been engaged upon it, we shall expect a model report in every particular.

The Hon. J. H. Howe, chief justice of the supreme court of Wyoming, has written a letter setting forth his views of the success of the experiment of the mixed jury recently tried in that territory. The learned judge very modestly expresses regret for the notoriety and publicity that he has achieved through the means of the jury aforesaid, and declares that he had never been an advocate for the law, but that the law having been passed, he determined to see it fairly administered. He indulges in considerable eloquence and poetic rhapsody in eulogizing the female part of the jury, and says: "They are educated, cultivated Eastern ladies, who are an honor to their sex. They have, with true womanly devotion, left their homes of comfort in the states to share the fortunes of their husbands and brothers in the far West, and to aid them in founding a new state beyond the Missouri." Of the results the judge says: "With all my prejudices against the policy, I am under conscientious obligations to say that these women acquitted themselves with such dignity, decorum, propriety of conduct and intelligence as to win the admiration of every fair-minded citizen of Wyoming," etc. This is a very flattering side of the picture for the ladies, but there is another side that is perhaps worthy of consideration. It is hinted at, in a letter that has been made public, said to have been written by a niece living in the family of one of the "educated, cultivated eastern ladies," who served her country on the jury. This girl declares: "I know it was a great honor for her (the aunt), but I had an awful time of it, and was glad enough when they adjourned." It seems that shortly after the auntie, "with true womanly devotion," left her home to "serve her country" (?) in the jury-box, an infantile responsibility, toward which she unfortunately bore the relation of mother, awoke, and missing the maternal face, began to make things lively. Niece tried her best to keep it quiet, and sang

to it this little ditty, which will probably now be added to the nursery rhymes:

"Nice little baby, don't get in a fury,
'Cause mamma's gone to sit on the jury."

But "nice little baby" was not to be bamboozled out of his dinner by such poetic effusions. So niece was at last directed by the father to take the infant to the temple of justice. Here is her story:

"When I got there, the chief justice was preachin' to the wimmin beautifully, and told 'em how that all the world was looking at them; and that Wyoming had took the first step to give wimmin their rights, and lots more that I can't remember. Poor Ulysses spied his mother and was getting uneasy, so that I couldn't hear half of it. After he got through, anty gave the baby his dinner, and he was happy as a prince looking at all the folks. She said that if she did not come home to supper, I might bring the baby again about dark. Well, I had to trot that baby three times a day back and forth, all the time that anty was setting on that jury, and do all the work besides."

This is certainly bad enough, but the worst of it is that the aunt declares that "she is going to read and expand her mind, and some day start on a lecturing tour." If that is to be one of the results of the reconstructed jury system we trust that that system will not expand.

Experience is usually supposed to qualify a person for the ordinary duties of life, and we think there was formerly a proverb asserting it to be the *best* teacher. There seems, however, to have entered into the minds of politicians in this country a belief that the less a man knows about the duties of a public station, the more proper is it to choose him to fill that station. The consequence is, that the civil service of our nation is wretched in comparison with that of other countries, the civil service of the several states worse than that of the nation, and the service of the cities, where the prevalent sentiment has full play, so inefficient and corrupt, that men have begun to doubt whether it can longer be tolerated. The judiciary have, however, heretofore been comparatively unaffected by the principle of rotation in office — a good judge being usually re-nominated by the party to which he belonged. But the new judiciary article of the constitution has, by its provision limiting the judicial office to persons under seventy years of age, afforded to political managers an excuse for introducing their favorite theory into the judicial nominating conventions, by advocating the nomination of no person over the age of fifty-six.

By excluding from nomination every person who will, before the termination of fourteen years, reach the age of three-score and ten, we may possibly reduce the frequency of elections for the office of judge, which is the only advantage that can be justly claimed. The fact that some of the judges must be supplanted by new ones, from time to time, before the expiration of the fourteen years, can do little injury, as it is better to change gradually than all at once, which, in accordance with the proposed rule, must be done at the close of the term of those now to be elected, as the youngest one of the present candidates will be at that time over the age of fifty-six.

The constitutional convention saw fit to terminate judicial labors at the period of human life which the wisdom of revelation and the common consent of man had designated as the time when the mental and physical powers begin to fail.

Whether this provision was wise or not, it is now useless to discuss. That the judiciary of England has had among its most eminent members many whose intellectual vigor remained undiminished long after that time, cannot be denied. That both there and here instances have occurred where the infirmities of age have disqualified those occupying the bench for the duties of their position, is likewise true. But the convention could never have anticipated that they were about, by their action, to deprive the people of this state of the services of those experienced and educated men who now constitute the major part of our judiciary, merely because some ten or twelve years hence they will, by law, become disqualified to act.

The two parties hold their conventions before the issue of our next number. At this our last opportunity, we earnestly ask the profession at large to see to it that our court of last resort be made up of men whose age and reputation shall secure respect; whose long familiarity with their calling and ripened judgment will insure certainty and stability in the law; and who, being no longer interested in the contentions of political life, may give the best efforts of their mature years to elaborating and adorning the jurisprudence of our state.

OBITER DICTA.

Judicial book-keeping — charging a jury.

It is a general remark that all classes of persons are ever ready to give their opinions. We think the lawyers must be excepted; they sell theirs.

"What do you know of character of this man?" was asked of a witness at police court, the other day. "What do I know of his character? I know it to be *unbleached*, yer honor," replied he, with emphasis.

In speaking of Judge Orr, who recently held court in Spartanburg, S. C., a local paper said that he was "essaying the herculean task of removing the accumulated mass of litigation from its Augean Issue Docket," and that it "had no doubt but the Alphean waters of a strong will and sound judgment" would render the labor much easier of accomplishment than it appeared to be.

Hon. Pierre Soule, who recently died in New Orleans, used to relate the following anecdote of himself: Some years ago he made an argument in one of the New Orleans courts in a murder case. He intended, he said, to make a very dramatic and pathetic statement of the tragedy, which took place in the kitchen of a public house. He thought he was getting on finely, but every now and then the jury and the entire court burst into a laugh which he could not understand. At last he indignantly appealed for an explanation to the judge, who said: "Why, Mr. Soule, when you doubtless intend to say kitchen, you say chicken."

The celebrated M. Berryer used to tell a story respecting a cause tried before the "Tribunal des Minimes," over which M. Le Roy Sermaise presided. Two rustics from Montreuil quarreled about their right to a small estate. The plaintiff rested his right on a deed of conveyance; the defendant had but uninterrupted possession to rest upon.

"How long," said the democratic judge, "has this possession lasted?" The peasant replied: "Why, citizen president, at least eighty or ninety years, taking in my great-grandfather, my grandfather, my father, and myself." "Then," replied the judge, "you ought to be satisfied. Every one in his turn; yours has lasted long enough in all conscience; now let your poor neighbor have his."

The married women acts of this state are not very dissimilar to that in force under the Roman Empire. By the form of marriage, the *usus*, almost universally adopted, the wife had virtually absolute control over her real and personal property; and though the husband had the benefit of the dowry, yet even that was under certain restrictions. The rich wife consequently ruled both her household and her husband. Marriage went out of favor, especially among the higher classes of Roman society. "You ask me," said Martial, "why I will not marry some one with plenty of money? It is because I have no wish to become the very humble servant of my own wife."

COURT OF APPEALS ABSTRACT.

The Buffalo and Allegany Valley Railroad Company v. *Emily Johnson, executrix, etc.*

This cause being at issue, and upon the circuit court calendar, the plaintiff entered an order for its discontinuance upon payment to the defendant of the costs and disbursements incurred therein, to be adjusted, and served copies on the defendant's attorney, together with notice to have his costs taxed. These papers were returned by the defendant's attorney, with notice that the discontinuance without payment of costs was a nullity.

On the eighth of December, the defendant's attorney, at the circuit, took a dismissal of the complaint. The clerk, in adjusting the costs, allowed a trial fee and a clerk's fee on trial, the plaintiff objecting. The court, at special term, decided that this was wrong, and ordered a re-adjustment by striking out those items. The general term affirmed the order, and the defendants have appealed to this court.

Held, that "the order from which the appeal is taken is not appealable. Assuming that it affects a substantial right, it does not determine or discontinue the action. It enables the plaintiff to effect a discontinuance by the payment of the costs and disbursements necessary for that purpose, but does not, of itself, operate as a discontinuance.

If such payment is not made in proper time, the defendant will be at liberty to proceed in the action.

Dolan v. *The City of Brooklyn.*

The plaintiff brought an action for damages sustained by him by being thrown from his carriage in the night-time, by a pile of dirt laying in the streets of the defendant — a municipal corporation — unguarded. On the day before the accident an excavation was made in the street where the accident occurred, by a plumber licensed by the city authorities to do such work, for the purpose of connecting the waste pipes of a private house with the sewer. The permit to do the work provided that it was to be done "under the direction of the engineer and director of sewers." The rules of the authorities provided also that all work of the kind was to be examined by the inspector before it was covered up, and also that no excavation in any street must be left open over night. *Held*, that the law was well settled that where, by the authority of any municipal corporation, any of its streets are excavated or out of repair, so as to be unsafe for use, it is the unqualified duty of such corporation to cause guards or lights to be put and kept up at night to prevent accidents; and, for its neglect to do so, is always liable to respond in damages. *Held*, that such corporation is liable for such neglect of duty though the excavation in a street is not for a public improvement, but is made for the private benefit of an individual, and is left unguarded at night by the fault of such individual, or of the person employed by him and acting under a permit from the city authorities. *Held*, also, that the defendant, having given authority to open or excavate a street, it was bound to see that it was safely done, and that the said street was restored to its former safe condition during the same day, or was properly guarded at night.

Van Allen v. *Wait.*

When a suit is commenced by warrant, the justice is not bound to render his decision forthwith, as provided by 2 R. S. 247, § 124, unless the defendant is in custody; and the burden of showing that fact is on the defendant. The general rule is, that a justice has four days within which to render a decision, and it is incumbent on the defendant to show that his case is an exception.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF IOWA.*

(*Continued from last week.*)

HUSBAND AND WIFE.

1. *Liability of wife.* — While a married woman might defeat a recovery in an action against her as surety upon a note of her husband, by appearing and pleading her coverture, yet if she fails to appear, and suffers a personal judgment to be rendered against her, she is, in the absence of fraud, concluded thereby, and cannot afterward avail the force thereof by pleading her coverture, and that she omitted, through ignorance of her legal rights, to make her defense at the proper time. *Van Metre* v. *Wolf.*

2. *Character and effect of judgment against wife: after acquired property.* — Personal judgments against a married woman, upon contracts which she has the legal right to make, are authorized by § 2933 of the Revision, and such judgments have the same effect as personal judgments against other parties, and are to be enforced in the same manner. *Ib.*

3. It is accordingly *held*, that after-acquired property of a married woman may be taken under a personal judgment against her. *Ib.*

4. *Constitutional law.* — Section 2933 of the Revision authorizing personal judgments against married women, under which after-acquired property may be taken, is construed to apply to contracts entered into before the date of its enactment as well as to those since, and this construction, giving the statute a retrospective operation, does not impair the obligation of the contract, increase the liability of the *feme covert*, nor create a remedy where none existed before. *Ib.*

5. *Argu.* 1. *Prior remedies.* — Prior to the Revision a remedy existed against a married woman on a contract she had a right to make, and by a proper proceeding her property then in possession might be subjected to the payment of the judgment against her and upon the subsequent acquisition by her of other property, it could also be subjected by a like proceeding to satisfy any balance remaining unpaid. *Ib.*

INSTRUCTION.

Inapplicability: seduction. — In an action for seduction the court charged the jury that, in estimating the plaintiff's damages, they should consider, among other things, "the loss of time by her, the expense incurred for medical attendance, if any, and board while sick and the like." It was objected that this instruction was erroneous, because inapplicable to the testimony, there being no evidence of loss of time during sickness, or that a physician was employed, or any thing expended for medicine,

* From E. H. Stiles, Esq., Reporter. To appear in 27th Iowa.

nursing or other service. It was, however, proved that the plaintiff had given birth to a child, though there was no evidence as to how many days' loss of time was occasioned thereby. *Held*, that there was no sufficient error in the instruction to justify a reversal of the judgment.—*Gray* v. *Bean.*

INSURANCE.

1. *Powers of agents.*—A local agent of a foreign insurance company, authorized to effect contracts of insurance, and conduct the business at his agency, is to be considered a general agent, and competent to bind his company by acts which are within the scope of the general authority he possesses, though in violation of limitations upon that authority not brought home to the knowledge of the assured. *Allman, Miller & Co.* v. *The Phœnix Insurance Company.*

2. *Agent's power to accept orders: evidence.*—Whether such agent has power to bind the company in case of a loss, and before settlement thereof, by the acceptance of an order drawn by the assured in favor of a creditor, *quere*. *Ib.*

3. ——— But if not, such powers could be implied from such acts on the part of the company as would induce the public to believe that such power had been conferred. So, too, his acts in this respect might, in a like manner, be subsequently ratified, and the company thus estopped from denying their validity; and evidence of acts tending to show such authority or ratification are admissible. *Ib.*

INTOXICATING LIQUORS.

1. *Indictment for nuisance.*—An indictment for keeping a nuisance, under section 1561 of the Revision, is sufficient, which charges the offense as having been committed "by using and keeping a room and place for the purpose of selling therein intoxicating liquors in violation of section 1562 of the Revision." *The State* v. *Freeman.*

2. *Quantum of proof.*—Proof of occasional sales in a secret manner, without testimony that the place was notoriously or publicly known as a place for the sale of intoxicating liquors, is sufficient to convict in a prosecution for nuisance under said section 1561. *Ib.*

JUDGMENT.

Reversal in supreme court: restoration of property taken.—Where property taken under a judgment from which an appeal has been taken without the filing of a supersedeas bond, and which is afterward reversed, has, by voluntary sale, or by seizure and sale under process, passed to an innocent purchaser pending the appeal, or where money collected under such judgment is received by one occupying a fiduciary capacity, as by an administrator, and he has, pursuant to an order of court, paid it over to another, the summary remedy provided by section 3510 of the Revision, for the restoration of property or money, cannot properly be administered, and the party is left to his ordinary remedy. *Hanschild* v. *Stafford.*

JUDGMENT LIEN.

Unrecorded deed.—An unrecorded deed will take preference over a judgment or attachment lien. Nor is the case varied by the fact that the deed is without a proper acknowledgment. *Hoy* v. *Allen et al.*

JUDICIAL SALE.

Adjournment by attorney.—The sheriff has no power to authorize the attorney of one of the parties to adjourn a judicial sale; and for such an irregularity, a sale on the day to which the adjournment was made will be held invalid. *Wolf* v. *Van Metre et al.*

JURY.

1. *Challenge: actual bias.*—The action of the court below in rejecting a juror under a challenge for actual bias will not be disturbed unless it be clearly shown that the discretion confided to the court by the statute has been abused. *May* v. *Elam.*

2. *Rule applied.*—The rejection of a juror because he had as plaintiff a similar case pending in the same court against another party, was held not erroneous. *Ib.*

3. So, too, the rejection of another juror who was shown to be an old acquaintance of the plaintiff, and to have received from him a full and circumstantial account of his case, and that he believed all that the plaintiff had stated, etc., but that he had no opinion whether plaintiff was right or wrong, was held not erroneous. *Ib.*

LANDLORD AND TENANT.

Forcible entry and detainer.—Where a tenant takes possession of premises under an agreement that he is to occupy them only so long as he shall continue in the employ of the landlord, he will not be regarded as a tenant at will, but one holding under a definite lease, and if, after quitting the service of the landlord, he refuses to yield up possession of the premises, he will be regarded as one holding over after the termination of a lease, and subject to an act of forcible entry and detainer on the part of his landlord upon three days' notice to quit. *Grasvenon* v. *Henry.*

MORTGAGE.

1. *Foreclosure: redemption.*—A junior mortgagee, after his debt has been fully satisfied, has no right of redemption, which he can exercise himself or transfer to another, from a prior sale made under foreclosure of a senior mortgage to which he was not made a party. *McHenry* v. *Cooper et al.*

2. Nor is the rule varied by the fact that the junior mortgage is in the form of an absolute conveyance, and that the mortgagee, after payment by the mortgagor and at his request, executes a conveyance of the premises to a third party. All right of redemption being extinguished by payment of the mortgage, none is transferred by the conveyance. *Ib.*

3. *Redemption by subsequent creditor.*—An ordinary judgment creditor (or a surety subrogated to his rights by payment of the judgment) whose judgment was rendered subsequent to a decree of foreclosure in favor of a third party, but before a sale thereunder, has, it would seem, under the statute, by virtue of the lien of his judgment on the mortgagor's interest in the mortgaged premises, the right to redeem at any time before sale. But, if this right is not exercised before sale, it will thereby be as effectually barred as if the creditor had been made a party to the foreclosure proceeding, or subsequently brought in for the purpose of cutting off his right. *Ib.*

4. *Foreclosure: parties: redemption.*—A decree of foreclosure and sale thereunder is not void because a subsequent purchaser of part of the mortgage premises was not made a party to the foreclosure proceeding. The purchaser in such case merely holds the equity of redemption which he may enforce by a proceeding therefor. *Douglas et al.* v. *Bishop.*

5. *Purchaser of part must redeem the whole.*—A purchaser of part of the mortgaged premises can redeem only by paying the whole of the debt secured by the mortgage. *Ib.*

6. *Release of portion.*—Where several lots are covered by a mortgage, the release by the mortgagee of one of the lots, with notice on his part that other of the lots had been sold by the mortgagor to third parties, will have the effect to discharge the lots thus aliened to the extent of the *pro rata* value of the one released. *Faylor* v. *Shoets, adm'r.*

7. *Aliter* if it could be shown that the mortgagor had no title to the lot released, or that purchasers were not prejudiced by the release. *Ib.*

MUNICIPAL CORPORATIONS.

1. *Bridges.*—The town of Cedar Falls, under its act of incorporation, had the power to contract for, and to issue warrants to provide for the payment of, the construction of a free bridge across the Cedar river, within the corporate limits and upon ground dedicated and set apart for a street, though the town was laid off on only one side of

the river, but was approached from the other side by a road touching the river where the bridge was located. *Dively* v. *The City of Cedar Falls.*

2. *Character of scrip.*—The scrip issued by the corporation to provide for the payment of said bridge was not issued to circulate as money and is not therefore void for that reason. *Ib.*

3. *Scrip used as a circulating medium.*—The fact that members of the council may have contemplated at the time of voting the scrip that it might or would become a convenient circulating medium would not make it money, nor its issue violative of the law. Nor would the corporation be released from liability by the fact that the scrip was used by individuals or the community generally as a circulating medium. *Ib.*

4. *Object of the law.*—It was the object of the law to lay its hands upon *banking* corporations prohibited by the express language of the old constitution, and it is not applicable to municipal corporations issuing its warrants or scrip in payment of its actual indebtedness. *Ib.*

5. *Scrip: free and toll bridge.*—Scrip issued by a municipal corporation for the erection of a free bridge would not be invalidated by the council subsequently declaring it a toll bridge. And the rule would be the same whether the scrip remained in the hands of the contractor or had been transferred to third parties. *Ib.*

6. *Limitation of corporation indebtedness: constitutional law.*—If a municipal corporation has the means in its treasury to meet its indebtedness, the issue of warrants to amounts larger than five per cent of its taxable property would not be a violation of section 3, article XI of the new constitution, which provides that no municipal corporation shall be allowed to become indebted to an amount exceeding five per cent of the taxable property within the corporation. In such case it would not become indebted within the meaning of the constitutional clause. *Ib.*

7. *What constitutes indebtedness.*—So, too, an obligation arising under a contract on the part of a municipal corporation to pay for work when and as it shall be performed in the future, does not constitute or ripen into an indebtedness within the meaning of the constitution until the performance of the work. *Ib.*

NOTES AND BILLS.

1. *Filling of blank: forgery and fraud.*—The maker of a promissory note, obtained under circumstances which would, as between him and the payee, render the latter guilty of forgery or fraud, may, nevertheless, be liable on the note to a *bona fide* holder to whom it has been negotiated before due. *McDonald* v. *The Muscatine National Bank.*

2. *Rule applied.*—Where a person intrusted by another with a paper signed in blank, to be filled up as an order, disregards the instruction, and fills it up as a negotiable promissory note, the maker is liable thereon to a *bona fide* holder thereof to whom it has been negotiated. *Ib.*

3. *Indorsment of collaterals by debtor.*—A judgment by a creditor against his debtor, as indorser of a note held by such creditor as collateral security for a note executed to him by the debtor, constitutes no bar to a suit by the former against the latter on the note thus secured. *Bonheimer Bros.* v. *Hart.*

4. *Payment: extinguishment.*—Where in such case the debtor settled the judgment on the collateral by paying the creditor a certain proportion thereof, and taking an assignment of it to himself, which judgment was against the makers of the collateral note, as well as against him as indorser thereof, it was *held*, that this constituted no bar to a suit upon the original indebtedness, and amounted to an extinguishment thereof only to the extent of the actual amount received, in the absence of any agreement or understanding to the contrary. *Ib.*

PARTNERSHIP.

Agency: change of firm name.—A change in the name of a firm does not operate to revoke or annul an agency conferred upon it, when the firm under the new name is composed of the same members as that under the old one. *Billingsley* v. *Dawson.*

PLEADING.

1. *Answer: legal conclusion: demurrer.*—A clause of an answer in an action upon a promissory note, which merely denies, as a conclusion, that there is due on the note the amount claimed by the plaintiff, constitues no defense, and may be assailed by demurrer. *Stuckslager* v. *Smith.*

2. *Seduction: requisites of petition.*—In an action by an unmarried woman for her own seduction, the petition, after alleging the fact of seduction, etc., averred "that plaintiff had been damaged by the defendant in the sum of $5,000, for which she asks judgment," it was argued for the first time after trial and verdict, that the petition was defective in not averring that plaintiff was damaged by reason of the wrong or injury imputed to defendant. *Held*, that the damages were sufficiently alleged to be the result of the seduction to sustain the verdict. *Gray* v. *Bean.*

PRACTICE.

1. *Exceptions to judgments rendered in vacation.*—That the report of a referee was filed and judgment thereon rendered in vacation, constitutes no sufficient reason for not excepting thereto, nor prevent the application of the rule that the supreme court will not review the action of the court below unless excepted to. *Roberts* v. *Cuss.*

2. *Assignment of Errors.*—Errors not embraced in the assignment of errors, though raised in argument, will not be considered by the supreme court. *Ib.*

3. *Redundant matter.*—That a pleading contains matter which is irrelevant or redundant, is not a ground of demurrer. A motion to strike such matter from the pleading is the proper remedy under section 2946 of the Revision. *Douglas et al.* v. *Bishop.*

RAILWAY COMPANIES.

1. *Liability as carriers for baggage.*—The liability of a railway company as a common carrier for the baggage of a passenger terminates upon the expiration of such reasonable time after its arrival at the place of destination as will enable the traveler to receive and take charge of the same. *Mole* v. *C. & N. W. R. R.*

2. In determining what would be a reasonable time, the customs of the company, the manner of transporting baggage from the station, and all the circumstances surrounding the case will be considered. *Ib.*

3. *Liability of a warehouseman.*—When baggage is unclaimed within a reasonable time after its arrival at the place of destination, it is the duty of the company to store it in a proper and secure place until called for; and when stored, the liability of warehouseman attaches to the company, and its liability as a carrier ceases. *Ib.*

4. *Duties of warehouseman.*—The obligation of the company as a warehouseman is to take ordinary and reasonable care of the property intrusted to its charge, and exercise toward it such diligence as men usually exert in respect to their own concerns. It would be liable for theft, if it were the result of the want of proper care. *Ib.*

5. *Rule applied.*—The baggage of a traveler was not claimed after its arrival at the place of destination. After remaining on the platform several hours, it was removed by the station agent into a room which was the only place for storing baggage connected with the station, and which was not a secure place for keeping such property, the door being so imperfectly fastened as to constitute no hinderance to any one desiring to enter, and the building left without a watch. During the night the trunk was broken open and rifled. *Held*, that the company was liable. *Ib.*

SERVICE AND RETURN.

Original notice.—A return on an original notice that it was "personally served by reading in the hearing of the defendant and leaving a true copy with him," is sufficient. *Grasven* v. *Henry.*

TAXES.

1. *School tax paid to wrong district.*—Certain sections of land embraced within the geographical limits of the civil township of C. were also embraced within the limits of the school district township of R. The school district township of C. included all of the civil township of C., except the lands embraced in the school district township of R. For several successive years the school district township of R. and the school district township of C. certified up to the proper county authorities the per centum or rate of taxation voted by their respective districts for school purposes, and the same was levied for such years, but the per centum thus certified up by the school district of R. to the county authorities, and by them levied, was not carried out upon the tax lists upon said land, and, consequently, never collected, but instead thereof, the per centum voted by the school district of C., and certified up, was carried out upon the tax lists as the amount of tax upon said lands, collected by the county treasurer, and by him paid over to said school district township of C. *Held*, in an action by the school district township of R. against the school district township of C. to recover the amount of tax thus paid over to the latter, that, as the tax levied by the county authorities for the plaintiff was never collected, but another and different tax, *viz.*: that certified up by the defendant, the money collected did not as of legal right belong to the plaintiff, and that it was not entitled to recover. *District Township of Rapids* v. *The District Township of Clinton.*

2. *Money had and received: estoppel.*—It appearing from the record that there was a dispute between the two districts respecting their boundaries—each claiming the territory in question, and failing to settle the question in some legitimate way, the allowance, by the plaintiff, of the defendant to levy, collect and receive the taxes from year to year, and expend them in meeting the wants of the district, estops it from maintaining an action therefor as for money had and received, upon principles of public policy similar to those which deny to a party who voluntarily pays an illegal or unconstitutional tax, the right to recover it back. *Per* DILLON, Ch. J. *Ib.*

TAXATION.

1. *Of national bank shares.*—Chapter 153, laws of 1868, providing for the taxation of shares in national banks, is authorized and valid under the forty-first section of the act of congress of June 3, 1864, and that of February 10, 1868.

Argu. 1: *Effect of repealing clause.*—By the clause contained in the fourth section of said act of the general assembly of 1868, repealing all acts and parts of acts inconsistent therewith, the abstract (existing when the case of *Hubbard* v. *The Supervisors*, 23 Iowa, 130, was decided) to taxing the shares in national banks, presented by section 1508 of the Revision, which provided merely for the taxation of the *capital* instead of the *shares* of banks organized under the state banking law, was removed; and under the general revenue law of the state, the taxation of shares in the state banks is authorized. *Morseman* v. *Younkin et al.*

2. *Right of exemption.*—If property which the legislature has declared to be liable to taxation is to be exempted from bearing its due proportion of the public burden, the exemption must rest upon some clear and just ground; and courts are not justified in indulging in nice distinctions to defeat the legislative will. *Ib.*

VENUE.

1. *Change of in criminal cases.*—The action of the district court in overruling an application for a change of venue in a criminal prosecution will not be disturbed, unless it satisfactorily appears that there has been an abuse of discretion. *The State* v. *Hutchinson.*

2. *Rule applied.*—In a prosecution for a misdemeanor, consisting in a violation of the liquor law, the defendant filed an application for a change of venue, based upon the ground of excitement and prejudice against him in the county, and stating that the same excitement and prejudice existed in three other counties named. Forty-six persons signed an affidavit that they believed that the defendant could not obtain a fair and impartial trial in the counties named. Thirty-four persons signed a counter affidavit denying the existence of prejudice, etc. The court overruled the application. *Held*, that there was no error in the ruling. *Ib.*

VERDICT.

Special findings: new trial.—The failure of the jury to return a special verdict upon a particular question submitted to them constitutes no ground for a new trial, especially where the general verdict is warranted by the evidence. *Dively* v. *The City of Cedar Falls.*

EXCHEQUER CHAMBER.

BEFORE KELLY, C. B., BRAMWELL AND CHUNNELL, BB., AND MILES, KEATING, BYLES, AND SMITH, JJ.

Readhead v. *The Midland Railway Company.**

Carriers by railway: contract with passengers: negligence: latent defect in carriage: warranty and insurance: "due care."—The plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he was traveling getting off the line and upsetting. The accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking: *Held*, affirming the judgment of the court of queen's bench, that the company were not liable in respect of such injury, there being no contract of warranty and insurance in the case of passengers that the carriage should be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril.

Observations on the obligation in such case of common carriers to take due care.

The following case was stated on appeal, the court of queen's bench (BLACKBURN, J. *dissentiente*) having given judgment in favor of the defendants.

The action was brought by the plaintiff to recover damages from the defendants for injuries sustained by him while traveling as a passenger by railway from Nottingham to South Shields, in consequence of negligence alleged to have been committed by the defendants. The plaintiff took a second-class ticket, and the carriage in which he was traveling got off the line and was upset, and the plaintiff received injuries therefrom. The cause of the carriage getting off the line and upsetting was the breaking of the tire of one of the wheels, and such breaking arose from a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking of the tire.

The question for the opinion of the court was, whether the plaintiff was entitled to recover in the action.

The following judgment of the court was, on May 10, 1869, delivered by—

MONTAGUE SMITH, J.—In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he was traveling getting off of the line and upsetting; the accident was caused by the breaking of the tire of one of the wheels of the carriage, owing to "a latent defect in the tire, which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking." Does an action lie against the company

*In the first number of the LAW JOURNAL we published an article on the principles involved in this case, referring to this decision. We have since received several letters from members of the profession asking for copies of the opinion, and have concluded to publish it in full. T.

under these circumstances? This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious that for the plaintiff, on this state of facts, to succeed in this action, he must establish either that there is a warranty by way of insurance, on the part of the carrier to convey the passenger safely to his journey's end, or, as his learned counsel mainly insisted, a warranty that the carriage in which he travels should be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care or foresight could have detected their existence.

We are of opinion, after consideration of the authorities, that there is no such contract, either of general or limited warranty and insurance, entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care (including in that term the use of skill and foresight) to carry the passenger safely. It of course follows that the absence of such care, in other words, negligence, would alone be a breach of this contract, and as the facts of this case do not disclose such a breach, and, on the contrary, negative any want of skill, care or foresight, we think the plaintiff has failed to sustain his action, and that the judgment of the court below in favor of the defendants ought to be affirmed.

The law of England has from the earliest times established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed, the responsibility of the carrier to re-deliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed and is so universally known that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm, or the common law declared long ago, that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into such contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiff to do in the case of carriers of passengers. The liability of the common carrier of goods attached upon the particular bailment of the goods to him in his capacity of common carrier, and the rules which govern the rights of bailors and bailees of things are, of course, applicable only to things capable of bailment. The law and the reasons for it, in the case of bailments to carriers, are found in the great judgment of HOLT, C. J., in *Coggs* v. *Bernard*, 1 Smith's Lead. Cas. 189, and are thus stated: "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to the bailee, those cases are of two sorts, either a delivery to one that exercises a public employment, or a delivery to a private person. First, if it be to a person of the first sort, and he is to have a reward, he is bound to answer for the goods at all events, and this is the case of the common carrier, common hoyman, master of a ship, etc., which case of a master of a ship was first adjudged 26 Car. 2, in the case of *Mors* v. *Slue*, Raym. 220; *S. C.*, 1 Vent. 190, 238. The law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment, contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons, that they may be safe in their ways of dealing, for else these carriers might have an opportunity of undoing all persons that had any dealings with them by combining with thieves, etc., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." The same law is found in numerous text-books (some of which are referred to in the judgments of my brothers Mellor and Lush in their judgments below), and has been acted on for centuries in the case of carriers of goods.

The court is now asked to declare the same law to be applicable to contracts to carry passengers. The learned counsel for the plaintiff felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for and mainly relied on the proposition that there was at least a warranty that the carriage in which the passenger traveled was roadworthy, and that the liability of the carriers of goods in this respect ought to be imported into the contract with the passenger. But first, it is extremely doubtful whether such warranty can be predicated to exist in the contract of the common carrier of goods. His obligation is to carry and re-deliver the goods in safety, whatever happens; in the words of Lord Holt, "he is bound to answer for the goods, at all events." Again, "the law charges this person thus intrusted to carry goods against all events but acts of God and of the enemies of the king:" and this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle; for, if the goods are safely carried and re-delivered, it would be immaterial whether the carriage was roadworthy or not, and if the goods are lost or damaged the carrier is liable on his broad obligation to be answerable "at all events;" and it is unnecessary to inquire how that loss or damage arose. But however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be dissected, and a particular part of it severed and attached to what on the hypothesis is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force to impose the limited warranty of the soundness of the carriage in favor of the passenger. The reason suggested was, as we understood it, that a passenger, when placed in a carriage, was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound: but this is not the reason, or any thing like the reason, given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is, no doubt, dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all. If then there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and, if so, it must follow as a consequence of the argument that there is a warranty that all these things shall be and remain absolutely sound and free from defects. This, which appears to be the necessary consequence of the argument, although Mr. Manisty disclaimed the desire to press it so far, tries the value of it. But surely if the law really be as it is now contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects or unsoundness in the rolling stock, others from defects in the permanent works. Long inquiries have taken place as to the causes of these defects, and whether they were due to want of care and skill, and these inquiries would have been altogether immaterial, if warranties of the kind now contended for formed part of the

contract. An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that every thing he necessarily uses is absolutely free from the defects likely to cause peril, when, from the nature of things, defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man, by implication of law, and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to two maxims of law, *Lex non cogit ad impossibilia; Nemo tenetur ad impossibilia*. If the principle of implying a warranty is to prevail in the present case, there seems to be no good reason why it should not be equally applied to a variety of other cases, as for instance to the managers of theaters and other places of public resort who provide seats or other accommodation for the public. Why are they not to be equally held to insure by implied warranty the soundness of the structures to which they invite the public? But we apprehend it to be clear that such persons do no more than undertake to use due care that their buildings shall be in a fit state. Thus a staircase in the Polytechnic Institution fell, and injured several persons attending a public exhibition there. Two actions were brought by separate plaintiffs who had paid money for the use of their staircase. The first was tried before WIGHTMAN, J., the second before ERLE, C. J. No one seems to have supposed that there was any warranty of the soundness of the staircase; yet the persons using it were as helpless to detect or prevent the accident as the traveler. Both learned judges put the liability entirely on the question whether there was the want of due care in maintaining the staircase, and ERLE, C. J., told the jury that the defendants would not be liable for latent defects. *Brazier* v. *The Polytechnic Institution*, 1 Fost. & F. 507; *Pike* v. *Same*, Ibid. 712. So in stating the liability of a canal company, who made the canal for profit, and allowed the public to use the canal on payment of tolls, TINDAL, C. J., in delivering the judgment of the court of exchequer chamber, says: "The common law in such a case imposes a duty upon the proprietors not perhaps to repair the canal or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property." *The Lancaster Canal Company* v. *Parnaby*, 11 Ad. & E. 223. The liability in that case was not put in any degree upon a warranty that the canal shall be free from perilous defects, but upon the rational obligation to use due care that it shall be so. The common law, with regard to carriers of goods and innkeepers, stands, as we have said, on its own special grounds. But it has been found so stringent, not to say unjust, in the liabilities it imposed on persons carrying on those trades, that the legislature has found it necessary in both cases to modify its stringency. It will now be necessary to examine the leading authorities cited during the argument.

The counsel for the plaintiff in the first place referred to some of the cases in which it has been held that in contracts for the supply of goods for a particular purpose, there is an implied warranty that the goods supplied shall be reasonably fit for that purpose. *Biggs* v. *Parkinson*, 7 Hem. & M. 955, is a case of that class. But the agreement to sell and supply goods for a price which may be assumed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attaching to it. Indeed, the learned counsel did not cite these cases as directly governing the present. Even in the cases of contracts to supply goods, it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee, in the case of a latent defect of the kind existing in the present case, which no skill or care could prevent or detect — that is to say, where an article is supplied which has been manufactured and tested in the best and most careful manner, so as to be turned out as perfect as in the nature of things it could be. It is clear, that if the manufacturer is liable for such an inevitable and undiscoverable defect, he can never sell what he makes without the risk of an action attaching itself to every contract he enters into — without, in fact, becoming an insurer, unless he expressly limits his liability. In cases of express warranties, the compact of the parties is to be gathered from the words they use in making them. When warranties are expressly made, the parties themselves may guard against excessive liability, by any exceptions they please, and in those implied by law the law itself must take care to keep them within the boundaries of reason and justice, so as not to impose impracticable obligations.

It is now proposed to consider the authorities relied upon as having a direct bearing on the question before us. The case which the plaintiff's counsel relied on as the strongest in his favor is *Sharp* v. *Grey*, 9 Bing. 457; *S. C.*, 2 Mo. & S. 620; 2 Law J. Rep. (N. S.) C. P. 45. But that case, when examined, furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of the axle-tree of a stage coach. The defect might have been discovered, if a certain examination had taken place; and it was made a question of fact at the trial whether it would have been prudent or not to make that examination. TINDAL, C. J., who tried the cause, is reported to have directed the jury to consider "whether there had been, on the part of the defendant, that degree of vigilance which was required by his engagement to carry the plaintiff safely." Now, if the learned chief justice had supposed there was an absolute warranty of road-worthiness, this direction could not have been given, as it would then have been immaterial whether the defendant had used vigilance or not, and the degree of vigilance would have been an utterly immaterial consideration. The jury having found on this direction for the plaintiff, a motion was made, in the absence of TINDAL, C. J., for a new trial. Two of the learned judges, in refusing the rule, GASELEE, J., and BOSANQUET, J., are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a road-worthy vehicle. PARK, J., uses language which, as reported, is ambiguous. But the judgment of ALDERSON, J., is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says: "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterward and be discovered by investigation." We have referred somewhat fully to this case, because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was relied on by the judges of the court of appeals in New York, in a decision which will be afterward referred to. But the case when examined furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and the authority of TINDAL, C. J., and ALDERSON, J., is against the plaintiff. The dictum of BEST, C. J., in *Bremner* v. *Williams*, 1 Car. & P. 416, was not necessary to the decision of the cause. The ruling of Lord Ellenborough in *Israel* v. *Clark*, 4 Esp. 259, was also relied on. Of these last two authorities, BLACKBURN, J., in his judgment below, said: "These are, it is true, only Nisi Prius decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood." We find also that BEST, C. J., makes observations in the opposite sense in the case of *Crofts* v. *Waterhouse*, 3 Bing. 319; *S. C.*, 4 Law J. Rep. C. P. 75. These cases are really the only English authorities which afford any support at all to the plaintiff's view for the interpretation reported to have been given by CRESSWELL, J., in *Benett* v. *The Peninsular*

and Oriental Steamboat Company, 6 Com. B. Rep. 782; *S. C.*, 18 Law J. Rep. (N. S.) C. P. 85, of the case of *Sharp* v. *Grey*, 9 Bing. 457; *S. C.*, 2 Mo. & S. 620; 2 Law J. Rep. (N. S.) C. P. 45, was only an observation made during an argument, when it was cited as incidentally bearing on the question then before the court, and cannot be relied on as authority.

On the other hand, there is not only the plain distinction between the liabilities of the carriers of goods, and of passengers, constantly referred to by text writers and judges as well-known and settled law, but numerous cases have been decided on grounds entirely at variance with the supposition that there existed contemporaneously with them the liability by way of warranty. In *Aston* v. *Heaven*, 2 Esp. 513, which was the case of injury to a passenger, EYRE, C. J., after carefully pointing out the law as to the liability of carriers of goods to make good all losses except those happening from the act of God or the king's enemies, and the reasons for it, says: "I am of opinion that the cases of losses of goods by carriers and the present are totally unlike." Again: "There is no such rule in the case of the carriage of persons; this action stands on the ground of negligence alone." In *Christie* v. *Griggs*, 2 Campb. 79, Sir James Mansfield says: "There was a difference between a contract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that, as far as human care and foresight could go, he would provide for their safe conveyance." In *Crofts* v. *Waterhouse*, 3 Bing. 319; *S. C.*, 4 Law J. Rep. C. P. 75, the observations attributed to BEST, C. J., clearly show that he did not think there was any warranty on the part of carriers of passengers, and PARK, J., in the same case, says: "A carrier of goods is liable at all events; a carrier of passengers is only liable for negligence." But, besides the observations of individual judges to show what has hitherto been understood to be the law, there is the long series of important cases involving costly and protracted trials, in which, by common consent, the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty. In *Grote* v. *The Chester and Holyhead Railway Company*, 2 Exch. Rep. 255, where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the company were answerable. Parke, B., says: "It seems to me the company would still be liable for the accident, unless he (the engineer) also used due and reasonable care, and employed proper materials in the work." There is no trace in the report that it ever occurred to the court to suppose there was any warranty of the safety of the bridge.

In a case tried before ERLE, C. J., *Ford* v. *The London and Southwestern Railway Company*, 2 Fost. & F. 730, the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tire of one of the wheels of the tender; ERLE, C. J., in his direction, told the jury, "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The railway company is bound to take reasonable care to use the best precautions in known practical use, for securing the safety of their passengers." There the defect was in the tire of a wheel of the tender of the train by which the plaintiff traveled. And no suggestion that a warranty of its soundness existed was made throughout the case. But a case still more directly bearing upon the present point was tried before COCKBURN, C. J. There the accident happened in consequence of the breaking of the tire of the near wheel of the engine. The tire broke from a latent flaw in the welding. The trial lasted six days, and the questions mainly were, whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The lord chief justice commences a full direction to the jury by saying, "The question is, whether the breaking of the tire resulted from any negligence in the defendants or their servants, for which they are responsible." The latent defect in the tire was admitted to be the cause of the accident; but the jury having found, in answer to specific questions, that there was no evidence that the tire was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of that case appear to be exactly like the present, except that in this case the defective tire was in the wheel of the carriage, and there in the wheel of the engine. But, for the reasons already given, it can never be that a warranty can exist as to the carriage but not as to the engine drawing it. Thus, then, it is plain that a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied; and there the learned chief justice and the parties themselves seem to have been utterly unconscious of the contract which was really existing, if the plaintiff in this case is right, for the warranty, as an obligation implied by law, must have existed at the time of these trials if it exists now; and surely it is strong to show that no such rule does form part of the common law that it was not then recognized and declared. The learned counsel for the plaintiff insisted that a carrier by sea is bound to have his ship seaworthy. Undoubtedly the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise, and it does not appear to be material to inquire, when he is subject to this large obligation, whether he is subject also to a less one. In the case of *Lyon* v. *Mills*, 5 East, 428, it was, no doubt, stated by the court, that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It is well to observe that Holroyd, who argued for the plaintiff, and Gaselee, for the defendant, both state the liability of the carrier in all its breadth, viz., a liability for all losses however happening, except by the act of God or the king's enemies. This case, therefore, falls within the class of decisions relating to the liability of the carriers of goods. No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists, that in this maritime nation no passenger has ever founded an action upon it. The case of *Burns* v. *The Cork and Bandon Railway Company*, 13 Irish Com. Law Rep. 546, in the Irish court of common pleas, certainly does not support the plaintiff's view of the law. The court there says the averments in the defendants' plea are all consistent with gross and culpable negligence, and on that ground gives judgment for the plaintiff. The judgment plainly shows that the court does not mean to declare that there is an absolute undertaking that the vehicle shall be free from defects. The language is, "free from defects as far as human care and foresight can provide, and perfectly roadworthy." The court refers with approbation to the language of Sir James Mansfield and ALDERSON, J., which helps to explain that it was disposed to adopt the views of those learned judges, and to place the liability, not on a warranty, but on the obligation to exercise care and foresight.

It now remains to consider the American decisions on the subject. They have not been uniform. The judgment of Mr. Justice HUBBARD in *Ingalls* v. *Bills*, 9 Metc. Rep. 15, cited at length by my Brother Mellor in his judgment below, is opposed to the notion of a warranty. Decisions, however, were cited before us by Mr. MANISTY from the courts of the state of New York, having a contrary tendency, to show us that, in that state, the law had been declared in favor of annexing a warranty to the contract. The most important of these decisions is *Alden* v. *The*

New York Central Railway Company, 12 Smith, 102, in the court of appeals of the state of New York. That was the case of an accident caused by a defect in an axle-tree; the reasons given by GOULD, J., for the decision are not satisfactory to our minds. The learned judge seems to assume that there was no negligence shown on the part of the company. He cites the case of *Sharp* v. *Grey*, 9 Bing. 457; *S. C.*, 2 Mo. & S. 620; 2 Law J. Rep. (N. S.) C. P. 45, in the court of common pleas here, and he interprets that case to determine that the carrier warrants the road-worthiness of his coach. But if the view of the case of *Sharp* v. *Grey*, 9 Bing. 457; *S. C.*, 2 Mo. & S. 620; 2 Law J. Rep. (N. S.) C. P. 45, taken in the early part of this judgment, is correct, the learned judge gave too great weight to it. He then, after having given the rule as he supposed it to be laid down in *Sharp* v. *Grey*, 9 Bing. 457; *S. C.*, 2 Mo. & S. 620; 2 Law J. Rep. (N. S.) C. P. 45, observes: "And though this may seem a hard rule, it is probably the best that can be laid down, since it is plain and easy of application, and, when once established, is distinct notice to all parties of their duties and liabilities." With deference to the learned judge, these reasons founded on the convenience of the arrangement are scarcely sufficient to warrant the introduction of onerous obligations into the contracts of parties; and the terms in which the judgment is given rather lead to the conclusion that the learned judge was conscious that he was annexing to the contract of the carrier of passengers what had not hitherto been understood to form part of it. The English courts are desirous to treat the American decisions with great respect, but, as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine the reasons on which this decision was based, with the result which has been already stated. Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given. We have already gone fully into the reasons for holding that in our opinion the warranty contended for, in this case, is not so founded.

On the other hand, it seems to be perfectly reasonable and just to hold that the obligation well known to the law, and which, because of its reasonableness and accordance with what men perceive to be fair and right, has been found applicable to an infinite variety of cases in the business of life, viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturers, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. See on this point *Grote* v. *The Chester and Holyhead Railway Company*, 2 Exch. Rep. 255. "Due care," however, undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed, or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery they are obliged to use, which no human skill or care could either have prevented or detected. In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and, so far as it rests on principle, fails in reason. Consequently, the judgment of the court of queen's bench in favor of the defendants will be affirmed. Judgment affirmed.

CHANGES IN THE ENGLISH JUDICIAL SYSTEM.

The following abstract of the remarks of Lord Chancellor Hatherley, in the house of lords, indicates something of the magnitude and importance of the reforms that are about to be wrought in the English judicial system:

The lord chancellor said that, in rising to move the first reading of the Judges' Jurisdiction bill, he could state its object in a very few words. Its object is simply to enable any judge of any one of the superior courts of Westminster to sit, on request of the chief justice or chief baron, in any other court, for every purpose, and with the same jurisdiction and powers, as if he was a judge of the court to which he was invited. It also enables the judges of any court to sit in banco in two divisions, if that shall be found convenient, and gives powers for two courts to sit together in London and at Westminster at *nisi prius*. The cause which had led him to introduce the bill was that, while the court of queen's bench has, since the death of Mr. Justice Hayes, been overburdened with business, there are more judges than are required in the other common-law courts. For the same reason, it is not thought necessary to fill up the vacancy in the court of queen's bench; because seventeen judges, if their services can be made available in every court, are quite adequate to the transaction of the common-law business of the country. It had in like manner not been considered right to fill up the vacant lord justiceship in chancery, because there are only thirteen appeals waiting for hearing, and of these the three oldest only date from December last, while the remainder were set down in January. His lordship then said that he now proposes to call the attention of the house to the measures which the government proposed to introduce in order to carry out the recommendations of the judicature commission. This commission took its rise mainly on the conviction which has been entertained for some time, that we have suffered severely, both in our judicature and our jurisprudence, from the total separation of courts of law and equity. No such separation existed in Rome in the best days of its jurisprudence, nor did such a state of things prevail in Scotland, France or in any other continental system. After tracing the steps by which the separate jurisdictions of the common law courts and the courts of equity had grown up, his lordship said that the result is that there are two species of right co-existing constantly in the same individual. By virtue of one of those rights, he may be entitled to a remedy at common law; while, on the other hand, his opponent may be able, by applying to a court of equity, not only to restrain him from proceeding in the court of common law, but actually to mulct him in costs for proceeding before a tribunal where he must have succeeded had he been allowed to go on. That never was and never could be right. It is clear that a man should be able to have the whole of his cause determined, and complete right done by one court, whatever that might be. And that this was so was seen clearly so long ago as the time of Cromwell, by Mr. Shepherd, an eminent lawyer of that day, who recommended in a book called "England's Balm," that causes should no longer be sent from law to equity, or *vice versa*, but that which ever court a cause first came before should have power to dispose finally of every question that arose in its course. The reforms which he recommended had been partially carried out of late years by the acts which gave the courts of law power to grant injunctions or to entertain equitable pleas, which enabled the courts of equity to decide points of law, and to try causes by jury. Still much remained to be done in order to the complete fusion of law and equity, and it was, as he had already said, a conviction that it is desirable to carry the process much further than has yet been done, which led to the appointment of the judicature commission.

That commission was appointed in September, 1867, and reported in March, 1869. It had submitted to its investigations the courts of common law and equity, the court of admiralty, probate court, and the court of divorce.

With the exception of the judge of the court of admiralty, all the commissioners came unanimously to the conclusion that the whole of the courts should be consolidated into one court of judicature; that that court should have power to divide itself into separate divisions, not to continue the separation of the jurisdiction of common law and equity, but for the purpose of handing over to each division the business most appropriate to it. This division of business would be subject to this reservation: That any judge may sit in any division, and, from time to time, if it be desirable, a cause may be transferred bodily from one division to another. *It was also recommended that pleadings should be rendered as simple as possible, and that some alterations that he could not then advert to should be made in the mode of taking evidence.* He then came to the court of appeal. It is thought desirable that the court of appeal should consist mainly of judges devoted to this work, and it was also considered expedient that the master of the rolls should cease to be a judge of first instances, and should become a judge of appeal. In order to supply the deficiency in the judges of first instance in the court of chancery created by the removal of the master of the rolls to the appeal court, the chief judge in bankruptcy would be added to that division of the courts. As to the common-law courts, each division would consist of five judges, while another division would consist of the two remaining judges and the judges of the courts of probate and of admiralty. The court of appeal would be composed of the lord chancellor, the master of the rolls, of four permanent judges, and of three judges to be selected by her majesty, from time to time, from the courts of first instance. The court of exchequer chamber, which has not been found to work well, would be abolished. Another provision of the bill would be the abolition of the home circuit, the business of which would in future be transacted in London. He did not intend at present to legislate on the subject, but he thought it would be expedient to take measures to facilitate the dispatch of the appeal business of the house. With that view, he would suggest that that house should appoint a judicial committee, which should have the power to summon to their aid members of the judicial committee of the privy council. This committee would have power to sit during the recess, reporting its decisions, as recommendations, to the house, by whom they would be formally authorized.

BOOK NOTICES.

The American Law Review.

The April number of the deep blue Boston quarterly is hardly up to its usually excellent standard. The leading articles are: "Contributory Negligence on the part of an Infant;" "Doubtful Points under the Bankrupt Law, I," and "Rights of a Landlord to Gain Possession by Force." The balance of the number is taken up with the opinion of Judge Drummond, of the United States circuit court of the southern district of Illinois, on the proprietary right of an author over literary productions before publication; digests of English, American and bankruptcy decisions; book notices, list of law books and summary of events. The *Review* is edited with decided ability, and is superior in most respects to the English legal quarterly.

The American Law Register.

The April number of this law monthly contains a well-written article by Edmund H. Bennett, of Boston, on "The Burden of Proof in cases of Insanity," in which the learned writer attempts to show that in criminal prosecutions the burden of proving sanity is on the prosecution.

Legal Gazette: Philadelphia.
Legal Intelligencer: Philadelphia.
The Daily Law Transcript: Baltimore.
The Pittsburgh Legal Journal.

These are all weekly journals, devoted mainly to the reporting *in extenso* of opinions of local interest. The last named, however, devotes a portion of its columns to general legal intelligence, and is edited with skill and judgment.

The Bankrupt Register: New York.

The *Register* is devoted exclusively to reporting decisions in bankruptcy, and displays much enterprise in its peculiar field. Those engaged in the bankruptcy practice will find it of great value.

LEGAL NEWS.

Hon. A. O. P. Nicholson is a candidate for one of the supreme judgeships in Tennessee.

A twenty thousand dollar libel suit has been instituted against the *Cincinnati Inquirer*.

The health of Hon. Samuel Shellabarger, of Ohio, has improved so much that he is now able to resume the practice of the law.

On motion of Hon. Caleb Cushing, Ex-Governor Wise, of Virginia, was recently admitted to practice in the United States supreme court.

A farmer in Wisconsin has applied to one of the courts of that state for a divorce from his wife on the ground that she can't split half the amount of wood she boasted she could before their marriage.

The Kentucky legislature passed a special act for the benefit of a young man twenty years of age, that he might be permitted to practice as an attorney and counselor at law.

A young woman in Montreal, who was accused of having caused the death of her brother-in-law by sitting upon him when he was very low, has been acquitted.

A Rochester police justice, instead of sending to jail a man who was brought before him for begging, procured employment for him, and was rewarded by the heartfelt thanks of the man, and his promise to give a good report of himself.

Hon. George Bartlett, a leading Broome county lawyer, died at Binghamton recently, aged about fifty-two years. He was a descendant of Josiah Bartlett, of New Hampshire, one of the signers of the Declaration of Independence.

The jury in the Richardson case consists of two dry goods dealers, two "merchants," one lace dealer, one produce dealer, one grocer, one ship chandler, one wholesale liquor dealer, one broker, one insurance agent, and one theatrical agent.

The Auburn *News* having published a twelve-line paragraph complaining that the county jail was filthy and in a most wretched condition, the sheriff, Sidney Mead, brought an action for libel against it. The jury, after a two days' trial, brought in a verdict that there was no cause of action.

In denying a motion for a new trial for a condemned murderer, Judge PRIMM, of the Missouri supreme court, spoke severely of "that sickly, maudlin sentimentality which of late has become fashionable, and which would grant an immunity to every gigantic criminal on the assumed ground of insanity."

Associate Justice Bradley has written to a friend in Mobile, thanking him for his congratulations upon his appointment, and saying: "While I have always been intensely national, I have, nevertheless, felt a kindly regard for the southern people, deeply realizing the difficulties of their situation. If there is any one wish that I cherish more than another, it is to see the substantial classes of the south once more firmly knit in attachment to the old government and the old flag. I hope the time may soon come when the president and congress shall deem it wise and prudent to extend a general amnesty. I have some idea of making a little tour through the states of the circuit as soon as the court shall adjourn."

THE BROOKLYN LAWYERESS.

Miss Barkalo is a native of Brooklyn, N. Y., and is a woman of more than ordinary ability. Two years ago, after having read Blackstone and other elementary law books, she made application for admission as a student at Columbia College, New York, but was peremptorily refused. Nothing daunted, however, she came out west and settled in St. Louis, where she was admitted, without difficulty, to the St. Louis Law School. For eighteen months she has been assiduously devoting her energies to the study of science, and her fellow students all agree in declaring her, by far, the brightest member of the class. That there is no question of her ability was clearly shown yesterday at the examination, where she promptly and correctly answered every question propounded to her. Judge Knight, although overflowing with gallantry, gave the lady no quarter. The most abstruse and erudite questions were propounded to the applicant, but not once did the wise judge catch the fair student tripping. Miss Barkalo is about 22 years of age, of a buxom figure, amiable and really intelligent face, and a large and expressive eye. (This is a figure of speech—she has two.) She is now a member of the St. Louis bar, and considerable interest is manifested to witness her maiden effort.—*St. Louis Times.*

By an oversight on our part, we omitted to give proper credit in last week's LAW JOURNAL to the writers of three articles. The article on "Legal Reform" was written by F. W. Hackett, Esq., of the Boston bar, a gentleman to whom we have frequently been under obligations for valuable and readable contributions. That on "John C. Spencer" was written by L. B. Proctor, Esq., of the Dansville, N. Y., bar, who is at present engaged in preparing a work on "The Bench and Bar;" and the article on "A Ministry of Justice" was from the *Pall-Mall Gazette.*

TERMS OF THE SUPREME COURT FOR APRIL.

4th Monday, Circuit and Oyer and Terminer, Suffolk, Gilbert.
4th Monday, Circuit and Oyer and Terminer, Johnstown, Bockes.
4th Monday, Circuit and Oyer and Terminer, Livingston, Johnson.
4th Monday, Circuit and Oyer and Terminer, Wayne, Dwight.
4th Tuesday, Circuit and Oyer and Terminer, Lewis, Morgan.
Last Monday, Special Term, Ontario, J. C. Smith.
Last Tuesday, Special Term, Otsego, Murray.
Last Tuesday, Special Term, Albany, Hogeboom.

NEW YORK STATUTES AT LARGE.*

CHAP. 163.

AN ACT to amend the act entitled "An act to authorize the business of Banking," passed April eighteen, eighteen hundred and thirty-eight.

PASSED April 9, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Every Banking Association organized and doing business under and by virtue of the act entitled "An act to authorize the business of Banking," passed April eighteen, eighteen hundred and thirty-eight, and the various acts supplementary thereto and amendatory thereof, is hereby authorized to take, receive, reserve, and charge on every loan or discount made, or upon any note, bill of exchange, or other evidences of debt, interest at the rate of seven per cent per annum, and such interest may be taken in advance, reckoning the days for which the note, bill, or other evidence of debt, has to run. The knowingly taking, receiving, reserving or charging a rate of interest greater than aforesaid shall be held and adjudged a forfeiture of the entire interest which the note, bill, or other evidence of debt carries with it, or which has been agreed to be paid thereon, and in case a greater rate of interest has been paid, the person or persons paying the same, or their legal representatives, may recover back twice the amount of the interest thus paid from the association taking or receiving the same; provided, that such action is commenced within two years from the time the said excess of interest is taken. But the purchase, discount, or sale of a *bona fide* bill of exchange, note, or other evidence of debt, payable at another place than the place of such purchase, discount or sale, at not more than the current rate of exchange for sight drafts, or a reasonable charge for collecting the same, in addition to the interest, shall not be considered as taking or receiving a greater rate of interest than seven per cent per annum.

§ 2. It is hereby declared that the true intent and meaning of this act is to place the banking associations organized and doing business as aforesaid on an equality, in the particulars in this act referred to, with the national banks organized under the act of congress entitled "An act to provide a national currency, secured by a pledge of United States bonds, and to provide for the circulation and redemption thereof," approved June third, eighteen hundred and sixty-four. And all acts and parts of acts inconsistent with the provisions hereof are hereby repealed.

§ 3. This act shall take effect immediately.

CHAP. 180.

AN ACT relative to the care and education of deaf mutes.

PASSED April 12, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Sections one and two of an act entitled "An act to provide for the care and education of indigent deaf mutes under the age of twelve years," passed April twenty-fifth, eighteen hundred and sixty-three, are severally hereby amended by adding to and inserting therein after the words "New York institution for the deaf and dumb," wherever the same occur in said sections respectively, the words following, viz.: "or in the institution for the improved instruction of deaf mutes."

§ 2. All provisions of the law now existing fixing the expense of the board, tuition and clothing of children under twelve years placed in the New York institution for the instruction of the deaf and dumb, shall apply to children who may from time to time be placed in the said institution for the improved instruction of deaf mutes, in the same manner and with the like effect as if said last mentioned institution had also originally been named in the acts fixing such compensation, and as if said acts had provided for the payment thereof to the institution last mentioned, and the bills therefor properly authenticated by the principal or one of the officers of the said last mentioned institution shall be paid to said institution by the counties respectively from which such children were severally received, and the county treasurer or chamberlain, as the case may be, is hereby directed to pay the same on presentation, so that the amount thereof may be borne by the proper county.

§ 3. Sections nine and ten of title one of an act entitled "An act to revise and consolidate the general acts relating to public instruction," passed May second, eighteen hundred and sixty-four, are hereby amended so that the same shall extend and apply to the said "institution for the improved instruction of deaf mutes" in the like manner and with the like effect as if said last mentioned institution, as well as the others therein mentioned, had originally been named in the said sections respectively.

§ 4. This act shall take effect immediately.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the Secretary of State which is attached to the copy from which we print.—ED. L. J.

The Albany Law Journal.

ALBANY, APRIL 30, 1870.

THE DOCTRINE OF INSANITY.*

The question of exemption from legal responsibility for crime, by reason of unsoundness of mind, has so long been one of the most difficult and perplexing questions that have been presented to courts of justice, that it has been thought that it would not be unacceptable to the profession to state here, and in this connection, the result to which much reflection and some experience have brought the reporter's mind on the subject.

Shortly before my elevation to the bench, and when I was one of the inspectors of the state prison at Sing Sing, I was present at a court in Westchester county, where a man was tried for rape. After the jury had retired, I expressed to the presiding judge my opinion that the man was insane. I had never seen nor heard of him before, but I judged from the testimony in the case, which, as no one knew who the man was, was necessarily confined to the acts connected with the offense. The man was convicted and sent to the state prison.

Within a month the attention of the board of inspectors was called to the case, and he was reported to us by our physician, our chaplain, and principal keeper, as unquestionably insane.

Before treating him as such, however, we caused minute inquiries to be made, and we found that he had been confined in the county lunatic asylum on Blackwell's Island for several years, and was regarded as a confirmed lunatic; that, that asylum being inconveniently crowded, its officers had turned loose upon the community some fifteen or twenty of its most harmless inmates, and this man among them; that he had wandered off from the city into the country, and within forty-eight hours of his discharge from that institution had committed this offense. We committed him to the state asylum, without any hope that he would ever recover.

As I knew that the judge who tried him was one of the soundest jurists in the state, I at once inquired what was the rule of law that would warrant this conviction. I found it was this, as charged by that judge, that if he had capacity and reason enough to enable him to distinguish between right and wrong, as to the particular act, he was not exempt from punishment for crime.

Now, this man did know that the act he was doing was wrong. He talked about it as rationally as I could, yet he was unquestionably and incurably insane. He was far too unsound to have it safe for him to go at large, so that no great harm was done in that particular case, for the result was merely to return him to confinement again. But, I asked myself, suppose the punishment had been death, what was there in the law to prevent the horrible tragedy—the judicial murder of hanging an insane man? Yet I found the rule, as then prevailing in the law, was as the judge had charged it to the jury.

In the case of *Abner Rogers*, Chief Justice SHAW, of Massachusetts, had laid down the rule in this form: "A man is not to be excused from responsibility if he has capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he is then doing; a knowledge and consciousness that the act he is doing is wrong and criminal, and will subject him to punishment. In order to be responsible, he must have sufficient power of memory to recollect the relation in which he stands to others, and in which others stand to him; that the act he is doing is contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty. On the contrary, although he may be laboring under partial insanity, if he still understands the nature and character of his act and its consequences; if he has a knowledge that it is wrong and criminal, and a mental power sufficient to apply that knowledge to his own case, and to know that if he does the act he will do wrong and receive punishment, such partial insanity is not sufficient to exempt him from responsibility for criminal acts. If, then, it is proved to the satisfaction of the jury that the mind of the accused was in a diseased and unsound state, the question will be whether the disease existed to so high a degree, that, for the time being, it overwhelmed the reason, conscience, and judgment, and whether the prisoner in committing the homicide acted from an irresistible and uncontrollable impulse; if so, then the act was not the act of a voluntary agent, but the involuntary act of the body without the concurrence of a mind directing it."

This rule was quoted in 2 Greenleaf's Evidence, § 372, as the settled law.

In *McNaughton's case* (10 Clark and Fin., 210), the twelve judges of England, in answer to queries by the house of lords, laid down the rule as the law of Great Britain as follows: The questions propounded to the learned judges by the house of lords were in these words:

"1. What is the law respecting alleged crimes, committed by persons inflicted by insane delusion in respect of one or more particular subjects or persons; as, for instance, where, at the time of the commission of the alleged crime the accused knew he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or avenging some supposed grievance or injury, or of producing some supposed public benefit?

"2. What are the proper questions to be submitted to the jury when a person, alleged to be afflicted with insane delusion respecting one or more particular subjects or persons, is charged with the commission of a crime (murder, for example), and insanity is set up as a defense?

"3. In what terms ought the question to be left to the jury as to the prisoner's state of mind at the time when the act was committed?

"4. If a person, under an insane delusion as to existing facts, commits an offense in consequence thereof, is he thereby excused?

"5. Can a medical man, conversant with the disease

* From a note appended to *Kleim's case*, reported in Edmonds' Select Cases vol. 1, p. 28

of insanity, who never saw the prisoner previous to the trial, but who was present during the whole trial, and the examination of all the witnesses, be asked his opinion as to the state of the prisoner's mind at the time of the commission of the alleged crime, or his opinion whether the prisoner was conscious, at the time of doing the act, that he was acting contrary to law; or whether he was laboring under any and what delusion at the time?"

The joint opinion of all the judges, except Mr. Justice MAULE, was delivered by Lord Chief Justice TINDAL, as follows:

"My lords, her majesty's judges, with the exception of Mr. Justice MAULE, who has stated his opinion to your lordships, in answering the questions proposed to them by your lordship's house, think it right, in the first place, to state that they have forborne entering into any particular discussion upon these questions, from the extreme and almost insuperable difficulty of applying those answers to cases in which the facts are not brought judicially before them. The facts of each particular case must of necessity present themselves with endless variety, and with every shade of difference in each case, and it is their duty to declare the law upon each particular case on facts proved before them, and after hearing arguments of counsel thereon. They deem it at once impracticable, and at the same time dangerous to the administration of justice, if it were practicable, to attempt to make minute applications of the principles involved in the answers given them by your lordship's questions; they have therefore confined their answers to the statements of that which they hold to be the law upon the abstract questions proposed by your lordships; and as they deem it unnecessary in this particular case to deliver their opinions *seriatim*, and as all concur in the same opinion, they desire me to express such their unanimous opinion to your lordships.

"In answer to the first question, assuming that your lordships' inquiries are confined to those persons who labor under such partial delusions only, and are not in other respects insane, we are of the opinion, that, notwithstanding the party accused did the act complained of, with a view under the influence of insane delusion of redressing or avenging some supposed grievance or injury, or producing some public benefit, he is nevertheless punishable, according to the nature of the crime committed, if he knew, at the time of committing such crime, that he was acting contrary to law, by which expression we understand your lordships to mean the law of the land.

"As the third and fourth questions appear to us to be more conveniently answered together, we have to submit our opinion to be, that the jury ought to be told, in all cases, that every man is presumed to be sane, and to possess a sufficient degree of reason to be responsible for his crimes until the contrary be proved to their satisfaction; and that to establish a defense on the ground of insanity, it must be clearly proved, that, at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. The mode of putting the latter part of the question to the jury, on these occasions, has generally been whether the accused, at the time of doing the act, knew the difference between right and wrong; which mode, though rarely if ever leading to any mistake with the jury, is not, as we conceive, so accurate when put generally and in the abstract, as when put in the party's knowledge of right and wrong in respect to the very act with which he is charged. If the question were to be put as to the knowledge of the accused solely and exclusively with reference to the law of the land, it might tend to confound the jury, by inducing them to believe that an actual knowledge of the law of the land was essential in order to lead to a conviction; whereas the law is administered upon the principle that every one must be taken conclusively to know it, without proof that he does know it. If the accused were conscious that the act was one which he ought not to do, and if that act was at the same time contrary to the law of the land, he is punishable, and the usual course, therefore, has been to leave the question to the jury whether the party accused had a sufficient degree of reason to know that he was doing an act that was wrong; and this course we think is correct, accompanied with such observations and explanations as the circumstances of each particular case may require.

"The answer to the fourth question must, of course, depend on the nature of the delusion; but making the same assumption as we did before, namely, that he labors under such partial delusion only, and is not in other respects insane, we think he must be considered in the same situation, as to responsibility, as if the facts with respect to which the delusion exists were real. For example, if, under the influence of delusion, he supposes another man to be in the act of attempting to take away his life, and he kills that man as he supposes in self-defense, he would be exempt from punishment. If his delusion was that the deceased had inflicted a serious injury to his character and fortune, and he killed him in revenge for such supposed injury, he would be liable to punishment.

"In answer to the last question, we state to your lordships that we think that the medical man, under the circumstances supposed, cannot in strictness be asked his opinion in the terms above stated, because each of these questions involves the determination of the truth of the facts deposed to, which it is for the jury to decide, and the questions are not mere questions upon a matter of science, in which case such evidence is admissible. But where the facts are admitted, or not disputed, and the question becomes substantially one of science only, it may be convenient to allow the question to be put in that general form, though the same cannot be insisted on as matter of right."

The first case of insanity that came before me as judge was this case of Kleim. On the preliminary inquiry into present insanity I followed this rule, and the verdict of the jury at once satisfied me that it had misled them, for he was not totally, but only "partially insane," and he did know it was wrong to shut that woman and her children in their hut and burn them to death; yet there was no doubt of his insanity, and in less than a year he became a mere drivelling idiot, and so died. He knew the act was wrong, yet he was insane. The act of piling up shavings,

fastening the woman in her hut, and forcing her back into the flames, was not an "involuntary act of the body without the concurrence of a mind directing it." Yet he was insane. He knew the "act was contrary to the plain dictates of justice and right, injurious to others, and a violation of the dictates of duty," yet he was insane. He knew "he was acting contrary to law," yet he was insane. He knew the act was "one he ought not to do," yet he was insane.

So it seemed to me, that, though the man was unquestionably insane, he was yet to be hung for murder; and so it seemed that all that class of cases known among scientific men as moral insanity, as distinguished from physical, was entirely without the protection of the law.

Hence it was that I made the examination of the rule, and stated the result as contained in my charge. I do not mean to be understood as saying that I have settled the rule; I have but announced an onward step, and it remains for subsequent adjudications to say whether it shall be sustained. In the mean time, I have been assured that the rule, as I have stated it, is more acceptable than any other yet announced to those of the medical profession to whom insanity has been a particular study, and the English doctrine has received a very signal condemnation from that class of physicians there.

It appears from the report of the Capital Punishment Commission made to parliament in 1866, that at the annual meeting of the association of medical officers of asylums and hospitals for the insane, held at the Royal College of Physicians, July 14, 1864, at which were present fifty-four medical officers, it was unanimously

"*Resolved*, That so much of the legal test of the mental condition of an alleged criminal lunatic as renders him a responsible agent, because he knows the difference between right and wrong, is inconsistent with the fact, well known to every member of this meeting, that the power of distinguishing between right and wrong exists very frequently among those who are undoubtedly insane, and is often associated with dangerous and uncontrollable delusions."

I know of no greater difficulty in the law than the making of a definition of insanity which shall include all the cases that ought to be included, and leave out those which ought to be left out; and for the simple reason that it is impossible for the most skillful of experts to determine always where the insanity begins, and sanity ends.

The doctrine, as contained in my charge, does undoubtedly include many cases where, before that, the punishment designed for the sane was inflicted upon the insane; yet I have never supposed that I had removed all difficulty. I had met that and cognate cases only, leaving out, of course, many others.

I afterward attempted to enlarge, and, as far as I could, make definite the rule. In a discourse delivered before the Academy of Medicine, in New York, a few years ago, I ventured upon this definition, which I insert here merely for the examination of the professions, and in the hope that perhaps I may contribute my mite, at least, to the solution of so difficult and so important a problem.

"A sane man is one,

"1. Whose senses bear truthful evidence;

"2. Whose understanding is capable of receiving that evidence;

"3. Whose reason can draw proper conclusions from the truthful evidence then received;

"4. Whose will can guide the thought thus obtained;

"5. Whose moral sense can tell the right and wrong of any act growing out of that thought;

"6. And whose act can, at his own pleasure, be in conformity with the actions of all these qualities.

"All these unite to make sanity. The absence of any one of them makes insanity."

DISQUALIFICATION OF JURORS IN CRIMINAL CASES.

The fact that under existing laws only one out of about a hundred jurors is qualified to sit in a capital case is rather startling. The further fact that it costs the public many thousands of dollars to pick out those choice spirits who are qualified is still more startling. One unacquainted with legal affairs would infer that the twelve grains of wheat, sifted out from the eleven hundred and eighty-eight atoms of chaff, would be models of intelligence, probity, and impartiality; but the result by no means universally justifies the inference. The rule that the juror's mind must be, as to the case in hand, "like a piece of blank paper," was established in the days when printed paper was almost unknown. The great obstacle in the way of selecting an unbiased jury in these days seems to be the newspaper, a growth of modern days. "*Tempora mutanta, et nos non mutamur in illis.*" The contrast between the facilities for traveling and the diffusion of news in old times and the present, has been so strikingly presented by an eloquent pulpit orator that we quote his words, from a sermon preached on the text, "Say not thou what is the cause that the former days were better than these":

"But it is sometimes said that the statistics of crime are adapted to produce discouragement; that these show a positive increase of evil. In reply to this it is to be said that the men and the morals, and the achievements of the past are magnified by appearing through the mist of antiquity. The men of the past are often thought to be much better and wiser than they really were. Much of the favorable impression of the virtue of a past age is the result of ignorance. We have not the same means of knowing the wickedness of the past as we have that of the present. We are presented there with general outlines, while here a multitude of details appear to us. And, further, we must not forget that means are at work to increase our knowledge of the details of crime, which had no existence in former days. We live in an age of telegraphs and of newspapers, in an age when thousands of eyes and ears are employed in nothing else than the detection of iniquity, and thousands of presses in diffusing these infinite details into every household to be food for reflection and matter for conversation. There is not a murder committed in the remotest mining town of the west but finds its way speedily into the New York papers, and through these into every village. The assassination of a single female traveler in the African desert is flashed under the ocean waves, and we read the story at our break-

fast tables. A burglary committed in any little country store in New England finds its way in twenty-four hours into the note-book of a Chicago reporter. In short, society's knowledge of the details of crime is enormous."

Compare this state of things with that existing in England at the beginning of the last century, as described by Macauley: "The chief cause which made the fusion of the different elements of society so imperfect was the extreme difficulty which our ancestors found in passing from place to place. Of all inventions, the alphabet and the printing press alone excepted, those inventions which abridge distance have done most for the civilization of our species. Every improvement of the means of locomotion benefits mankind morally and intellectually as well as materially, and not only facilitates the interchange of the various productions of nature and art, but tends to remove national and provincial antipathies, and to bind together all the branches of the great human family. In the seventeenth century, the inhabitants of London were, for almost every practical purpose, further from Reading than they are now from Edinburgh, and further from Edinburgh than they are now from Vienna." "The history of the newspapers of England from that time to the present day is a most interesting and instructive part of the history of the country. At first they were small and mean looking. Even the *Postboy* and the *Postman*, which seem to have been the best conducted and the most prosperous, were wretchedly printed, on scraps of dingy paper, such as would not now be thought good enough for street ballads. Only two numbers came out in a week; and a number contained little more matter than may be found in a single column of a daily paper of our time. What is now called a leading article seldom appeared, except when there was a scarcity of intelligence; when the Dutch mails were detained by the west wind; when the Rapparees were quiet in the Bog of Allen; when no stage-coach had been stopped by highwaymen; when no non-juring congregation had been dispersed by constables; when no embassador had made his entry with a long train of coaches and six; when no lord or poet had been buried in the Abbey, and when, consequently, it was difficult to fill up four scanty pages." Mail coaches were introduced in 1784. It is within the memory of middle-aged men that our national congress deemed the electric telegraph chimerical.

The law should tolerate nothing that is inconvenient or impracticable. The law should not be an unprogressive science; it should adapt itself in its forms and modes of procedure to the shifting exigencies of imperative occasion and the changed conditions of times. Its principles are unchangeable. The methods of adapting them to practical results may properly change. It is a cardinal principle of the law that a juror should be unbiased and impartial. But if, in the progress of material improvement, news is so rapidly circulated that it becomes impossible that every crime should not be generally known and discussed within a few hours after its commission, and that naturally impressions more or less defined should be made on the mind of the reader, all that the law should require is that the juror shall not have become permanently warped, prejudiced, or biased by the perusal. We cannot ignore the newspaper nor its consequences. We must accommodate our system to them, and make the best of them. The oak, finding it cannot get rid of the stone lodged in the fork of its branches, grows about it, takes it in, and arranges itself with reference to the intruder. Because locomotive engines occasionally run off the track, and steamboat boilers sometimes explode, men do not make long journeys on foot or in wagons. The dangers of these new modes are more than counterbalanced by their conveniences.

Again: Jurists are beginning to doubt, on principle and from observation, that the man who never reads the newspapers, or, if he reads them, derives no impression from the perusal, is the best fitted for the duties of a juror. It is our belief that if such is to be the rule we would better abolish the jury. The proposition that the diffusion of education, and the increased facilities for the spread of news, have rendered mankind less reliable as judges of right and wrong, of truth and falsehood, seems quite absurd. Shall we construct the panel only of those who do not take in a newspaper? Or still better, only of those who cannot read? Why not make the duties of the juror a profession, and bring up a select class to it, handing down the caste from father to son, as in the case of the executioner in some countries, and as carefully preserving the candidate from the sight of a newspaper as the young princess, in the fairy story, was kept from the sight of a distaff, lest by an untoward prick some knowledge shall be let in upon the blank mind of the unhappy wretch? Jurors should not be children, idiots or ignoramuses. What we require of them is fairness, not ignorance. We readily grant that if the impression derived from reading is so firmly fixed that it would require evidence to remove it, the person is biased and unfit. But in how few instances is this the case. The impression formed in the majority of minds is based on the assumed correctness of the report. If such and such statements are true, and there is nothing to explain them, why then the prisoner must be guilty, or innocent, as the case may be; this is the course of reasoning that passes through most minds. But, unless the juror has made up his mind that the report is correct, he is not prejudiced or biased. A mere temporary impression is not objectionable; it is usually unavoidable; and an expression of opinion, based on the assumed correctness of the printed report and the absence of explanatory circumstances, ought not to disqualify the juror if he swear that he can decide the case on the evidence without feeling the influence of what he has read. It is possible that men might be better jurors if *all* men never read the papers. But it has become a matter of choice between those who read and those who do not. And here we can have no more hesitation than we have in believing that the man who can read and write is a more intelligent voter than he who is ignorant. In a community where ninety-nine out of a hundred jurors can and do read the papers, the qualities which lead one to read them will render him a more intelligent juror than one who cannot or does not read them.

But, aside from the question of comparative fitness,

the public convenience should in a great measure control. If, by strict adherence to a rule adapted to a time long gone by, nine-tenths of our citizens are found technically unfitted for jury duty, we must modify the rule rather than depend on the one-tenth for our jurors. The evil complained of is continually increasing. It is constantly becoming more difficult to procure a jury in a capital case. The venue has frequently to be changed to obviate this difficulty, thus putting the prisoner at a disadvantage, and the community to increased expense. The spectacle of half a dozen lawyers trying for a week to dodge the effect of the newspapers in any given case has become ludicrous. In the progress of events the age has marched away from us and our rule of practice. It remains to be seen how much longer we will persist in applying to the nineteenth century provisions adapted to the seventeenth, and in endeavoring to measure the conscience and judgment of men of to-day by the criterions of the dead past.

LAW AND LAWYERS IN LITERATURE.*

XVI.

A CHAPTER OF EPIGRAMS.

My friend, Alexander G. Johnson, of the *Troy Whig* newspaper, who unites with a legal education an extensive familiarity with the elegant letters of all times, has pointed out to me most of the following epigrams.

By Sir John Davies:

"Publius, student at the common law,
Oft leaves his books, and for his recreation
To Paris Garden doth himself withdraw,
Where he is ravisht with such delectation,
As downe among the bears and dogs he goes,
Where, whilst he skipping cries, to head, to head,
His satten doublet and his velvet hose
Are all with spittle from above bespread.
When he is like his father's country hall,
Stinking with dogges, and muted all with hawkes;
And rightly, too, on him this filth doth fall,
Which for such filthy sports his bookes forsakes,
Leaving old Ploydon, Dier, and Brooke alone,
To see old Harry Hunks and Sacarson."†

The next four are from "Fasciculus Florum, or a Nosegay of Flowers, translated out of the Garden of several Poets and other Authors." London, 1636:

"This kind of course much profit doth them draw;
Their purple and their jewels sell their law;
So needful 'tis with greater voice to live,
And greater show, that men large Fees may give."

The following verses, translated from Latin, were presented to learned King James, in Bacon's time, and gained at his royal hands the poor delayed Suitor the quick dispatch of his cause:

"Thy great Seales, faithfull Keeper, thou dids't send
Vnto (great King) my honest cause to end:
My Cause he well decreed, but Seale still lackes;
So had I Honey, but without the Wax:
Grant me (my Liege) in favour of my case,
I' enjoy the whole Hive of your Princely Grace."

"The Satyricall Poet" complains of the corruption of Lawyers in his time:

"If my unhonest Neighbour seize my Lands,
And Fields of my Forefathers to his hands,
Dig up the sacred Mere-stone, th' ancient Bound
Of mine Inheritance, and Grand-sires Ground,
Whereon with Pulse and hallow'd Wafer Cake,
A yearly Sacrifice I wont to make.
Or being my Debtor, though damnably
Forswear the Debt, or payment mee deny,
Vowing the Bill under his hand and Seal
Is Counterfeit, not worth a Cockle-shell;
Yet I am forced to stay a year from hence,
Till Time the People's Common Pleas commence;
When that time comes, I then must all's abide
A thousand trifling put off tricks beside."

This I think is imitated from Martial:

"Get thee to Gallia or to Africa,
The nurse of Lawyers, if thee list to lay
Thy Tongue to pawn, and plead for muckle mead,
And hire out thy voice at a good price indeed."

Epitaph on the gravestone of an attorney in St Pancras churchyard:

"Here lieth one, deny it if you can,
Who, though a lawyer, was an honest man;
The gates of heav'n to him are open wide,
But shut, alas! to all the tribe beside."

An imitation:

"Entomb'd within this vault a Lawyer lies,
Who Fame assureth us was just and wise,
An able advocate and honest too,
That's wondrous strange indeed—if it be true."

Another epitaph:

"Hic jacet Jacobus Straw,
Who forty years follow'd the law;
And when he dy'd,
The Devil cry'd,
Jemmy, give us your paw."

On an insolvent barrister:

"Without effect is *nolo pros.*
How happens this? cries one, and pauses
His palm no fees were known to cross;
Effects can only spring from causes."

Proposed inscription for the Inner Temple Gate London:

"As by the Templars' holds you go,
The *horse* and *lamb* displayed,
In emblematic figures show
The merits of their trade.

"That clients may infer from thence
How just is their profession:
The lamb sets forth their innocence,
The horse their expedition.

"O happy Britons! happy isle!
Let foreign nations say;
Where they get justice without guile,
And law without delay."

Answer to the above:

"Deluded men, these holds forego,
Nor trust such cunning elves;
These artful emblems tend to show
Their clients, not themselves.

"'Tis all a trick, these all are shams,
By which they mean to cheat you;
But have a care, for you're the lambs,
And they the wolves that eat you.

"Nor let the thoughts of no delay
To these their courts invite you;
'Tis you're the showy horse, and they
The jockeys that will ride you."

This has been better thus expressed:

"Your clients speciously you've plied,
But time will soon impress 'em;
The *horse* denotes you mean to ride,
The *lamb* you mean to fleece 'em."

Pickwickian Quarrels:

"Two lawyers, when a knotty cause was o'er,
Shook hands, and were as friendly as before:
'Zounds,' said the client, 'I would fain know how
You can be friends, who were such foes just now?'
'Thou fool!' said one, 'we lawyers, though so keen,
Like shears, ne'er cut ourselves, but what's between!'"

An attorney's heir:

"The father took it of the devil, and then
Gave it his son—to send it back again."

A country quarter sessions—Swift:

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

† Names of two celebrated bears.

"Three or four parsons full of October:
Three or four squires, between drunk and sober;
Three or four lawyers; three or four liars;
Three or four constables; three or four criers;
Three or four parishes, bringing appeals;
Three or four writings, and three or four seals;
Three or four bastards, and three or four whores;
Tag, rag and bobtail, three or four scores;
Three or four statutes misunderstood;
Three or four paupers, all praying for food;
Three or four roads that never were mended;
Three or four scolds, and the sessions are ended."

"How comes it that Quibus should pass for a wit?
He sold what he spoke, and he bought what he writ."

By Lord Neaves:

"We grease the axle that it may not creak;
We grease the lawyer's palm to make him speak."

Advantage of Impecuniosity:

"Clients returning, before thieves may sing,
For *back* from London they can't money bring."

The Consequences of the Fall:

"From Adam's fall behold what sad disasters!
Both us and ours it sells to various masters:
Our souls to Priests, our body to the Doctors,
Our lands and goods to Pleaders and to Proctors."

By Furetiere. On a statue of Justice removed into the market place:

"*Q.* Tell me why Justice meets our eye,
Raised in the market place on high?
A. The reason, friend, may soon be told
'Tis meant to show she's to be sold."

By Guillaume des Autels:

"Blindfold is Justice drawn, for this,
To show she's random, hit or miss;
A sword she bears—bugbear for those
Sans wit or wealth to ward its blows;
The pair of scales she's made to hold
Makes sure that all she gets is sterling gold."

From Baraton:

"'Call silence!' the Judge to the officer cries;
'This hub-bub and talk, will it never be done?
Those people this morning have made such a noise,
We've decided ten causes without hearing one.'"

On the Law of Libel:

"Our statesmen all boast that in matters of treason,
The law of old England is founded on reason;
But they own that when *libel* comes under its paw,
It is rarely indeed that there's reason in law."

"You may say certain spades are black,
And you may call a spade a spade;
But if you name a quack a quack,
By law of libel you are flayed.
The ace of spades you deem an ace,
No legal terrors then you brave;
But 'tis with cards alone the case,
That you may call a knave a knave."

On a Briefless Barrister:

"If to reward them for their various evil,
All lawyers go hereafter to the devil;
So little mischief thou dost from the laws,
Thou'lt surely go below without a cause."

On the statue in Clement's Inn of a Negro supporting a sun-dial:

"In vain, poor sable son of woe,
Thou seek'st the tender tear;
For thee, alas! it still must flow,
For mercy dwells not here.
From Cannibals thou fled'st in vain,
Lawyers less quarter give:
The first won't eat you till you're slain,
The last will do't alive."

"The law decides questions of *Meum* and *Tuum*,
By kindly arranging to make the thing *Suum*."

"When we've nothing to dread from the law's sternest frowns,
How we smile at the barristers' wigs, bands, and gowns;
But no sooner we want them to sue or defend,
Than their laughter begins, and our mirth's at an end."

By Jekyll:

"The sergeants are a grateful race;
Their dress and language show it;
Their purple robes from Tyre we trace,
Their arguments go to it."

On a part of St. Mary's church at Oxford being converted into a law school:

"Yes, yes, you may rail at the Pope as you please,
But trust me that miracles never will cease.
See here—an event that no mortal suspected!
See Law and Divinity closely connected!
Which proves the old proverb, long reckon'd so odd,
That the nearer the church the farther from God."

Seven good things requisite before going to Law:

"Dear Tom, take advice, nor commit a *faux pas;*
As you travel through life never get into law;
The odds are against you a million to one,
'Tis a horse to a hen that you're quickly undone;
And if there's no help and to law you must go,
Indispensables seven 'tis fit you should know.
And first you'll be wise to reflect well and pause,
And be sure ere you stir, you have a good cause.
Like your cause your attorney should also be good—
A *sine qua non*—it is well understood.
Your jury besides must be good and not packed,
And by a good counsel your cause must be backed;
A good witness and staunch, too, you'll certainly need;
If in this point you fail, Tom, you cannot succeed.
To make all secure, ere an inch more you budge,
You'll be lost if you haven't a very good judge.
These are six needful things, yet fast you'll be stuck,
And still lose your cause, if you haven't good luck."

On the Lord Advocate:

"He clenched his pamphlets in his fist,
He quoted and he hinted,
Till in a declamation mist,
His argument he tint it;
He gaped for't, he grasped for't,
He found it was awa', man,
But what his common sense came short,
He eked out wi' law, man."

The Dying Lawyer:

"Old Quillit, his race upon earth almost run,
Thus sagely advised his too diffident son:
'Like a true limb of law, would you live at your ease,
Ne'er boggle on any side, lad, to take fees;
Keep clear of a noose, though you merit to swing,
And be sure to sell justice for what it will bring.'
'*Sell* justice!' retorted his wondering heir,
'A thing of such value, so precious, so rare,
The cement of society, honour's best band—
Sell justice?' 'Ay, *sell* it, and that out of hand,
You extravagant rascal! If 'tis as you say,
A thing of such price, would you give it away?'"

On a Briefless Barrister, recovered from illness:

"On his sick-bed as Simple lay—
A novice in the laws,
The hopeless youth was heard to say,
'How cruel to be snatched away,
And die without a cause.'

"Jove, pitying, hears; his gracious nod
The youth from death reprieves.
Yet, with submission to the god,
His case is still extremely odd—
Without a cause he lives."

A Verbal Distinction:

"A counsel once of talents vain,
A Quaker rudely treated,
Who often in his story plain
The word '*also*' repeated.

"'Also!' said Brief, with sneering wit,
'Won't *likewise* do as well?'
'No, friend; but if thou wilt permit,
Their difference I will tell.

"'Scarlett's a counsel learned, we know,
Whose talents oft surprise:
Thou art a counsel, friend, *also*,
But surely not *like-wise*.'"

From the Latin of Bocehius:

"Alexander in judgment was sitting one day,
And was seen with his right ear attention to pay
To the plaintiff, but purposely block up the way
To the left with his finger. Said he
To his retinue, asking him why this was done,
'My other ear, sure, if the plaintiff gets one,
The defendant's a right to have free.'"

The next two are from "Satyricall Epigrams," compiled by Henry Hutton, 1621:

An Action of the Case:

"Shouldring a minstrell in a lane I broke
His violl's case by an unlucky stroke;
Who swore he would complaine, to vent his grudge.
And what care I what any law will judge?
For why: I will maintaine it face to face,
'T can be no more but th' action of the case."

In Causidicum:

"Causidicus wears patch'd cloathes, some bruit,
And must do so, for he has nere a suite."

The Suit Ended:

"Ten pence recovered! ten pounds spent in cost!
You say I've gained my suit; I say I've lost."

Two of a trade:

"How fitly joined, the lawyer and his wife!
He moves at bar, and she at home, the strife."

I translate the next epitaph from the French of Borde:

"Here lies a law solicitor profoundly wise,
Who seventy years to pillage others' goods descended.
He mourns, if from the other world he recognize
That you read free of charge these lines for him intended."

From the Greek of Lucillius:

"I lost a little pig, an ox, a goat,
For which you, Menecles, received a groat,
In small retainer—neither I nor these
Have ought in common with Orthryades;
My thieves I trace not to Thermophylæ;
Against Eutychides is this our plea:
Why Xerxes bring again on Grecian grounds?
And Lacedaemon with my loss confound?
The facts, the law, or else I raise loud cries—
So Menecles!—the rest my pig supplies."

The above reminds us of Martial. The next two are from the Greek of Agathias:

"Blind to law's use and wont. Fool! not to know
That we to men corrupt must judgment owe;
Thou boasted thy shrewd eloquence, whose fire
Knows in best words right issue to inspire.
Hope on! I pardon thee, but vain and strange,
Thy genius serves not Themis' course to change."

A judgment as profound as Captain Cuttle's:

"A poor man a learned sergeant sought and saw,
And questioned him upon this point of law:
'My slave-girl ran away; her some one found,
And knowing her another's chattel, bound
In marriage to his man, to whom she gave
Issue: of whom now is that issue slave?'
He ponder'd, and deep por'd in many a book.
Then, turning his arch'd brow, with solemn look:
'To you or him who has the slave girl now,
Her issue here in case as slave must bow;
But seek out some wise judge: you'll quickly gain
His weightier voice, if true what you explain.'"

Another version of the same:

"A plaintiff thus explained his cause
To counsel learned in the laws:
'My bond-maid lately ran away,
And in her flight was met by A,
Who knowing she belonged to me,
Espoused her to his servant B.
The issue of this marriage, pray,
Do they belong to me or A?'
The Lawyer, true to his vocation,
Gave signs of deepest cogitation,
Look'd at a score of books, or near,
Then hemm'd, and said: 'Your case is clear;
Those children, so begot by B
Upon your bond-maid must, you see,
Be yours or A's. Now this I say,
They can't be yours if they to A
Belong—it follows then, of course,
That if they are not his, they're yours.
Therefore, by my advice, in short,
You'll take the opinion of the court.'"

From the Greek of Nicardeus:

"Two persons deaf as posts invok'd the laws;
A judge than either deafer tried the cause;
One said the other owed him five months' rent,
One that all night in mill-work he had spent.
'Wherefore contend ye?' frowning said the Court,
'Of both the mother, both must her support.'"

This was translated into Latin by Sir Thomas More. Another version of the same:

"A deaf man cited his deaf neighbour
Before a judge as deaf, to ground
A debt unpaid for quarter's labour;
Defendant swore, so far from sound,
That mites were swarming in the cheese.
The judge, whose mind suspended stood
At last decreed the marriage good,
And then dismissed them both to pay the fees."

From Borbonius:

"A thief once consulted a lawyer of note,
How best to ensure from the halter his throat.
Said the sage, as he pocketed gravely his fee,
'Run away if you can, and perhaps you'll be free.'"

On the Law of Custom, founded on fact. From an obscure Trojan poet:

"A western New York judge of sterling mental stuff,
Of shaven upper lip, of manners coarse and rough,
Disdaining all such foppery as clean apparel,
Once with a young attorney sought to pick a quarrel,
And with ill-timed severity in court did lash
Th' offending youth because he sported a moustache,—
Saying, 'Young man, that dirty hair about your mouth
You didn't wear till you from Buffalo went south,
And left plain folks like us for the metropolis.'

The bashful but deserving youth blushed deep at this,
But held his tongue, and bowing low to the rebuke,
Waited till summing up, when thus revenge he took:
'The point is, gentlemen, whether a custom's proved,
With reference to which these parties are supposed
T' have contracted,—one, 'tis said, to Buffalo,
Peculiar and unknown as further south you go.
Such case may easily be, for from his honor's talk
You learn what's strange to you is common in New York.
With us they let the beard grow on the upper lip,
But this subjects one here to a judicial nip;
No custom 's universal, but customs vary
With each degree of latitude in which you tarry;
A New York judge takes pride in keeping free from dirt—
Not so with judges here—look at his honor's shirt!'
The bar with loud applause greeting this pithy one,
Acknowledged G——r met his match in F——n."

The next seven are from "Recreation for Ingenious Head-Pieces, or a Pleasant Grove for their Wits to Walk in," etc. London, 1667:

"Loquax, to hold thy tongue would do thee wrong,
For thou wouldst be no man but for thy tongue."

"If Lawyers had for Term a tearm of war,
Souldiers would be as rich as Lawyers are;
But here's the difference 'tween Guns and Gowns,
These take good *Angels*, th' other take *crackt Crowns*."

"Our Civil Law doth seem a Royal thing,
It hath more titles than the Spanish king;
But yet the Common Law quite puts it down,
In getting, like the Pope, so many a Crown."

"A lusty old gown-grave, gray-headed Sire,
Stole to a wench to quench his lust's desire;
She ask'd him what profession he might be?
I am a Civil Lawyer, girle (quoth he).
A Civil Lawyer, Sir! you make me muse,

Your talk's too broad for civil men to use;
If Civil Lawyers are such bawdy men,
O what (quoth she) are other Lawyers then?"

"Law serves to keep disordered men in aw,
But *Aw* preserves orders and keeps the Law,
Were *Aw* away *L* (*aw*) *yers* would lyers be
For *Lucre*, which they have and *hold in fee*."

"To go to Law I have no maw,
Although my suite be sure,
For I shall lack suits to my back,
Ere I my suit procure."

Upon Anne's marriage with a Lawyer:

"Anne is an Angel—what if so she be?
What is an Angel but a Lawyer's fee?"

The next twenty-six are from Owen's Latin Epigrams:

"If happy's he who knows of things the cause,
How happy thou Cause-Pleader with Applause."

"Lawyers are prudent, provident beside,
For prudently they for Themselves provide."

"Physicians and Lawyers in their Trade
Are like, their gain of others' loss is made;
To Patients these, to Clients those apply
Their helping hand, and help themselves thereby.'

"A man lies with a Wife, which is his own
Whom he supposed Another's, till 't was known;
Whether the Child by such mistake begot,
Be spurious, legitimate, or not?"

"No Terms determine, no Vacations vain,
Thou wholly Vacant art, by Strifes to gain."

"Rome had one God, called *Terminus* of old;
But Westminster more Terms than one doth hold."

To the Lord Chancellor:

Lest Force the greatest Enemy to Law,
Should violate it, Law keeps Force in awe:
But thou the Law's Extreams hast pow'r t' abate,
And in the Chancery to moderate."

"Thou pleadest for thyself, not Client; he
Not for himself, but brings his Gold for thee:
The certain Laws uncertain Causes cross:
Thou sure of gain, thy Client's sure of loss."

"Pontilian, thee Christ'pher sues at Law;
Not thee, but money 'tis from thee to draw."

To a Lawyer:

"Part of thy Life thou to thy Wife dost give,
Part to thy Client: When to thyself wilt live?"

"Thou shalt not steal, this Law's for Lawyer's writ:
Thou shalt not kill, this for Physician's fit."

"Though Cicero call Law the sum of Reason,
And that Law's best which thence proceeds in season:
Few Lawyers are Logicians; use Example,
The Laws and Statutes are of either Temple."

The Four Terms at Law:

"The first Term's from St. Michael declar'd;
For now the Arch-Angel* doth the Lawyer guard:
The next is Hilary, this Term doth cause
The Lawyers hilarity by the Laws.
The third from Easter feast its title took,
The Lawyer's Dockets are like the Easter Book.†
The fourth Term's called Trinity; but why?
Because each cause hath a Triplicity."‡

"Wert not cause-maker, thou, thy need to serve,
Thou, no cause-pleader, might'st for hunger starve."

"Kings, Shepherds; People, Sheep; Laws, Fodder, are;
For sick Sheep, Doctors, Kings, Law's cure prepare."

"I many Penal statutes, Fronto, saw,
But not one Premial in all your Law;
Laws Penal, Premial, support a state;
This age hath lost the last; the first's in date."

Hast care to cure, and to secure thy cause?
Incline, then, Client, to thy Lawyer's Laws."

"God t' Adam gave a Law before his Sin;
Ill manners, therefore, all Laws brought not in."

"A Judge, who to be Just, on bribes doth look,
Is like a Fish, which while it takes, is took."

"We have one Advocate in Heav'n, saith Paul;
Are no more Advocates within that Hall?"

"We many Laws have made, almost not any;
For if not any kept, what's good so many?
That Laws be kept, this one more Law ordain,
Which if soon marr'd, will soon be made again.'

"Wonder'st the Judges' Ears are shut to thee,
When unto them thine hands not open be?"

"If Judge to thee be deaf, thy cause is lost;
Thy gain is vain Experience with cost:
'Tis better Judges please than plead the Laws;
Those before them indulge unto thy Cause."

"If mortals would as nature dictates live,
They need not Fees to the Physicians give:
If men were wise, they need not have their Cause
Pleaded, prolong'd by th' ambiguous Laws.
So Bartolus might (Feeless) go to bed,
And Mice corrode Hippocrates unread."

"The way to Law than Justice more we trace,
Though this the shorter, that's the longer Race."

"To take a thing without the Lord's consent
Is theft. What if the lady be content?"

This is from Thomas Pecke's "Heroick Epigrams," London, 1659:

"The study of the Laws did Galba please
Better than other charming Sciences.
When Princes want the Knowledge of the Law,
'Tis Tyranny, not Reason, keeps in Awe."

*The gold coin. †The Parson's Easter Book. ‡Client, Lawyer, Judge.

By the same:

"Law is a Well,
Men are the thirsty buckets which receive
More or less Water, as Reason gives Leave.
There's an Eternal Spring."

"Certain set Forms, fixt in the Memory,
Almost accomplish for the chancery."

From Sir Walter Raleigh's "Pilgrimage:"

"From thence to Heaven's bribeless Hall,
Where no corrupted voices brawl;
No Conscience molten into Gold,
No forg'd Accuser bought or sold,
No cause deferr'd, no vain-spent journey,
For there Christ is the King's attorney;
Who pleads for all without degrees,
And he hath Angels, but no Fees:
And when the grand twelve million Jury
Of our sins, with direfull fury,
'Gainst our Souls black verdicts give,
Christ pleads his Death, and then we live.
Be thou my Speaker, taintless Pleader,
Unblotted Lawyer, true Proceeder!
Thou giv'st Salvation even for Alms,—
Not with a bribed Lawyer's Palms."

On seeing a law book, bound in uncolored calf and white edges:

"With unstain'd edges and in spotless calf,
A Law book bound must make a stoic laugh;
For in that striking emblem you may see
Not what the Law *is*, but what the Law *should* be,
A Law book thus in the Law Livery drest,
Is like a Jesuit in a Layman's vest;
'Tis like a strumpet cloath'd in spotless white;
'Tis like a bitter apple, fair to sight:
'Tis like a simple Quaker, plain and neat,
That with his yeas and noes is sure to cheat;
'Tis like a pirate that false colours shows,
Or Hecla's flames concealed in virgin snows;
'Tis like, in short, 'tis like Dan Milton's sin,
All fair without, but monstrous foul within."

"A Justice, walking o'er the frozen Thames,
The ice about him round began to crack:
He said to's man, 'Here is some danger, James;
I pr'ythee, help me over on thy back.'"

On a counselor having his hat stolen in Westminster Hall:

"Should'st thou to Justice, honest thief, be led,
Swear that you stole his hat who had no head,
That plea alone all danger shall remove,
Nor judge nor jury can the damage prove."

By Mrs. Madan in her brother's Coke upon Lyttleton:

"O thou, who labour'st in this rugged mine,
May'st thou to gold th' unpolished ore refine!
May each dark page unfold its haggard brow!
Doubt not to reap, if thou canst bear to plough.
To tempt thy care, may each revolving night
Maces and purses swim before thy sight!
From hence, in times to come, adventurous deed!
May'st thou essay to look and speak like *Mead!*
When the black bag and rose no more shall shade
With martial air the honours of thy head;
When the full wig thy visage shall enclose,
And only leave to view thy learned nose;
Safely may'st thou defy wits, beaux, and scoffers,
While tenants, in fee simple, stuff thy coffers!"

Epitaph on a magistrate who had formerly been a barber:

"Here lies Justice; be this his truest praise;
He wore the wig which once he made
And learnt to shave both ways."

From Herrick:

"Dead falls the cause, if once the hand be mute
But let that speak, the client gets the suit."

By the Earl of Orrery:

"For that is made a righteous law by time,
Which law at first did judge the highest crime."

"*Tua Cæsar Ætas*" was Justice Aston's motto on the rings which he distributed on being made a judge of the king's bench; this epigram was thereupon made:

"All, all is Cæsar's, new-rob'd Aston cries,
All, all is Cæsar's, the King's Bench replies.
Poor people, you have nothing left, we see,
Since all is Cæsar's which belong'd to me."

Epitaph from the Latin of Theodore Beza:

"O fickle Fortune, cruel, heartless jade,
This brawler who his voice his fortune made,
Summoned to plead in Rhadamanthus' court,
Finds what he sold before must now be bought."

By Swift:

"Here lies Judge Boate within a coffin;
Pray, gentlefolks, forbear your scoffing.
A Boat a judge! yes, where's the blunder?
A wooden judge is no such wonder.
And in his robes, you must agree,
No boat was better deckt than he.
'Tis needless to describe him fuller;
In short, he was an able skuller."

Anonymous:

"Here lies Lawyer Lag, in a woeful condition,
Who once was a law-man, now turn'd politician;
Alive, he a Templar was, keeping his terms,
And dead, he makes one in the Diet of Worms."

"He practiced virtue, pleaded for the right,
And ran the race that all men try to win;
He lightened many an over-burdened wight,
And if a stranger came, he took him in."

By Ben Jonson:

"No cause, nor client fat, will Cheveril leese,
But as they come, on both sides he takes fees,
And pleaseth both; for while he melts his grease
For this, that wins for whom he holds his peace."

By Lindsay (a friend of Dean Swift; a judge, and an elegant scholar):

'A slave to crowds, scorch'd with the summer's heats,
In courts the wretched lawyer toils and sweats;
While smiling Nature, in her best attire,
Regales each sense, and vernal joys inspire.
Can he who knows that real good should please,
Barter for gold his liberty and ease?'
Thus Paulus preach'd:—When, entering at the door,
Upon his board his clients pour the ore;
He grasps the shining gifts, pores o'er the cause,
Forgets the sun, and dozes o'er the laws."

As the LAW JOURNAL goes to press on Wednesday, we shall be unable to notice in this issue the proceedings of the conventions to nominate court of appeals judges.

CURRENT TOPICS.

Fortunately the apprehensions which have been entertained that the United States supreme court would reverse its own decision in the legal tender question are not likely at present to be fulfilled. The cases of *Latham*, and of *Deming* v. *The United States*, which involved the question, have been withdrawn by the plaintiffs; and the motion recently made to reopen the Hepburn-Griswold case has been denied. The causes which led to the withdrawal of the former two cases have not transpired. In denying the motion in the latter case the chief justice said that the reason why the rehearing was denied was that none of the four judges now on the bench who concurred in the opinion in that case desired to have the case reheard, and, under the rule of the court, without the consent of some one of the judges who concurred in the decision of a case, it could not be reheard.

In the case of *King* v. *Talbot*, 1 Hand, 76, the duties of trustees holding trust funds for investment for the benefit of minor children were very fully discussed, but the court stood divided on the very important question, as to whether such trustees were bound to invest in government or real estate securities. The supreme court of South Carolina has just decided an analogous case — *Mayer and Wife* v. *Mordecai et el.* — holding that where a trustee is not limited or directed by the instrument under which he acts, as to investment of the trust fund, his discretion must be exercised with the same diligence that a prudent man would bestow on his own concerns; but that this, however, would not sanction such investments as are never favored or sanctioned by the court, although men of prudence, dealing with their own means, might make them — as loans on mere personal security — or stocks of railroad companies, or other private corporations. The trustee is bound to manage the property for the benefit of the *cestui que trust*, with the care and diligence of a prudent man. The English rule is that trustees holding funds for investment must invest in the government securities. We fail to discover any valid objection to a rule requiring them here to invest either in government or real estate securities. This would seem to be the only safe way to guard the property of orphans.

The New York *World* has been endeavoring to convince its readers that state courts are not bound by a decision of the United States supreme court. The arguments advanced result in the proposition that the decision of a court, in any given case, is only binding upon the parties directly interested, and that the law laid down by the decision is only applicable to the particular case in question; and Kent is cited as an authority to this effect. The citation, however, comes very far short of sustaining any such proposition. On the contrary the chancellor declares in his Commentaries that "a solemn decision upon a point of law, arising in any given case, becomes an authority in a like case, because it is the highest evidence which we can have of the law applicable to the subject, and the judges are bound to follow that decision so long as it stands unreversed, unless it can be shown that the law was misunderstood or misapplied in that particular case." That the state courts are bound to receive as authoritative precedents all decisions made by the federal courts in cases over which they have either appellate or original jurisdiction, is a proposition which can be most abundantly sustained by authorities, but which is too evident to every lawyer to need sustaining.

We published in a recent number an article from the *Pall Mall Gazette* upon "A Ministry of Justice," whose duty it should be to overlook the passage of public statutes by parliament. We understand that a bill establishing a "bureau of justice," having similar duties intrusted to it, has been introduced in congress.

Certainty in the law is a necessity among civilized men. We do not mean to be understood that the law should never be changed, but that all changes should be made with such care and deliberation that the object thereof may be attained without injury to any one. A jurisprudence which is the result of the accumulated wisdom of generations is far more likely to be correct than one produced under the influence of the passions and prejudices of any particular time. Statute laws must nevertheless be made to meet the wants of a progressive age, and these statutes must

more or less infringe upon and alter the great body of the law which existed before them. When made in haste and by men ignorant of legal science, they are liable not only to confuse and render doubtful the meaning of the law, but in many instances to fail in accomplishing the purpose for which they were created. To prevent these evils, and also to secure stability and a uniform character to our legislation, a body of learned and practical men, having advisory and supervisory power as to the enactment of general statutes, is felt to be a need in England. Would not such an institution be of advantage in this state, where it has become not unusual, in order to accomplish private ends, to vary and to overturn the fundamental principles of the law?

The New York *Tribune* recently contained a lengthy editorial on "The Limitations of Defense," which opened with the following assertions:

"It will be remembered, at least by all our readers who are interested in celebrated cases, that some years ago Lord William Russell, an aged nobleman, was barbarously murdered in his own London house by a Swiss valet, who, upon his trial, was defended by Mr. Charles Phillips. The line of defense adopted by the distinguished advocate was that the murder was committed by the female servants of the house, and he also argued that bloody articles found in the prisoner's box were placed there by policemen with a view to the reward offered for his discovery and conviction. Suddenly in the very middle of the trial, Mr. Phillips was astonished by receiving from his client a full confession of guilt. But he did not swerve a hair's breadth from the line of defense which he had adopted. He lifted his eyes to Heaven, and fervently declared to the jury that God alone knew who had committed this murder! He continued his insinuations against the housemaid especially, the result of which was that the poor girl was carried to an insane asylum. Mr. Phillips did his client no good, however, for he was convicted, and in due time executed."

The *Tribune* thereupon proceeds from this text to lecture the legal profession soundly for their moral depravity, and to lay down a code of ethics for their future guidance. Now, the only objection we have to the discourse is, that it is based on a text false in every essential particular.

The case alluded to by the *Tribune* is known as "Courvoisier's case," and has been made famous by the bitter discussions that took place in the papers of the day, of the conduct of Mr. Phillips, the prisoner's counsel. He was charged with having retained Courvoisier's brief after having heard the confession; with having appealed to Heaven as to his belief in Courvoisier's innocence after the confession, and with having endeavored to cast upon the female servants the guilt which he knew was attributable to Courvoisier. The last two charges were at once proved, by the most undoubted and reliable authority, to be utterly false and groundless. It was most clearly established that Mr. Phillips had conducted himself, under the trying circumstances in which he was placed, in a most honorable and conscientious manner. Mr. Baron Parke, who sat with the chief justice at the trial, and who knew of the confession himself, declared that for reasons of his own he had most carefully watched every word that Phillips uttered, and that the address was perfectly unexceptionable, and that he made no such statements as were subsequently attributed to him. Other prominent gentlemen who were present, including the chief justice, Tindal, bore evidence to the same fact. In the reports of the case published in the London *Times*, *Chronicle*, *Herald* and other prominent papers, it appears that Mr. Phillips not only did not attempt to cast the guilt on the female servants, but expressly stated to the jury that they must not for a moment suppose that he meant or intended to cast any suspicion upon either of the female servants. As to the charge of having retained the brief after the confession, we believe that there is no difference of opinion in the profession that, under the circumstances, this course was right. Indeed, directly after the confession, Phillips informed the judges of it, and of his desire to throw up his brief, but was informed by them that if the prisoner wished to be defended he was bound to defend him, and to use "all fair arguments arising on the evidence." We should not have referred to the matter at such length had not the *Tribune* reiterated charges proved beyond per adventure to have been false, and thereupon attempted to show the moral depravity of the legal profession.

OBITER DICTA.

We learn that Mr. Justice Daly, of the Court of Common Pleas of the city of New York, is engaged in writing a life of the late Chancellor Kent.

We once knew a young limb of the law, more conceited than wise, who, on being applied to by a landlord to know if he could get a tenant out of his house, answered, "why certainly we can *replevy* the house."

"Suppose, Mr. K.," said an examiner catechizing an applicant for admission to the bar, "suppose a tenant for life should hold over after the termination of his estate, how would you proceed to evict him?" "I think I should proceed under the statute of mortmain," was the reply.

A young lawyer was once engaged in trying his first case before the late Judge Pearce of the Supreme Court of Ohio, and was indulging in some lofty flights of eloquence. Just as he was preparing for his loftiest soar, the judge interrupted him by rapping on the desk several times, and said: "Hold on, hold on, my dear sir. Don't go any higher, for you are already out of the jurisdiction of the court."

Few witticisms of the bar more deserve to be perpetuated than the following of Wirt: One day in court, when Mr. Wickham and Mr. Hay were opposed to each other in the trial of a cause, the former got the latter into a dilemma; observing and enjoying which, Mr. Warden whispered to Mr. Wirt, who was sitting near him, "*Habet fenum in cornu*" (he has *Hay* on his horns). Wirt instantly extemporized the following neat epigram:

"Wickham, one day, in open court,
Was tossing Hay about for sport;
Jack, rich in wit and Latin too,
Cried '*Habet fenum in cornu!*'"

The Austin (Texas) *Journal* relates the following: In 1837 or 1838, the county of —— had just been organized, and the first district court was held in a small room that had been used for a grocery. It was the fall term, a severe norther was blowing, and there was no fire-place or stove in the room. A desperado was on trial for one out of many murders he had committed, and the judge and jury were impatient to end the case. The county was sparsely settled, and consequently too poor to make adequate arrangements for the comfort of prisoners; so, when the jury brought in a verdict of guilty, the judge

in pronouncing sentence upon the culprit, said: "Bob Jones, you have had a fair trial; you have been found guilty, and the court adjudges that you be hanged by the neck until you be dead; but as the county is just organized and affords no conveniences to lodge a prisoner with any degree of comfort—there being no suitable building nor bedding, not even blankets, the court do hereby, in consideration of his personal comfort, order that the prisoner be taken to the nearest tree and there hanged until he be dead, and may the Lord have mercy on his soul." The sheriff then borrowed a lariat from a bystander, put it over the culprit's neck, and led him out to a tree a few feet from the court-house, threw it over a limb, and suspended the prisoner until life was extinct.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF ILLINOIS.*

BILL TO QUIET TITLE.

1. *Character of title required.* — A complainant in a suit to quiet title is not bound to show a perfect title as against all the world, as in the case of a party seeking to recover possession. *Rucker* v. *Dooley.*

2. *What character of relief is proper.* — On a bill to quiet the title of the complainant, where it is alleged that a sheriff's deed executed to the defendant is a cloud upon such title, it will be proper, the facts warranting it, to quiet the title of the complainant by setting aside the sheriff's deed, but the court should not decree a conveyance by the holder of such deed to the complainant. *Ib*

CONTRACT.

Construction thereof. — A contractor, who had engaged to construct a piece of work, employed another, at certain stipulated wages, to superintend the construction, having previously requested the latter to make the plans and devise the best means by which certain difficult parts of the work could be accomplished. After his employment, the superintendent, at the request of his employer, applied these plans in the execution of the work, which was successfully done. *Held*, in an action against the contractor by his employee, to recover for the skill and labor bestowed in the making of those plans, that they were not embraced in the original contract of employment, nor in the duties thereby imposed, and he might recover additional compensation therefor. *Dull et al.* v. *Bramhall.*

COSTS IN CHANCERY.

1. *At what stage of the cause they may be awarded.* — Where, in a suit in chancery to foreclose a mortgage, a decree is rendered which settles the rights of the parties and directs a sale of the premises, but leaves the question of costs undisposed of, and the whole case stands over to await the report of the master, the parties being retained in court in view of further probable action in the case, it is competent for the court to require the costs to be taxed at the term subsequent to that at which such decree is rendered. *The Northern Illinois Railroad Company et al.* v. *The Racine and Mississippi Railroad Company.*

2. *Award of costs in chancery: discretionary.* — The awarding of costs in chancery cases is a matter of discretion with the court, which this court will rarely interfere with. *Frisby* v. *Balance*, 4 Scam. 300, and *Blue* v. *Blue*, 38 Ill. 19. *Ib.*

CRIMINAL LAW.

1. *Accessory equally guilty: distinction between accessories before the fact and principals abolished: not after the fact.* — Under our statute, the distinction between accessories *before* the fact and principals is abolished, but this is not true as to accessories *after* the fact. *Yoe* v. *State.*

2. *Accessory after the fact: may be convicted: though indicted as a principal.* — Under our criminal code a party may be convicted as an accessory after the fact, and punished accordingly, though indicted as a principal. *Ib.*

3. *Rights of accused.* — In cases of this character, where the proof showed that, if accused was guilty at all, she could only have been so as an accessory after the fact, it is proper and right for the court, in its instructions to the jury, to inform them that if the prisoner had given any explanation of the circumstances proved against her, showing them to be consistent with innocence of the charge, they should favorably consider them. *Ib.*

DEEDS.

1. *Containing condition against a conveyance within a limited period: construction thereof.* — Where the grantor, in a deed, annexed to the grant a condition that the grantee should not convey the property, except by lease for a term of years, prior to a certain day named therein, and the grantee afterward, and within the limited period, executed to a party a lease of the premises for ninety-nine years, and also at the same time gave to him a bond for the conveyance of the property in fee, after the expiration of the limitation, and received from the purchaser the purchase price therefor: *Held*, that these acts of the grantee were not prohibited by the condition, and hence worked no forfeiture of the estate. *Samuel Voris et al.* v. *William Renshaw, Jr.*

2. *Condition to avoid an estate: construed strictly.* — A condition to avoid an estate must be taken strictly. It cannot be extended before its express terms. And, when a party insists upon the forfeiture of an estate under a condition, he must bring himself clearly within its terms. *Ib.*

EVIDENCE.

1. *In criminal cases: of the right to show the character of a witness: in a capital case.* — Where, upon the trial of a capital case, a witness, who had acted as a detective, was asked the question by the prisoner's counsel, upon cross-examination, "What is the character of your associates in your business as a detective?" *Held*, that the inquiry was objectionable, as tending to degenerate into investigations wholly foreign to the matters in question. *Yoe, impleaded, etc.*, v. *People of the State of Illinois.*

2. *Medical books: extracts read therefrom: not evidence.* — And in such case, where the state's attorney, in his argument to the jury, read from medical books not in evidence or proved to be authority upon the subject, it was the duty of the court to instruct the jury that such book is not evidence, but theories simply, of medical men. *Ib.*

3. *Testimony given in another case: and in another state: inadmissible.* — It was error for the court to permit to be used in evidence against the prisoner the testimony of a professor of chemistry, given in another case and in another state, and reported in the criminal reports, no opportunity having been had either to cross-examine such witness or to meet his testimony by other evidence. *Ib.*

FORFEITURES.

Not favored. — The law does not favor forfeitures, but refuses to enforce them, whenever wrong or injustice will result therefrom; and before a forfeiture will be enforced, a clear case, appealing to the principles of justice, must be established. *Voris* v. *Renshaw, Jr.*

HOMESTEAD EXEMPTION.

1. *Abandonment.* — B. and wife executed to C. a conveyance of their homestead, but the deed did not operate to release the homestead right. B. continued in the occupancy of the premises after the execution of the deed, under a lease from C., and paid rent therefor. Subsequently B. died, leaving a wife and one child, who remained in possession for a time, when the widow intermarried with one M. and removed to another town, taking the child with her, and leased the premises to A, appropriating the rents to the education of the child. *Held*, in an action of ejectment brought by C. against A,

* From Hon. N. L. Freeman, State Reporter. To appear in 49 Illinois Reports.

that the homestead right was lost by act of B.'s widow in abandoning the possession, and that C. was entitled to a recovery. *Buck* v. *Conlogue.*

2. *Exemption is not lost: by the act of the grantor in taking a lease from his grantee.* — By the mere act of B. in taking a lease of the premises from C. after the conveyance, and paying rent therefor, no forfeiture was incurred of the right to assert the homestead exemption, either on the part of B. in his life-time, or his widow and child after his death, while they continued to occupy the homestead. *Ib.*

3. *Abandonment.* — But B.'s widow, by her intermarriage with M., and removal with her child to a different town, and taking up her residence upon premises owned by her husband, acquired a new home, and by its acquisition lost the right of homestead in the premises. *Ib.*

4. *Intention of returning must be clear.* — In such case the proof of an intention on the part of the claimant to return and occupy the homestead must be clear and satisfactory in order to preserve the right. *Ib.*

5. *Abandonment by the widow: deprives the children of the right.* — After the death of B. his widow became the head of the family, and by her marriage, and abandonment of the homestead, the child also lost the right to claim the statutory privilege as completely as if the abandonment had occurred during the life of B. and by his act. *Ib.*

INJUNCTION.

1. *In cases to enjoin collection of a note: bond may provide for payment of the debt.* — In a suit to enjoin the collection of a promissory note the statute prescribes no rule in regard to the conditions to be inserted in the injunction bond, and in such cases the judge or master granting the writ may require a complainant to give security for the payment of the note, in the event he fails to maintain his suit. *Billings* v. *Sprague.*

2. *Bond conditioned to pay the debt: surety liable therefor: upon dissolution of the injunction.* — And in injunction cases of this character, where the bond is conditioned for the payment of the debt, the liability of the surety therefor becomes fixed, upon the dissolution of the injunction, and a recovery may be had against him, in an action upon the bond. *Ib.*

3. *Debt paid by surety: on an injunction bond: rights of.* — And where, in such suit, the note enjoined is secured by a deed of trust, and the bond provides for its payment, in event the injunction is dissolved, the surety, when he shall have paid the debt, will be substituted in equity to the lien under the trust deed. *Ib.*

4. *Directing the finding.* — In an action upon an injunction bond, the court instructed the jury what amount to find. *Held*, that this was erroneous. But, inasmuch as it appeared from the record that the verdict could not have been for a less sum, being simply the amount of the debt, which rested merely in computation, the judgment would not, for such error, be reversed, and the parties put to the additional cost of a new trial. *Ib.*

LANDLORD AND TENANT.

Permission to surrender lease: given without consideration: may be revoked before acted upon. — A mere license given by a landlord to his tenant, to surrender the lease, where there is no consideration for such permission, may be revoked by the landlord at any time before it has been acted upon. *Dunning* v. *Mauzy.*

NEGLIGENCE.

1. *Liability of a railroad company for killing stock.* — In an action against a railroad company for killing stock, an instruction is not objectionable which fails to exclude *all* of the places excepted by the statute from being fenced, where it is apparent from the testimony that the injury did not occur in one of the excepted places, witnesses having been permitted to testify *without objection* that the injury happened in a place where defendant was bound to fence its road. *The Toledo, Peoria and Warsaw Railway Company* v. *Parker et al.*

2. *Stock injured: duty of owners as to its disposal.* — And in such case, where the stock, at the time the injury occurred, was in good condition, it is the duty of the owner to dispose of it to the best advantage possible, by converting it into beef, or otherwise, and he is entitled to a reasonable time thereafter within which to do so. *Ib.*

3. *When owner discharged from the performance of such service.* — And it cannot be objected in such case, that the owner failed to perform his duty in the premises, in not disposing of the stock to some profit, where the evidence shows, that, on the evening of the day when the injury occurred, the stock was taken possession of and buried by the employees of the defendant. *Ib.*

4. *The question: what is a reasonable time: for the jury to determine.* — In such case, an instruction which assumes to inform the jury what was a reasonable time within which the owner should have taken possession of the injured stock is erroneous; that question is for the jury to determine, from all of the circumstances. *Ib.*

PARTNERSHIP.

1. *When it exists as to third persons.* — Parties may so conduct themselves as to be liable to third persons as partners when in fact no partnership exists as between themselves. The public are authorized to judge from appearances and professions, and are not bound to know the real facts. *Phillips* v. *Phillips.*

2. *As between the parties themselves.* — But a partnership can only exist as between the parties themselves, in pursuance of an express or implied agreement to which the minds of the parties have assented; the intention or even belief of one party alone cannot create a partnership without the assent of the others. *Ib.*

3. *To recover for services, upon the basis of a quantum meruit.* — A bill in chancery was exhibited asking for the dissolution of an alleged partnership between the complainant and the defendants, and that an account be taken. On an appeal to the supreme court it was held there was no partnership, but the court allowed the bill to be retained, in order that the complainant might, if he could, make out a case independent of the partnership set up, by which he might obtain, on the basis of a *quantum meruit*, compensation for alleged services of complainant to the defendant, in the business in relation to which it had been claimed the partnership existed. *Ib.*

PROMISSORY NOTES.

1. *Payable to the wife: at common law belong to her husband.* — At common law, and independent of the statute, a note payable to the wife belongs to the husband, and he may indorse it, or sue upon it and recover in his own name. *Snider* v. *Ridgeway.*

2. *Rule: how affected by the married woman's act of 1861.* — And this rule of the common law is not affected by the act of 1861, except in cases where the consideration for which the note was given belonged to the wife in her own right. *Ib.*

3. *Payable to the wife: indorsed by her husband: assignee takes it at his peril.* — And, where a note payable to the wife is indorsed by her husband, the assignee takes it at his peril, and should it afterward appear that it was her property, the assignee would acquire no title. *Ib.*

4. *Where payable to the wife: may be shown to belong to her husband.* — And notwithstanding a note is made payable to the wife, it may be shown that the real ownership and title are in the husband. *Ib.*

5. *Note payable to the wife of a judgment debtor: may be reached by garnishee process.* — And where a promissory note, made payable to the wife, belongs to her husband, such note, after its maturity, is liable to the process of garnishment issued by a judgment creditor of the husband. *Ib.*

6. *Proceedings may be instituted before the note matures.* — And it is no objection that proceedings in garnishment, to reach indebtedness on a promissory note, were instituted before the maturity of the note, provided judgment is not rendered until after it falls due. *Ib.*

7. And in such case, where the payee of the note, upon the trial of the suit, fails to state that the note had been indorsed before maturity, and the defendant in the proceeding neglects to inquire of such witness whether the note had been transferred before it became due, the jury, under such circumstances, are warranted in finding that it had not been so indorsed. *Ib.*

SHERIFF'S DEED.

1. *Within what time it must be executed.*—Although the statute requires a sheriff, on presentation of the certificate of purchase of land sold under execution, to make a deed to the holder thereof, if the land be not redeemed, yet such presentation must be made within a reasonable time, and that reasonable time must be considered, as the time in which the judgment is a lien, adding thereto the fifteen months allowed for redemption. *Rucker* v. *Dooley et al.*

2. If the application for a deed be made after the eight years and three months have elapsed, and within twenty years, the same must be made through the court from which the execution issued, by a rule upon the sheriff to show cause, and on notice to parties interested, as intermediate purchasers from the judgment debtor or otherwise. *Ib.*

3. But the court would be inclined to hold, in analogy to the statute of limitations, and for the protection of purchasers for a valuable consideration, without notice of any lien, from the judgment debtor or those claiming under him, that after the lapse of twenty years a sheriff's deed should not be executed to the holder of a certificate of purchase not under legal disabilities, on the application of the holder to the sheriff, or by any rule or order of court upon him for such purpose; that such lapse of time should be considered an insuperable bar to its execution. *Ib.*

4. In this case a sheriff's deed was executed, on the application to the sheriff by the holder of the certificate, twenty-nine years after the sale on execution. In the intervening time the judgment debtor sold and conveyed the land, the title passing by several subsequent conveyances to a remote purchaser, for a valuable consideration, and without notice of any lien, and who entered into possession before the sheriff's deed was made. It was *held*, the sheriff was not warranted in making the deed, after such a lapse of time, and it was set aside as a cloud upon the title of the party in possession. *Ib.*

SURETY.

1. *Mortgage taken by a creditor from principal debtor as a further security: inures to the benefit of the surety: as well as to the creditor.*—The principle is well settled, that, where a mortgage is taken by a creditor from the principal debtor, as a further security for his debt, the mortgage so taken must be held in trust, not only for the benefit of such creditor but for the surety's indemnity. *Phares* v *Barbour.*

2. *Creditor becomes a trustee as to the property mortgaged, and must deal with it in good faith.*—In such case the creditor becomes a trustee as to the mortgaged property, and this relation imposes it as an obligation upon him to act in good faith toward his *cestui que trust*, in dealing with the fund, and hold it fairly and impartially, for the benefit of the surety, as well as for himself. *Ib.*

3. *Creditor violating his trust: must account for the full value of the property.*—And if the creditor parts with the property so mortgaged, without the knowledge, or against the will, of the surety, or does any act in violation of the trust, or omits to perform any duty which this relation imposes, whereby the surety is injured, he must be held to account for its full value. *Ib.*

4. *Extension of time to principal: when surety released.*—When the payee of a note gives time or forbearance to the principal debtor, by a promise binding in law, without the knowledge or consent of the surety, the latter is discharged. *Ib.*

TITLE.

1. *Fraudulently obtained: held in trust for owner.*—Where a person entitled to a soldiers' bounty land warrant, employed another to obtain the warrant for him, and the person so employed, by fraudulent means, procured the land to be located under the warrant, in his own name, he will hold the title as a trustee for the rightful owner. *Smith* v. *Wright et al.*

2. A purchaser of the land thus situated, from the equitable owner thereof, may maintain a bill against the party who obtained the title fraudulently, and those claiming under him, who are not innocent purchasers, and for a valuable consideration, for the purpose of establishing the fraud, and enforcing the trust in his favor. *Ib.*

TRESPASS AGAINST AN OFFICER.

1. *Whether the legality of his appointment can be inquired into.*—In an action for trespass, assault and battery, and false imprisonment, the defendant justified the arrest out of which the alleged cause of action arose, which arrest was without warrant, upon the ground that he was an officer and found the plaintiff intoxicated and in a suspicious condition in respect to a larceny. *Held*, that the question whether the defendant was an officer legally appointed could not be tried in this action. *Marshall et al.* v. *Smith.*

2. *Of arrest upon suspicion.*—It is the duty of a police officer, if he knows a felony has been committed in his jurisdiction, and there is good reason to suspect a particular person as being the guilty party, to arrest him and take him before a magistrate for examination. *Ib.*

3. But there must be strong conviction, from the circumstances, that the party arrested was the felon, for, if it should appear that there were no such circumstances, a jury can exercise a wide and liberal discretion as to the damages they will give the injured party. *Ib.*

4. *Questions for the court and jury.*—In an action for trespass, based upon an alleged illegal arrest of the plaintiff, where the defendant justified as a policeman of a city, the court, in leaving the question to the jury as to whether the defendant was a duly and legally appointed policeman, should explain to them what constitutes such appointment. *Ib.*

TRIAL.

In criminal cases: improper conduct of counsel in address to the jury: duty of court.—And where, in a capital case, counsel, in his argument to the jury, made a statement, against objection, that he had a witness by whom he could have proved a certain declaration made by the prisoner, stating it, but that she was sick, such declaration being a serious admission against him: *Held*, that such conduct was improper, and that the court should have excluded the statement from the jury. *Yoe* v. *State.*

TRUSTEE.

Cannot become a purchaser at his own sale.—A trustee employed to sell trust property cannot, either directly or indirectly, become a purchaser at his own sale. *Phares* v. *Barbour.*

TRUSTS.

1. *Of estate conveyed in trust, whether realty or personalty.*—Where, by an agreement between the parties to an undertaking, a portion were to furnish the capital, and the other parties, as agents in the joint undertaking, were to invest it in lots in the city of Chicago, to be bought and sold on speculation for their joint use and benefit, and those furnishing the capital were, at the expiration of the time to which the joint undertaking was limited, to have the capital, so furnished and invested, returned to them, together with a stipulated annual interest, which was first to be deducted from the proceeds of the undertaking, and the remainder to be equally divided among the parties so interested,—*Held*, that the resulting estate, in the property so bought and sold, being an interest in the profits merely, was of the nature of personalty. *Nicoll* v. *Mason.*

2. But if the lots so purchased are not sold, but, by consent of all the parties, are conveyed by the purchasing agents to one of the beneficiaries, in trust for all, by such conveyance the beneficiaries are invested with an equitable estate of inheritance, and the estate is thereby changed from its character as personalty to that of realty, and invested with all its incidents. *Ib.*

3. If, however, the purchasing agents, as the *cestuis que trust*, convey the land, by consent of all the beneficiaries, to one, in trust for all, expressly limiting the power of such trustee to a sale of the land and division of the profits, the character of the estate would not be changed by such conveyance, but would still remain as personal estate in the beneficiaries of the trust. *Ib.*

4. *Declaring a trust.* — A court of chancery will not, after a long lapse of years, interfere to reform a deed, or declare a trust, except upon the most positive and satisfactory evidence of the intention of the parties at the time the deed was executed or trust created. *Ib.*

COURT OF APPEALS ABSTRACT.

OPINIONS PRONOUNCED MARCH TERM, 1870.

Blend v. *People.*

Where, during the trial of a person on an indictment for a criminal offense, and after a jury had been impaneled and some of the evidence taken, one of the justices of sessions left, and another justice was substituted in his stead, under objection of counsel for prisoner; *held*, that such substitute was an error for which a conviction would be reversed; that when the justice of sessions abandoned the trial, the court was disorganized, so far as that trial was concerned; that it differs from the case when a member of the court left the bench for a few minutes, with the intention to return, and does return. Opinion by INGALLS, J.

Bryant v. *Bryant, administrator, etc.*

The plaintiff claimed certain personal property as having been conveyed to her by bill of sale by the defendant's intestate. At the death of the intestate, the bill of sale of the property was found in his possession, and it was proved that he had retained possession of and used the property, and that the plaintiff had never had control of it; and the only proof that the bill had ever been delivered to the plaintiff was evidence of a man who had heard intestate say that he had given plaintiff a paper. *Held*, that a motion for a nonsuit was improperly denied; that the bill of sale having been found among the intestate's papers, the presumption was that he had never delivered it. *Held*, also, that the question was properly reviewable in this court; that where there is no evidence of a fact essential to the plaintiff's case, and an exception taken to a refusal to nonsuit for want of such evidence, this court can review it. All that was decided by the case of *Parker* v. *Jervis*, 3 Keyes, was that where the evidence is conflicting upon a point, this court, after verdict, cannot examine into and pass upon the weight of evidence. Opinion by GROVER, J.

Bentes v. *Thompson.*

In an action for breach of promise of marriage, it appeared that the defendant had promised to marry the plaintiff in the fall of 1862, but that in the early part of October of that year he expressly refused to marry the plaintiff at any time. This action was commenced on the 25th of October following. *Held*, that the action was not prematurely brought; that clearly notifying the plaintiff of a settled determination not to fulfill the contract was such a breach on the part of the defendant, and would sustain an action at once. Case distinguished from ordinary contracts. Opinion by GROVER, J.

Bennett v. *Morehouse et al.*

The judgments in this action were for money, and the amount recovered was adjudged to be a lien and charge upon certain real estate, particularly described in the judgment, which was directed to be sold by the sheriff of Saratoga county for the satisfaction of the debts. The executions issued thereon were as stated in the motion papers, "in the usual form of executions or *fi. fas.* issued upon judgments for money," and it was claimed by the appellant that they were irregular. *Held*, that, if the executions were not in the form prescribed by law, it was an irregularity, subject to correction by the court below. *Held*, also, that the order of the special term, refusing to set aside the executions, did not effect a substantial right, and was not appealable to this court. Opinion by LOTT, J., and FOSTER, J.

UNITED STATES SUPREME COURT DECISIONS.

The Phenix Insurance Company v. *Copelin.* — Error to the circuit court for the district of Missouri. — This case grew out of a policy of insurance issued by the company on the steamboat *Benton*, which was subsequently sunk in the Missouri river in consequence of being struck by a snag, and abandoned by the assured as a total loss. The court below held that there was no right on the part of the assured to abandon for a total loss, although notice was given of the abandonment; but that the company, in taking possession of the vessel, raising and repairing her, failed to make sufficient repairs to constitute indemnity for the injury sustained, and, not having tendered the repaired vessel in reasonable time, were responsible for the amount of the policy, the assured having refused to receive the boat. Mr. Justice STRONG delivered the opinion of the court affirming the judgment.

The Steamboat Keokuk et al. v. *The Home Insurance Company.* — Appeal from the circuit court for the district of Wisconsin. — This suit was brought to recover for the loss of a cargo of wheat shipped in bulk on board of the barge *Brady*, at Hastings, Minn., and taken in tow by the steamer for a voyage on the Mississippi to La Crosse, Wis. The libel charged the unseaworthiness of the barge; and the defense was, loss by contact with concealed obstructions in the river. The court below held that, when the plea of unavoidable danger is set up, the proofs must show the fact satisfactorily, and that in this case it was not shown. The decree was for the company. This court affirmed the decree, holding that in such cases the barges will be deemed as belonging to the propeller, and that they must be kept in such condition as to withstand the ordinary perils of navigation. Mr. Justice MILLER delivered the opinion of the court.

The Steamboat Northern Belle and Barge Brady v. *Robson.* — Appeal from the circuit court for the district of Wisconsin. — The libel in this case charged the unseaworthiness of the barge, by which a cargo of wheat was lost. The defense was, that the loss was occasioned by the dangers of river navigation, the barge having sunk in consequence of being blown upon a bar. The libel was sustained, and the court affirmed the decree. Mr. Justice MILLER delivered the opinion.

Joseph Gates, Assesor of Internal Revenue, v. *Osborne et al.* — Error to the circuit court for the Northern district of New York. — This action was to recover damages for an alleged illegal assessment of internal revenue taxes upon castings made and used by the defendants in error in the construction of the Kirby harvester and mower. The allegation was that the castings were not articles of trade in any sense, as they could not be used except for the particular purpose mentioned. The judgment was for the defendants in error, and the case was brought here, where the judgment is reversed and the cause remanded, with directions to dismiss it for want of jurisdiction, it appearing that the parties were all residents of the state of New York. Mr. Justice CLIFFORD delivered the opinion.

Clark et al. v. *Bansfield et al.* — Certificate of division from the circuit court for the northern district of Ohio. — The question in this case was whether an invention for grain-

ing pails by means of an elastic bed containing the impression of the device to be grained upon the pail, over which the pail is moved to receive the impression, is patentable for a design merely under the act of March, 1861; or whether the elastic bed was patentable under the general law as a machine. The patentee claimed and obtained a patent for the invention as a machine, but the defendants insist that the invention is for a design only, and that the bed is but a sequence or incident of the design. An additional question was, whether the patent was not void for ambiguity in the specification. This court answer the questions in favor of the patentee. Mr. Justice NELSON delivered the opinion.

Bushnell v. *Kennedy et al.* — Error to the circuit court for the district of Louisiana. — Kennedy et al., as assignees, commenced suit in the state courts by attachment against Bushnell, a non-resident, to recover a certain sum of money. The cause was subsequently removed to the circuit court, where, upon consideration, it was remanded for want of jurisdiction to the state court. That judgment was now reversed and the cause remanded; this court holding substantially that the restriction contained in the judiciary act, upon the exercise of jurisdiction by the circuit court, in a suit to recover the contents of a chose of action, in favor of an assignee, unless a suit might have been prosecuted in that court by the assignor, does not extend to a suit commenced in a state court, by a citizen of the state in which the suit is brought against the citizen of another state of which the circuit court has obtained jurisdiction by removal, in pursuance of the twelfth section of the act of 1789. The chief justice delivered the opinion.

The Propeller Portsmouth v. *The Onondaga Salt Company.* Appeal from the circuit court for the northern district of Illinois. — In this case the company shipped by the propeller a quantity of salt from Buffalo to Chicago. The propeller in a dense fog and at night, supposed she had arrived at Chicago from certain sounds heard on shore, and putting in, went aground at Waukeegan, and was compelled to throw overboard a quantity of the salt to lighten the vessel so that she could be hauled off the bar. The decree was for the company, and this court affirm it, holding, in substance, that the propeller was not justified, under the circumstances, in taking the chances and acting upon the presumption that she had arrived at the port of Chicago, or any other particular place, but that she should have waited until the approach of the light or the lifting of the fog rendered it certain where she was. Mr. Justice STRONG delivered the opinion.

The steamboat Keokuk and barge Farley v. *Robson.* — Appeal from the circuit court for the district of Wisconsin. — The barge Farley, belonging to the owners of the Keokuk, was lying at the dock at Winona, Minn., when Robson took possession of her and loaded her with wheat; but being left at night without any one in charge, in the morning she was found sunk. None of the officers of the Keokuk knew of the loading of the barge, and learned nothing of it until after the loss. The libel of Robson charged unseaworthiness of the barge, and his libel was sustained below. The owner's appeal, claiming that the loss was occasioned by the carelessness of Robson, and that there was no such shipment of the wheat as to fine the steamer or subject it to lien for the loss. The court sustains this view and reverses the decree, remanding the cause with directions to dismiss the libel. Mr. Justice DAVIS delivered the opinion.

Schooner Gray Eagle v. *Greening et al.* — Appeal from the circuit court for the district of Wisconsin. — This was a case of collision in the Straits of Mackinoe between the Eagle and the schooner Perseverance, the latter being the libelant, alleging that the Eagle caused the accident by hazardously attempting to cross the bows of the approaching Perseverance. The court below sustained the libel, and this court affirms the decree. Mr. Justice BRADLEY delivered the opinion.

Jones et al. v. *Bolles.* — Appeal from the circuit court for the district of Wisconsin. — This was a proceeding to enjoin Jones from bringing an action against the Mineral Point Mining Company for mineral rents, and to restrain the company from paying such rents to him, on the ground that Bolles had been induced by Jones and others, as agents of the company, by fraudulent representations that the company owned the lands, unincumbered, to purchase shares of its stock. The court below granted the relief prayed for, and this court affirms the decree. Mr. Justice BRADLEY delivered the opinion.

Steamer City of Paris v. *Simmons et al.* — Appeal from the circuit court for the eastern district of New York. — Case of collision, representing questions of fact as to the condition and navigation of the colliding boats; decree affirmed. Opinion by Mr. Justice SWAYNE.

REPORTS OF THE COURT OF APPEALS.

The article in number 14 (p. 265), by Mr. Moak, with this title, has called out several letters from the profession. Among them is one from Dwight H. Clark, Esq., inclosing a copy of Judge GROVER'S opinion in *Taylor* v. *Bradley*, 39 New York, 129, referred to by Mr. Moak. As the opinion is of interest to the profession, we publish it below to complete the report of the case:

LEWIS C. TAYLOR, *Appl't*, v. HENRY M. BRADLEY, *Resp't.*

Opinion by GROVER, J. The case shows that at the time of making the contract by the parties, for the breach of which this action was brought, the defendant held a contract for the purchase of the farm in question from the owners in fee; that, before the time for the entering upon the performance of the contract between these parties, the defendant sold said contract to one Ingraham, and that the owner of the fee conveyed such farm, in pursuance thereof, to Ingraham. This shows that the defendant had such an interest in the farm, as would have enabled him to perform his contract, had he chosen to do so. Then it follows that the class of cases cited by defendant's counsel, fixing the rule of damages between vendor and vendee, lessor and lessee, when the vendor or lessor cannot perform his contract because of a want of title, have no application to this case.

It is not material whether the contract between these parties created the technical relation of lessor and lessee between the parties. The contract is in writing, clear and explicit in its terms, and in substance, that defendant should let the plaintiff the farm for three years; that it should be stocked with twenty-five cows, each furnishing half; that the defendant should cultivate the farm, and, with certain exceptions, the products should be equally divided between the parties. From the case it appears that the plaintiff was prepared, ready and willing to perform this contract; that the defendant had, at the time of entering into the contract, such title as enabled him to perform, but that he sold and parted with this title voluntarily before the time fixed for the defendant to take possession of the farm. The suggestion of the defendant's counsel, that the plaintiff consented to this sale, is not sustained by the facts of the case, nor was the case disposed of upon any such theory in the supreme court.

The question is simply, what damages, if any, is the plaintiff entitled to recover for the violation of this contract by the defendant, his failure to perform not arising from any defect of title or other inability to perform. It was *held* by the court below that the plaintiff was entitled to recover the additional expense of removing his family and effects to another farm, hired by him about four miles more distant from his residence than the farm in question, over what it would have cost to remove to the one in question. And the court, in substance, limited his recovery to such expense. Upon what principle or authority

this expense was allowed is not apparent to my mind, but, as the defendant has not appealed, and this question has not been discussed by counsel, I shall not examine or attempt to decide it. If the plaintiff can recover this and nothing more, it would follow, that, had not the plaintiff had occasion to remove, he could only have recovered nominal damages. The plaintiff insisted upon his right to recover damages sustained by him in consequence of being deprived of the benefits he would have derived from its performance. This was rejected by the court. This ruling is sought to be sustained upon the ground, first, that the action was commenced before such benefits and gains would have been received by the plaintiff in case of performance; and, secondly, upon the ground that such benefits and gains were so uncertain and contingent that the law will not permit a recovery therefor.

The first ground clearly cannot be sustained. If the contract was valuable to the plaintiff, he was at once deprived of this value by its violation by the defendant, and his cause of action therefor was complete, as much as at the end of the term. This must be considered as wholly independent of the second ground. This view is sustained by *Masterton* v. *The Mayor of Brooklyn*, 7 Hill, 61; *Bugby* v. *Smith*, 6 Selden, 489, and by numerous analogous cases, where damages in cases of personal injury, sustained after the commencement of the action, are held to be recoverable. The principal difficulty arises upon the second ground. Questions of this character have been before the court in a vast number of cases, and their solution has been attended with much difficulty. The same rule has not been applied to all cases seemingly within the same principle. An examination of the cases will show that the courts have been endeavoring to establish rules, by the application of which a party will be compensated for the loss sustained by the breach of the contract; in other words, for the benefits and gains he would have realized from its performance and nothing more.

It is sometimes said that the profits that would have been derived from performance cannot be recovered, but this is only true of such as are contingent upon some other operation. Profits which would certainly have been realized but for the defendant's default are recoverable. *Griffin* v. *Colver*, 16 N. Y. 489. Upon this principle, it was held that a party, who had contracted for an engine to propel machinery to be delivered upon a given day, could recover as damages for the delay the value of the use of the machinery to be propelled by it, although he could not show the profit he would have made by dressing lumber with such machinery, the latter being contingent. This shows the contingency or uncertainty upon which the rejection of the claim was based. It is not an uncertainty as to the value of the benefit or gain to be derived from performance, but an uncertainty or contingency whether such gain or benefit would be derived at all. In the case referred to, it was certain the plaintiff would have had the benefit of the use of his machinery had the engine been received, contingent upon other matters whether profits in dressing the timber therewith would have been realized, therefore the former was allowed and the latter rejected. Judge SELDEN in his opinion in *Griffin* v. *Colver*, arrives at the conclusion, that had the plaintiff in *Blanchard* v. *Ely*, 21 Wend. 342, claimed damages for the loss of the trips of his steamer; that is, what she could have been chartered for such trips, he could have recovered therefor; but that as he claimed to recover the profits he could have made upon such trips, the claim was rightly rejected, as it was uncertain whether there would have been any profits had the trip been made. It is some times said that particular damages cannot be recovered because the amount is uncertain; but such remarks will generally be found applicable to such damages, as it is uncertain whether sustained at all from the breach, sometimes the claim is rejected as being too remote. This is another mode of saying that it is uncertain whether such damages resulted necessarily and immediately from the breach complained of. The general rule, that all damages resulting necessarily and immediately and directly from the breach are recoverable, and not those that are contingent and uncertain; the latter description embracing, as I think, such only as are not the certain result of the breach, and does not embrace such as are the certain result, but uncertain in amount. Then it has been held that a party agreeing to lease real estate, having title, who refuses to perform his contract, is liable for the difference between the rent agreed to be paid and the actual value of such rent. *Driggs* v. *Dwight*, 17 Wend. 71. The real value of the rent of real estate is more or less uncertain, particularly in country localities, and must always be determined by proof, and that often conflicting, and yet this has never been suggested as a reason against a recovery. In this case, Judge COWEN says, the measure of damages was certainly not confined to the difference of rent. The jury might look to the actual value of the bargain which the plaintiff had made. By the latter remark, I think must be understood only as enabling them from this source to determine the real value of the rent. In the present case, the natural, immediate, and direct consequence of the breach by the defendant, was to deprive the plaintiff of his right to the use of the farm, and the half of the products for three years, and I can see no reason why the plaintiff should not recover compensation for this, the same as though the contract gave him the use of the farm and all its products for the like term for a specified money rent. The uncertainty as to the gains in the latter case, so far as seasons and fluctuating markets are concerned, would be the same in the latter as in the present case.

It is certain that such uncertainty would be no barrier in the way of a recovery in case of a certain money rent. I think such uncertainty no obstacle to a recovery in the present case. But the question still remains, how is the value of the plaintiff's bargain to be determined? In the language of SELDEN, Judge: "The law uniformly adopts that mode of estimating damages which is the most definite and certain." In *Masterton* v. *Mayor*, where the marble had no fixed value, it was held that resort might be had to proof of the cost of furnishing it in the condition required for delivery. In accordance with this rule the value of the interest of the plaintiff must be proved by experienced farmers, acquainted with the business of farming and with the farm in question. This may be readily done if such an interest has a market value and the witnesses can testify to such value. *The mere conjectures or opinions of witnesses cannot be received. If it shall appear upon trial that the value of the plaintiff's interest cannot be proved as above, for the reason that such an interest has no ascertainable market value, facts must be proved; the quantity of land improved, the quality of the soil, the quality of the various kinds of products in ordinary years; the market value of such products at the time of the breach, or at the usual market season therefor of the year before, the value of labor in cultivating the farm; and from these and other facts tending to throw light upon the question, the jury must determine the value of that bargain to the plaintiff at the time of the breach by the defendant.* I think the court were correct in excluding the claim of the plaintiff for time employed in purchasing the cows he was to furnish, or the loss upon a resale of such cows. Such damages were not the direct, immediate consequences of the breach of the defendant, but depended on other contingencies. The plaintiff will be fully compensated by recovering the value of his bargain. He ought not to have more, and I think he is not precluded from recovering this by any infirmity of the law in ascertaining its amount. He ought to receive no more than he would if at the time of entering into the contract he had had on hand the cows and other things required by him for performance on his part. My conclusion, unaided by any opinion of the court below, or any argument or brief upon the part of the appellant, is, that the judgment appealed from must be reversed and a new trial ordered, costs to abide event.

REVISION OF THE UNITED STATES LAWS.

During the past few days the house committee on the revision of the laws of the United States, of which Judge POLAND, of Vermont, is chairman, has been doing some very important work in reporting and in the passage by the house of several bills in which every practitioner and almost every litigant in the United States courts are much interested. The following is a synopsis of the principal features of the several measures:

In the house of representatives, April 7, 1870, Mr. Poland, from the select committee on the revision of the laws, reported a bill, which was passed, relating to witnesses for respondents in extradition cases.

The bill provides that whenever any person shall be brought before a judge or commissioner upon a charge of crime committed within a foreign government, and shall satisfy said judge or commissioner that any testimony of witnesses within his jurisdiction is material to the defense, and that the accused is unable to pay the fee of such witnesses, such judge or commissioner shall certify the fees of such witness to the marshal, and the same shall be allowed to the marshal at the treasury, and the marshal shall pay the fees to the witnesses and to the officers for summoning them.

In the house of representatives, April 7, 1870, Mr. Ferris, from the select committee on the revision of the laws, reported a bill "to perpetuate testimony in the courts of the United States," which was passed.

Section one provides that any party in interest in a suit in any court in the United States may cause the testimony of any witness material to him to be taken conditionally, and be perpetuated. Section two provides that upon producing to any justice of the supreme court of the United States, circuit or district judge, register in bankruptcy or commissioner appointed to take acknowledgments of bail and affidavits, due proof by affidavit that the applicant is party to a suit pending in some court of the United States, or has an interest in some matter which is, or may be, the subject of a suit in such court; that the testimony desired is material; that the party of adverse interest is of full age, with name and residence, such evidence may be taken after ten days from the appointment therefor by such officer. Section three provides for the summoning of the witness, first by showing the original summons, second, delivering a copy, and third by tendering fees and mileage same as allowed in district courts of the United States. Section four provides for proceeding to take testimony ten days after serving notice on the adverse party, if within the district, and after thirty days if without the district. Section five requires the officer to insert every answer of witnesses to questions by either party, the deposition to be read to and subscribed by witness, certified by the officer, and within thirty days filed in the clerk's office if a suit is pending; or if not, then in such district as the officer granting the order shall appoint; the original order and affidavits on which the same was founded, and those proving service of such order, to be filed with the same. Section six. The original affidavits or a certified copy to be evidence of compliance with this act. Section seven provides that same penalties for refusing to obey summons shall apply as if on the trial of a suit in the district court of the United States. Section eight provides that in case of death or insanity, or absence of witness, such deposition or a certified copy, may be given in evidence by either party. Section nine provides that the deposition shall have the same effect as evidence, as the oral testimony of witness, and be subject to same objections and limitations. Section ten provides that an officer granting order for such deposition may require it to be taken by some other officer residing in the same district with witnesses. Section eleven provides that depositions which have been lawfully taken in any suit pending in any court of the United States may be recorded in subsequent suits between the same parties, or those claiming under them, where the same subject-matter is in controversy. Section twelve provides that when witnesses are out of the jurisdiction of the United States, any circuit or district court of the United States may grant a commission to some officer in the civil or diplomatic service of the United States abroad, to take testimony of such witnesses upon direct and cross-interrogatives, attached to such commission, to be used as depositions hereinbefore authorized to be taken within the United States.

In the house of representatives, April 6, 1870, Mr. Poland, from the select committee on the revision of the laws, reported bill, house report No. 340, "to extend the provisions of an act to provide further remedial justice in the courts of the United States," approved August 29, 1842, which act was passed in consequence of a difficulty about the steamboat *Caroline*, out of which grew the McLeod trial. That act provides that a person imprisoned in the United States, claiming that the act done by him was done by the authority of a foreign government, could be discharged under the writ of habeas corpus by a judge of the supreme court or of the district court, upon proof that he was acting as an officer or agent of such foreign government in such manner as to be protected by its authority. This bill is to prevent kidnaping into the country.

Section one provides that whenever any person has been seized in a foreign country and brought into this country, the writ of habeas corpus may be granted when the restoration of the person is claimed by the foreign country. Section two provides that such a demand of a foreign government may be proved by a certificate of the secretary of state under seal of the department; and upon application for the writ of habeas corpus and in proceedings thereunder, copies of any depositions taken in the state, province, or country where the seizure was made, shall be laid before the government by the diplomatic representative of such state or country, and duly certified by the secretary of state, shall be admitted as evidence. Section three provides, that if the person brought into the country was seized in violation of the laws of the country where the capture was made, such prisoner shall be returned at the expense and under the safeguard of the United States to the place of capture, and be delivered to an agent of the government demanding the return of such prisoner; or if no such agent shall be found, he shall be set at liberty. Section four provides that any person unlawfully seizing any person in such foreign country, or aiding or detaining such person if brought within the jurisdiction of the United States, upon conviction, may be punished by a fine not exceeding $5,000, or imprisonment not exceeding five years, or both, in the discretion of the court. Offenses to be tried either in the district where the person was seized, or in any district where such person shall have been unlawfully detained. Section five provides that writs of habeas corpus under this act, or under the act of which this is an addition, may be issued by any judge of the supreme court of the United States, or any circuit judge within his circuit, or any district judge within his district, subject to the same right of appeal provided for in the original act. The bill passed.

In the house of representatives, April 7, 1870, Mr. Jenckes, from the select committee on the revision of the laws, reported a bill, which was passed, entitled "An act Relative to Proceedings in Admiralty." It provides that United States commissioners and registers in bankruptcy are authorized to issue preliminary proceedings in admiralty cases. In the house of representatives, April 6, 1870, Mr. Poland reported back, with substitute, a bill (house resolution No. 510), respecting the taking of evidence upon bounty and pension claims. The substitute provides that whenever an original paper pertaining to the case as evidence shall have been filed in any one of the departments, a properly certified copy of such paper shall be received as evidence when presented in any other department where such original paper would have been received. The substitute was adopted, and the bill passed. In the house of representatives, April 5, 1870, Mr. Poland, from the select committee on revision of laws, reported a substitute for a bill (house resolution No. 719), "to extend the time in which certain offenses may be prosecuted," introduced by Mr. Ferris, which was passed.

Section one provides that no person shall be prosecuted, tried, or punished for forgery, perjury, subornation of perjury, or other offense hereafter committed in the application for, or prosecution of, any claim for any pension or bounty money or lands, unless a prosecution shall be instituted within four years after the offense. Section two provides that prosecutions for these offenses shall not be barred or affected by any prior statute of limitations, nor shall the act effect the prosecution of any offense committed prior to its passage.

Charles G. Ames, who was convicted at Los Angelos, Cal., of robbing a stage, on the testimony of an accomplice, corroborated by the fact that while the robbers, whose faces were masked, were engaged in plundering the passengers, one called another "Charley," has been granted a new trial by the supreme court of the state, as the statute provides that no person shall be convicted on the evidence of an accomplice without corroboration, and in this case the corroboration was insufficient, it applying, not to the defendant alone, but to any man named Charles.

APPOINTMENTS BY THE GOVERNOR.

By and with the advice and consent of the Senate.

Notaries Public confirmed April 19th, 1870:

Kings County.—John S. Anderson, Abraham B. Ackerly, John W. Byron, Cornelius A. Betts, Morgan G. Buckley, Ezra Baldwin, Jno. Burtis, Hugh Corboy, John M. Clancy, Theo. Cochen, Jas. L. Connelly, Simon Dunne, Jeremiah D. O'Driscoll, James L. Farley, Chauncy W. Felt, Abel Haywood, Samuel Irons, Joseph Kiernan, John Loomis, Geo. T. Lain, Edward B. Lansing, James A. McBain, Wm. W. Mershon, Wm. G. Merrill, Geo. H Pendleton, Francis Quin, Clemens W. Richter, Wm. Russell, Henry L. Rider, Alex. H. Shipley, Henry R. Thomal, John A. Taylor, Henry O. Vidal, Edward W. Van Vranken, Daniel D. Whitney, Samuel S. Waterhouse, Hasson H. Wheeler, James L. B. Willard, Geo. D. Weeks, Albert Fries, Jos. F. Cooke, Wm. Morgan, C. L. Walker, James A. Falkner, Jas. T. Larkins, Daniel S. Downey, Horace R. Fletcher, Edward Sentell, Edward J. O'Flynn, John Callahan, Chas. H. Ludden, W. W. Ellsworth, J. S. Black, John Jaggard.

City and County of New York.—John H. Comer, James Gibbons, Josiah W. Thompson, Demetrie T. Arosemena, Thos. Dunphy, Warren Springstead, Dan'l R. Reynolds, David Henriques, Michael Connolly, Jas. P. Campbell, Charles J. McDermott, Jaques Schmitz, Jacob Friedman, Augustus Wolz, Henry Morrow, Wm. Sutphen, Robert H. Woolsey, John McComb, Jr., Robert A. Young, Jas. G. Sinclair, Fred. B. Sears, A. W. Bailey, Moses Jeurem, Peter M. Ledwith, Aaron Dean, Wm. T. Riely, Wm. H. Class, August Hassey, Alexander T. Compton, John T. Sweeney, Mark Lanigan, John J. Martin, Wm. S. Dillon, George W. Bener, Julius Ascher, John R. Kelley, Gerson Golostein, Patrick Byrnes, Wm. Hallett, Albert K. Post, Edward Seleck, Charles H. Benedict, Lambert Quackenbush, John F. Twomey, Robert Murray, Frank S. Smith, C. W. Hanks, Chas. W. Welsh, James B. Bensel, Lewis L. Delafield, Louis T. Brennan, Wm. H. Allen, Jeremiah B. Aitken, Ogden N. Chapin, Jas. M. Hunt, Simeon D. Fredericks, Evan H. Hopkins, Henry Doune, Grenville A. Kissam, Edward C. Clement, Wm. B. Coleman, Alfred T. Ackert, Charles H. Neilson, Wm. May, Herman Schroeter, Derder H. Walker, John R. Walker, John B. Panners, Edgar J. Irving, John B. Ireland, James J. Traynor, Wm. Henry Morse, Theodore V. Bremson, Isaac M. Walton, Wm. Q. Judge, Wm. J. Bell, W. H. Munday, Chapman Coleman, James J. Ferris, Wm. A. Dunham, Augustus Gifford Vanderpoel, Wright Nelson, Daniel H. Stone, Celestin Astoin, Edward Rowell, Augustus W. Oliver, Samuel Barnett, Thomas Roese, R. C. de Thouars, Peter H. Jobes, John F. Tulley, John J. Levi, T. Kanady, Augustus Hynard, David R. Johnson, E. H. Clough, Charles M. Chancey, Richard S. Amerman, Henry R. Coldington, Patrick McMullen, W. Edelston, Charles W. Nassau, John H. Price, Alfred Tweed, Bernard C. Ryan, Daniel A. Murphy, Henry F. Sippold, Howard T. Marston, Peter A. Lehman, Thomas H. Horson, Alwyn A. Alvord, R. W. Pearsall, Henry A. Hiers, Thomas B. Mosher, W. Glasser, Frederick R. Lee, Morris F. Dowley, Lewis S. Goeble, Wm. F. Sutz, Lewis Sanders, Sargent P. Stearns, Andrew Gilhooly, Wm. H. Kinkaid, Zenas Newell, Wm. Robinson, Edward H. Hobbs, John Zimmerman, Francis B. Chedsey, Theo. P. Kelley, J. Folan, Arthur D. Williams, James Butler, Charles E. Tuthill, Charles V. Ware, David B. Barnum, Jas. E. Hadnett, Geo. W. Mahoney, Albert C. White, Jr.,

Oswego County.—J. De Witt Case, De Witt C. Gardner, William Foster.

Albany County.—Andrew Vanderzee, Samuel Goodman, Scott D. M. Goodwin, John W. Mattice, Peter V. W. Brook.

Seneca County.—Ira Almy.

Wyoming County.—Henry A. Wolcott.

Delaware County.—Frank T. Abbott, John T. Odwell.

Rockland County.—Alonzo Wheeler.

Erie County.—Charles B. Guthrie, John B. Green, Oscar Folsom, Austin A. Howard, Francis E. Eustaphieve, Sardis Hobart, Jacob W. Gale, Abram Bartholomew, Wm. T. Hauchmann, Truman C. White, Wheeler Hotchkiss, J. H. Hale, Willis J. Benedict, Frank H. Goodyear, John O'Riley, Joel Rogers.

Saratoga County.—Harmon Rockwell, Abraham Van Rensselaer, F. H. Palmer.

Westchester County.—Henry. H. Fowler.

Queens County.—John R. Morris.

Suffolk County.—John O. Ireland.

Onondaga County.—John B. Sabine, Lawrence W. Myers.

Ulster County.—John D. Hopkins, Martin Schutt.

Cayuga County.—Allen Mosher, Peter C. Wyckoff.

Schuyler County.—Melvin H. Conkrite.

Franklin County.—James C. Farnsworth, Horace A. Taylor.

Steuben County.—Amaziah S. Kendall, John W. Dinnny.

Allegany County.—Henry H. Lyman, Jesse D. Carpenter.

Cattaraugus County.—Andrew C. Adams.

Chemung County.—Archie N. De Voe.

Madison County.—Edward B. Parsons.

Putnam County.—Geo. F. Garrison, Abram J. Miller.

St. Lawrence County.—Daniel S. Griffin.

Cortland County.—Morgan L. Webb.

Commissioner of Emigration.—Hon. Emanuel B. Hart, of New York city, in place of Gulian C. Verplank, deceased.

Inspector of Gas Meters.—John Byrns, New York city.

Commissioner of Niagara Frontier Police.—R. H. Best, Buffalo.

CORRESPONDENCE.

BROOKLYN, N. Y., *April* 20, 1870.

Editor Law Journal:

I cannot but be of the opinion that the law of this State, as it relates to estates of married women and their responsibilities by reason of such estates, is in an unsatisfactory condition.

Upon the reading of the statutes "for the more effectual protection of the property of married women," it seems plain enough that the legislature has placed them in the precise condition, as to their estates, as if they were unmarried; and that between the unmarried women and the unmarried men there is, as there ought to be, no difference in such conditions. And with the exception of rights of dower, there is no difference between the estates of the owners of realty. These seem to me propositions about which there can be no diversity of opinion. Suppose a man owning and living in a house requiring repairs were to allow his wife to make them while he was otherwise occupied; or when, from infirmity or for other cause, he did not or could not attend to the matter in person. And suppose the wife should go to a hardware store declare the house to be her separate property, procure the articles required for the repair, make her written declaration that the house was her separate property, and pledging the same for the payment of the bill, which representations of ownership were false, and being false must be fraudulent. The wife takes the hardware, has it applied in repairing her husband's house, in his presence, and with his knowledge, and by his consent; at all events without any objection on his part, which would seem, of itself, to be consent. If he knew of the false representations made by his wife, he could not set them up in defense of an action brought to recover the value of the goods. If he was wholly and blankly ignorant of such false representations, inasmuch as he knew the goods were obtained somewhere, though he might not know where; and of somebody, though he might not know of whom; and as he accepted the goods, and saw them applied to his use and made a part of his freehold, would he not be held to have bought and accepted the goods so sold and delivered, and held to an implied promise to pay for them? That an affirmative answer must be given to this question of liability, I am unable to doubt. His refusal or neglect to pay for the goods would be a wrong, and where there is a wrong there is a remedy.

Now, if we change the statement of the above supposed case only by placing the wife as the owner and the husband as the repairing agent, we have the exact case of *Corning* v. *Lewis*, 54 Barb. 51. It seems to me that the rules of law; the relations of owners to their property; the principles of right, and the administration of justice, do not, in any degree, depend upon the sex of parties, but upon abstract rules which apply to all things capable of ownership, and all persons capable of owning, and that sex forms no term in any legal problem which grows out of a mere estate in land, and the dealings of its owner with other persons. N. B. M.

LEGAL NEWS.

The President gave a dinner on the evening of the 21st inst., in honor of the new judges of the supreme court.

We regret to learn that Chief Justice Chase is in poor health. He intends to take a trip to Europe during the summer.

The Mississippi legislature has appointed a special committee to memorialize Gov. Alcorn for the removal of Judge Shackelford for releasing Yerger on bail.

The senate judiciary committee, by a majority of one, have reported favorably the nomination of Bradley and Strong to be associate justices of the supreme court. No action has been taken on them, a disposition being manifested on the part of the senators to await final action on the pending bill requiring justices to reside in the districts to which they are appointed.

In a London court, recently, a woman who was making a rambling statement of the ill treatment she had received from a neighbor was told by a solicitor that she was making an *omnium gatherum* kind of a complaint. "Your worship," said she to the magistrate, "I never use such words; I ain't given to bad language."

A biography of the late Chief Justice Taney is in course of preparation by Mr. Samuel Tyler, of Georgetown, D. C. Shortly before the death of Mr. Taney he placed in the hands of Mr. Tyler a collection of papers and documents relating to his private and official life, that gentleman having long been his confidential friend, and having signified a desire to write the volume which is soon to make its appearance. In one of Judge Taney's letters in the above collection the following sentences occur: "A judge of the supreme court ought never to be connected with the parties and politics of the country. If he should, he will certainly destroy his own usefulness on the bench, and the court itself will be finally brought into the political arena."

Miss Emma Barkalow, who was recently admitted to the St. Louis bar, has auspiciously began her legal career. A few days ago a case was put into her hands which was so adroitly managed that a settlement was successfully effected without trial. The case was as follows: The plaintiff, a lady, claimed damages for a dead dog, whose earthly career was alleged to have been irregularly terminated by one of the city street cars. Sixty dollars was the amount of damages demanded. The directors of the railway company demurred to this bill, and retained Miss Barkalow as their counsel in the suit. There was overwhelming evidence of the fact that the dog was actually dead and could never bark again, as well as that its barkingless condition was caused by carelessness on the part of the defendants' agents. Miss Barkalow, therefore, with a sagacity and modesty which do her infinite credit, obtained a settlement of the case on favorable terms, notwithstanding that she thereby sacrificed a brilliant opportunity for making her maiden plea.

A case was decided by the United States supreme court some days ago, which will no doubt create a sensation among holders of confiscated property in the south, many of whom made their purchases without fully understanding the law on the subject. The case is that of *Bigelow* v. *De Forrest*, in which certain real estate in Virginia was seized under the confiscation laws and sold, the owner being adjudged guilty of treason. The person having since died, his heirs brought suit in ejectment to recover the property. The claim was resisted, upon the ground that the title of the original owner was forfeited by his treason and his rights in the property thoroughly divested. But the United States supreme court decide that it was only his estate during his life which was divested, and since his death his heirs may recover his property. The decision is in accordance with clause two, section three, article three of the constitution of the United States, which says: "Congress shall have power to declare the punishment of treason, but no attainder of treason shall work corruption of blood or forfeiture, except during the life of the person attainted."

TERMS OF THE SUPREME COURT FOR MAY.

1st Monday, Special Term (Motions), New York, Ingraham.
1st Monday, Oyer and Terminer and Circuit (Part 1) New York, Barnard.
1st Monday, Circuit (Part 2), New York, Brady.
1st Monday, Special Term (Chambers), New York. Cardozo.
1st Monday, Special Term (Motions), Kings, Barnard.
1st Monday, General Term, Albany.
1st Monday, Circuit and Oyer and Terminer, Waterloo, Dwight.
1st Tuesday, Circuit and Oyer and Terminer, Elizabethtown, James.
1st Tuesday, General Term, Buffalo.
2d Tuesday, General Term, Poughkeepsie.
2d Monday, Circuit and Oyer and Terminer, Ballston Spa, James.
2d Monday, Circuit and Oyer and Terminer, Oswego, Morgan.
2d Monday, Circuit and Oyer and Terminer, Ontario, Johnson.
2d Tuesday, General Term, Broome.
3d Monday, Special Terms (Issues), Kings, Barnard.
3d Monday, Circuit and Oyer and Terminer, Albany, Hogeboom.
3d Monday, Circuit and Oyer and Terminer, Chemung, Boardman.
3d Monday, Circuit and Oyer and Terminer, Delaware, Balcom.
3d Monday, Circuit and Oyer and Terminer, Chautauqua, Talcott.
3d Monday, Circuit and Oyer and Terminer, Orleans, Daniels.
3d Tuesday, Special Term, Lewis.
4th Monday, Circuit and Oyer and Terminer, Sullivan, Peckham.
4th Monday, Circuit and Oyer and Terminer, Onondaga.
4th Monday, Circuit and Oyer and Terminer, Genesee, Daniels.
4th Monday, Circuit and Oyer and Terminer, Niagara, Marvin.
4th Tuesday, Circuit and Oyer and Terminer, Plattsburgh, Bockes.
Last Monday, Circuit and Oyer and Terminer, Otsego, Parker.
Last Monday, Special Term, Corning, Johnson.
Last Tuesday, Special Term, Albany, Miller.

NEW YORK STATUTES AT LARGE.*

CHAP. 151.

AN ACT to regulate proceedings against corporations by injunction and otherwise.

PASSED April 7, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. An injunction to suspend the general and ordinary business of a corporation or a joint-stock association, or to suspend from office any director, trustee or manager of a corporation or joint-stock association, or to restrain or prohibit any director, trustee or manager of a corporation or joint-stock association from the performance of his duties as such, shall not be granted, except by the court, and upon a notice of at least eight days of the application therefor to the proper officers of the corporation, or the director, trustee or manager to be enjoined or restrained; and an injunction granted for any of the said purposes, except by the court and upon the notice in this section prescribed, shall be void.

§ 2. No officer or director of a corporation shall be suspended or removed from office, otherwise than by the judgment of the supreme court in a civil action, in the cases prescribed by the revised statutes, and all actions and proceedings against a corporation, when the relief sought or which can be granted therein shall be the dissolution of such corporation, or the removal or suspension of any officer or director thereof, shall be brought by the attorney-general in the name of the people of the state.

§ 3. A receiver of the property of a corporation can be appointed only by the supreme court in a civil action; and in one of the following cases, upon at least eight

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

days' notice of the application therefor, to the proper officers of such corporation:

1. In a civil action brought by a judgment creditor of the corporation, or his representatives, after execution has been issued upon such judgment and returned unsatisfied in whole or in part.

2. In a civil action brought by a creditor of the corporation for the foreclosure of a mortgage, upon the property over which the receiver is appointed, and when the mortgage debt, or interest thereon, has remained unpaid at least thirty days after it became due, and was duly demanded from the proper officers of the corporation, and when either the income of such property is specifically mortgaged, or the property itself is probably insufficient to pay the amount of the mortgage debt.

3. In a civil action brought by the attorney-general for a dissolution of the corporation when it appears to the court that such dissolution ought to be adjudged.

4. In a civil action brought by the attorney-general or by the stockholders to preserve the assets of a corporation, having no officer empowered to hold the same.

5. In the cases specifically mentioned in title four, chapter eight, part three of the revised statutes.

§ 4. Any director or other officer of a corporation or joint-stock association, upon whom shall be served any notice of an application for an injunction restraining or affecting the business of such corporation or joint-stock association, or for a receiver of its property and effects, or any part thereof, who shall conceal from or omit to disclose to the other directors, trustees, managers and officers thereof the fact of such service, and the time and place at which such application is to be made, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be punished by fine or imprisonment, or both such fine and imprisonment, and shall be liable, in a civil action, to the corporation or joint-stock association for all damages which shall be sustained by it by reason of such proceedings.

§ 5. The provisions of this act shall extend and apply to all corporations and joint-stock associations, created or existing by the laws of this or of any other state or government, doing business within this state, or having a business or fiscal agency, or an agency for the transfer of its stock therein, and to the directors, trustees, managers and other officers of such foreign corporations or joint-stock associations, and to all proceedings by the attorney-general, in the name of the people of this state, under the laws regulating proceedings against corporations: except that it shall not apply to corporations or associations having banking powers or power to make insurances, or to such as shall be organized under the general manufacturing laws of this State.

§ 6. This act shall take effect immediately.

CHAP. 215.

AN ACT to amend "An act for the publication of the session laws in two newspapers in each county of this state," passed May fourteenth, eighteen hundred and forty-five.

PASSED April 11, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section three of the act entitled "An act for the publication of the session laws in two newspapers in each county of this state," passed May fourteenth, eighteen hundred and forty-five, is hereby amended so as to read as follows:

§ 3. It shall be the duty of each board of supervisors, in the several counties of this state, at their annual meeting, to appoint the printers for publishing the laws in their respective counties. The appointment shall be made in the following manner: Each member of the board of supervisors shall designate by ballot one newspaper printed in the county to publish the laws, and the paper having the highest number of votes, and the paper having the next highest number of votes shall be the papers designated for printing the laws, provided such papers are of opposite politics, and fairly represent the two principal political parties into which the people of the county are divided. If said papers so balloted for and chosen are not of opposite politics, and do not fairly represent the two principal political parties into which the people of the county are divided, such balloting and choice shall be of no effect, and the balloting shall continue until two papers (if such there be in the county) are chosen that meet the requirements of this section. If there shall be but one paper published in the county, then, in that case, the laws shall be published in that paper.

§ 2. This act shall take effect immediately.

CHAP. 242.

AN ACT to amend an act entitled "An act to allow the several towns of this state to raise an increased amount of money for the support of roads and bridges, and to provide for increased compensation of commissioners of highways and other town officers," passed April fifteenth, eighteen hundred and fifty-seven.

PASSED April 15, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section two of an act entitled "An act to allow the several towns in this state to raise an increased amount of money for the support of roads and bridges, and to provide for increased compensation of commissioners of highways and other town officers," passed April fifteenth, eighteen hundred and fifty-seven, is hereby amended so as to read as follows:

§ 2. The commissioners of highways and assessors in any town in this state shall be allowed the sum of two dollars per day for each day actually and necessarily spent in the discharge of their official duties.

§ 2. Subdivision one of section fifty-three of title four of part one of the Revised Statutes is hereby amended so as to read as follows:

1. The supervisor (except when attending the board of supervisors) town clerks, assessors, justices of the peace, overseers of the poor, inspectors of elections and clerks of the polls, shall receive two dollars per day for each day's service performed by each or either of them.

§ 3. All acts and parts of acts inconsistent with the provisions of this act are hereby repealed.

§ 4. This act shall take effect immediately.

CHAP. 277.

AN ACT to amend an act entitled "An act to amend an act entitled 'An act for the benefit of married women in insuring the lives of their husbands,' passed April fourteenth, eighteen hundred and fifty-eight."

PASSED April 18, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The first section of "An act to amend an act entitled 'An act for the benefit of married women in insuring the lives of their husbands,' passed April fourteenth, eighteen hundred and fifty-eight, and amended by an act passed April eighteenth, eighteen hundred and sixty-six," is hereby amended so as to read as follows:

§ 1. It shall be lawful for any married woman, by herself, and in her name, or in the name of any third person, with his assent as her trustee, to cause to be insured for her sole use the life of her husband, for any definite period, or for the term of his natural life; and in case of her surviving such period or term, the sum or net amount of the insurance becoming due and payable, by the terms of the insurance, shall be payable to her to and for her own use, free from the claims of the representatives of the husband, or of any of his creditors, or any party or parties claiming by, through or under him. But, when the premium paid in any year out of the property or funds of the husband shall exceed five hundred dollars, such exemption from such claims shall not apply to so much of said premium so paid as shall be in excess of five hundred dollars, but such excess, with the interest thereon, shall inure to the benefit of his creditors.

§ 2. This act shall take effect immediately.

The Albany Law Journal.

Albany, May 7, 1870.

MR. O'CONOR AND THE CODE.

"I think the code contains, as I best recollect at this moment, only one thing which can be called new in principle, and this is an attempt at an absolute impossibility in prescribing the rule of pleading. It declares in substance and effect that you shall not plead, as in the old system, the conclusions in law or in reason from the facts of the case, and at the same time it prohibits you from stating or detailing the evidence merely on which you rely. You are required to state the "facts" which that evidence conduces to prove. Here, under the name of "facts," we find some things require to be stated which are neither in the vulgar sense of the word the mere fact, or transaction, or event, which did occur and can be proven by direct evidence, and are not the general, rational or legal conclusions from such fact, transaction or event.

"Now, according to my conception, it requires somebody much more wise or more subtle than myself, or any special pleader I have ever been acquainted with, to define or find out what it is that should be stated in a regular pleading drawn in compliance with this requisite of the code. I am not aware that any one has ever attempted to do it. The common practice in this state is to tell your story precisely as your client tells it to you, just as any old woman in trouble for the first time would narrate her grievances, and to annex by way of schedules, respectively marked A, B, C, etc., copies of any papers or documents that you may imagine would help your case. This is most emphatically a fair description of all the pleadings which come from the office of the chief codifier himself. *A demurrer to any pleading under the code is a very dangerous step*, because it is utterly impossible for the keenest investigator to determine in most cases what any other reader than himself will understand to be the import of the pleadings if it be demurred to.

"You may well imagine under these circumstances that, except in the very commonest and very simplest of cases, there are no precedents which would be of use to one beginning to draw pleadings under the code. Its idea seems to be that every vulgar ignoramus, upon reading them, will, from their conformity to his own helter-skelter manner of thinking and writing, think them quite sensible and intelligible, and that a person of opposite character and habits shall always be unable to comprehend what they mean, and consequently be forced to conclude that he must suspend judgment on their merits until the trial, and that if the parties then make out a case or a defense, the pleadings may then and there, or afterward, be amended, as occasion may require.

"It is truly laughable to one conversant with both systems to see the blunders into which lawyers of great ability, who have come to the bar within the last ten or fifteen years, sometimes fall in framing a declaration, plea, or subsequent pleading at common law in the circuit court of the United States."

We had supposed, until we saw the above, that the old rams of the law had done with butting at the code. One very able and conscientious judge went untimely to his grave with spite at the code, which he used to vent in his opinions, until it was evident that he was a monomaniac on the subject. But this was many years ago, and since then the main features of the code have been copied in several other states, and if there is any feature which has met with more general approval than another, it is that which Mr. O'Conor has selected for animadversion above. From some other parts of his letter, published in a recent number of the Law Journal, from which the above is quoted, we strongly suspect that he has at some time been unfortunate in demurring to some of "the pleadings which came from the office of the chief codifier himself." To our mind the highest praise which can be given to the code is contained in the words which he himself italicises. Can any one explain why the time of suitors, courts and community shall be consumed in contests about forms, and modes of expression, which, after they are decided, leave the party just where they started years before? Men are too busy and too much in earnest in the nineteenth century for any such fooling. It was all well enough in those halcyon, respectable and conservative days, a generation ago, when Mr. O'Conor and a few other eminent gentlemen monopolized the practice of the law, because pleading was so precarious and difficult. Justice was a jealous god, and was deaf to the entreaties of her suitors, unless they prayed according to established forms. It was no wonder that Mr. O'Conor, *et id omne genus*, sigh over the departure of the days when justice depended on pleading more than proofs, and they were the high priests who alone knew how to put up the prayers. But, if we remember rightly, demurring was always "a dangerous step." Woe be to the priest who did not pray according to rule; but still greater woe to the other priest, who objected that the prayer was not in the proper form, if it turned out that it was! And it was a matter of delicacy to determine how to wind up the prayer. The great British advocate, Mingay, in speaking for a defendant who was sued for the price of keeping a horse, and who defended on the ground that the fodder was of poor quality, said to the jury: "Gentlemen, the oats and hay were unfit to eat, and naturally the horse demurred." "He should have gone to the country," responded his antagonist, Erskine.

If any thing could justify the vulgar idea that law is a lie, and all lawyers are liars, the common law system of pleading would do it. It was a grand scheme of lies. The science was monopolized by a few adroit word-spinners. The most skillful pleader was he who most deceitfully and ingeniously concealed from his adversary, until the moment of trial, all suggestions of the real nature of the action. If the cause of action was a promissory note, he charged that the defendant was indebted to him for money lent and advanced, for money had and received, for money paid, laid out, and expended, for goods, wares and merchandise sold and delivered, for work, labor and services done, performed and rendered, and every thing else under the sun except a promissory note. And so the wretched defendant remained in dense ignorance of what was to pay until he came into court. By-and-by this state of things began to strike legislators and jurists as inconvenient, not to say unjust, and so the plaintiff was ordered to append to his declaration, in which he told all the aforesaid lies, a notice stating the truth, to wit: that the cause of action was a promissory note; or rather, that on the trial he would offer in evidence the note, the real cause of action, to give efficacy to the common counts, which constituted the lies. Com-

mon sense suggested the inquiry, if the notice is necessary and sufficient, what is the use of the lies? But we had told the lies so long and so often that we loved them and hated to give them up. They were part of the great science of pleading, and to be able to tell them in the right form was a feather in one's cap.

A beautiful outgrowth of this system was the doctrine of variance, which made fatal the slightest variation between the pleadings and the proof. Brown sued Jones in slander for calling him a "perjured, lying thief." On the trial it turned out that the words actually used were "perjured scoundrel and horse thief." This was a variance, and there was only one privilege left to Brown, and that was to pay Jones' costs and get out of court. The beastly doctrine of amendment, about which Mr. O'Conor growls, was no part of our consistent system of lying.

Another pleasant feature of the old system of pleading was its impartiality. The plaintiff had no monopoly of lying. The defendant might lie, too. He might set up as many defenses as the ingenuity of counsel could invent, without regard to their consistency, and he sought a recompense for his ignorance of what the plaintiff was at, by keeping him just as ignorant of the real nature of the defense. The object of pleadings, it will be borne in mind, was ostensibly all this time to inform the court of the issue to be tried.

When we came into a court of conscience, of course, one would suppose that all this was remedied. That was the principal reason for having such a court at all — to afford a refuge in certain cases from the court where lying held sway. But there must be some recompense for being compelled to state the truth, theoretically, and what was it? Why, lawyers were encouraged to make the pleadings as long as possible, by receiving pay in proportion to their length. And so expert did the profession become in the pleasant pursuit of money, that the pleadings in courts of chancery, or conscience, by reason of their prolixity, grew to answer nearly the same benign purpose as those in courts of law, or lying — *i. e.*, of not furnishing any hint of the real issue.

Such, in brief, and as we believe without exaggeration, was the Paradise from which Mr. Field and those other mistaken reformers so ruthlessly ejected Mr. O'Conor, Judge Barculo, and the rest of the proficients in the difficult science of pleading. And to what a barren and dismal waste have we been turned out! Just see: the complaint must contain "a plain and concise statement of the facts, constituting a cause of action, without unnecessary repetition." The answer, in addition to denials, may set up counter-claims "in ordinary and concise language, without repetition." The plaintiff may compel a sworn answer, by verifying the complaint. In considering pleadings for the purpose of determining their effect, they shall "be liberally construed, with a view of substantial justice between the parties." If pleadings "are so indefinite or uncertain that the precise nature of the charge or defense is not apparent, the court may require them to be made definite or certain by amendment." (Why didn't Mr. O'Conor try this on some of Mr. Field's abnormal pleadings?) No variance between pleadings and proof is material, "unless it actually have misled the adverse party to his prejudice;" and even then "the court may order the pleading to be amended, upon such terms as shall be just." The party may amend his own pleading under certain circumstances and in certain particulars, as a matter of course, and the court may always, on motion, amend the pleading "in furtherance of justice" and on proper terms. And, finally, "the court shall, in every stage of an action, disregard any error or defect in the pleadings or proceedings, which shall not affect the substantial rights of the adverse party."

Now, of course, the intricacy of such a system must be very embarrassing to such simple and inexperienced souls as Mr. O'Conor, trained to the simplicity and luminousness and intelligibility of pleadings under the old system. No doubt he misses the pleasant excitement and suspense, which, under the ancient rule, pervaded the mind of the practitioner, until he had steered safely past all the troublesome rocks which beset the telling of his client's story, and the conforming the proof to it. To adapt Virgil a little, *Qui vult vitare* pleading, *incidit in* variance. But we think he is too modest in conceiving that "it requires somebody much more wise or more subtle than" himself to learn to draw a pleading in compliance with the rules of the code. A few nights over that "Abbott's Annotated Code" would undoubtedly enable him to accomplish it.

But seriously, it is to our mind one of the best features of the code that, "except in the very commonest and very simplest of cases, there are no precedents which would be of use to one beginning to draw pleadings" under it. Instead of precedents it is truth that is required under the code. A form that fits one case must necessarily be false when applied to most others. "Circumstances alter cases," and a concise statement of the facts in each case will be more promotive of the development of truth than a Procrustean precedent for all cases. We really hope that Mr. O'Conor will be more successful in his search for precedents than that Troy lawyer and inveterate wag, who rushed into an attorney's office during the sitting of the circuit, apparently very much out of breath, and asked his friend if he could lend him "a blank form of speech for plaintiff's attorney in an action of assault and battery, where the defendant had kicked the plaintiff on the dock."

In conclusion, the code seems likely to live and thrive. The "conflict in opinion" as to its merits is confined to the imagination of Mr. O'Conor, in our opinion, and those judges who have "committed themselves" to "a lack of respect for its design, execution and effect," must belong to the class of one of whom Sam. Weller said that "he commits himself twice as often as he commits any one else." They have descended from the bench never to return, and all the people say amen. What the judges think of this particular subject of pleading may be gathered from the case of *Counaughty* v. *Nichols*, decided at the last term of the court of appeals, and not yet reported. That action was brought to recover the proceeds of the plaintiff's goods sold by the defendant on commission. The complaint stated the facts intelligibly enough, but at the end the pleader, forgetful of the fact and lapsing into precedent, in alleging the receipt of the money by the defendant,

added the words "which he has converted to his own use." The referee before whom the action was tried, who we venture to say is no admirer of the code, nonsuited the plaintiff because his complaint was in tort and his facts showed a contract. The court of appeals, Judge Ingalls giving the opinion, unanimously reversed the judgment of the referee. If Mr. O'Conor had been the writer of the opinion, he would have said, "Well done, good and faithful referee; enter thou into the joys of those who hate the code and all other uncleanness." But really there seems to be nothing left for him but to chuckle over the discomfiture of those unlucky wights who occasionally venture out of the complexities of the code into the sweet simplicity of "pleading at common law in the circuit court of the United States."

THE WAR ON LIFE INSURANCE.

Was the war a good excuse for not paying the annual premiums on a life policy issued before the war by a company at the North to a party at the South?

The United States, on the one hand, and the Confederate States on the other, during the rebellion, were belligerents, and in a state of war, by which all commercial intercourse between the rebel states and the citizens thereof, and the United States and the citizens thereof, was by act of congress declared to cease and be unlawful. U. S. Statutes at Large, 1861, p. 257.

The war cut off all intercourse of a commercial and financial nature between citizens residing within the Union lines and those residing in the rebel states. It *ipso facto* dissolved all partnerships existing between such citizens, forbade the payment of debts and the transfer of property, and the making of contracts. No court would enforce a contract made between individuals of the different belligerent countries.

The intervention of war does not divest the interest of an individual partner in the partnership property that happens to be in the enemy's country. It in no degree enlarges the interest of the partner who happens to be residing in the country where the property is found. It neither satisfies nor cancels any debt due from an alien enemy to a citizen of the other belligerent country.

War neither annihilates nor destroys any private rights between the citizens of the contending nations; it only suspends them, and they remain in *statu quo* until the restoration of peace, when they are all restored.

And so tender are Christian nations in modern times of the rights of individual citizens being alien enemies, that property not contraband of war is scarcely ever seized or confiscated by the belligerent government, although it would not be adjudged to be contrary to the law of nations to do it. The moral sense of Christendom has practically overruled what is strictly the law upon the subject. *Griswold* v. *Waddington*, 16 Johnson Rep., 346; *The Same* v. *The Same*, 15 id., 57; *Furtado* v. *Rogers*, 3 Bosw. & Puller, 191; 1 Kent's Commentaries, 62, 63, 64, 65; *Sanderson* v. *Morgan* 39 N. Y. Rep., 231; 3 Kent's Commentaries, 255.

According to the above principles it was impossible for a man living in the Confederate States during the war, and holding a life insurance policy on a company at the North, to continue it from year to year, by paying the annual premium. If he got a friend at the North to pay the premium for him, or if he got some one to run the lines and tender the gold at the counter of the company, in either case it would be of no avail. It would be unlawful, and a misdemeanor in the company, to receive it, and if it did receive it, no court of justice would enforce a contract based upon such payment.

In an action brought since the war upon a policy held by an alien enemy who died during the war, it is of no importance to inquire what was done toward paying premiums after the war began. Nothing could be lawfully done. These principles must be so, otherwise it would be competent for one belligerent country to get the lives of the soldiers of its army insured by the other. The question, therefore, is whether a failure to pay the premium by an alien enemy at the South, during the war, forfeits a life policy issued at the North.

The policy before us, as an example, was issued in 1849 for $5,000, and is upon condition that if the annual premiums "shall not be paid on the several days hereinbefore mentioned for the payment thereof, then this company shall not be liable to the payment of the sum insured, or any part thereof, and the policy shall cease, and all payments made thereon, and all profits be forfeited to the company."

This condition it became legally and morally impossible to perform. To have paid or accepted the premium would have been contrary to law, and it would have been morally wrong, and no court of justice would have enforced an obligation created by such a payment.

The performance of this condition of the policy became, after the war, an impossibility. It became impossible by the law of nations, the common law, and the law of congress. Does a breach of the condition under such circumstances work a forfeiture of the policy? It certainly does not.

Says Lord Coke: "In all cases where a condition of a bond, recognizance, etc., is possible at the time of making the condition, and before the same can be performed, the condition becomes impossible by the act of God, *or of the law*, or of the obligee, etc., then the obligation is saved." Coke upon Littleton, 206, *a*.

This is the law of the land. It has been so for ages, and from time immemorial. There is no authority against it. There can be no sound reasoning against it. It commends itself to the understanding and the heart of every man.

The payment of the premium became impossible by the act of the law, if not by act of God, and the policy is saved, and must be paid by the company, subject to such deduction as shall be just for the nonpayment of the premiums during the war.

The following authorities will show that the law, as laid down by Lord Coke, has ever been a living principle, applicable in every conceivable case against penalties and forfeitures occasioned by no fault of the party. *People* v. *Manning*, 8 Cowen, 279; *Carpenter* v. *Stearns*, 12 Wendell, 189; *People* v. *Bartlett*, 3 Hill

(N. Y.) 197; *Jones* v. *Judd*, 4 N. Y. 412; *Wolfe* v. *Howes*, 20 id. 197.

These were all actions at law, and the principle was applied to support the action in some of the cases, and to defend the action in others, and all without the interposition of a court of equity. A forfeiture or penalty is where one man suffers a dead loss of money or property, and another takes it for nothing. As where a man agrees to work a year and works six months, and is taken sick or dies. He can recover for the work done, although he agreed to work the whole year before payment; or where a man binds himself that another shall appear at a future day, and before the day the latter person dies; or where a man contracts to do a job of work, and works several months, and before the job is done a law is passed forbidding the completion of the work. In these and all like cases, the common law will protect the rights of the parties who have expended their labor or money, or bound themselves in penalties for objects which become impossible without their fault. So, in life insurance, where a man invests his money for a series of years, and the year before he dies it becomes, without his fault, impossible to pay his premium, the common law will save the policy.

The principle does not apply to naked contracts under which neither work has been done, nor money or property paid or delivered. As in a contract to sell and buy a farm on a given day, and one party is unable, without his fault, to fulfill, he cannot hold the opposite party. The latter can give time to fulfill or not at his option; but if the failing party had been paying money by installments under a contract to forfeit all if he did not make further payments by a certain day, yet if it became, without his fault, impossible to pay, the opposite party could not abandon the contract and walk off with the payments he had already received. The common law will not enforce a penalty or forfeiture where, without fault, it works a dead loss to one party and a clear gain to the other. The above definitions may be thought very unnecessary, but a clear and distinct view of what a forfeiture and a penalty is, forms the key to unlock and reconcile all the authorities upon the subject.

This question now arises: Is there any thing in the contract for life insurance that exempts it from the operation of the common law? Nothing whatever. On the contrary, it would be difficult to name a conditional contract on which the rule of law, as we have stated it, would act with more benignity and justice. In the case before us the policy had run thirteen years, twelve premiums had been paid, and the party died without paying the thirteenth, because it was impossible for him to do it. On account of and for this failure, it is claimed that his children forfeited the $5,000 that became due at his death, for which he had paid premiums so many years. These sums were sufficient to have insured the party nearly five years longer, according to the present law of Massachusetts restraining the forfeiture of life policies. The theory of life insurance is based upon the principle of the investment of money for the benefit of others after the death of the party, and it is in no just sense a mere wager upon the life of a person from year to year. The sole or chief object of a party who invests in life insurance is to secure loved ones a sum certain in case of his early death. To do this he invests at a very considerable sacrifice in case of long life, and He, in whose hands are the times of us all, determines the contingency of life and death between the different depositors, and he who first pays the debt of nature receives the most for his friends according to his investment. They all invest by paying premiums large enough to make it sure that the company which is the trustee shall receive money sufficient to pay to or for every one the amount he contracted for, according to the terms of the policy. Hence it is that the policy of a deceased party, who was by the war prevented from paying his second premium, is just as good for the whole amount as a policy on which twenty premiums had been paid. And if the two are forfeited, the company just as clearly gets the amount of the short policy as the amount of the long one, for nothing. The company contracts to receive premiums sufficient to pay all, and contracts upon terms that will secure the payment of all the policies that they can be required to pay, without forfeiting the policy of any one who fails to pay from a cause which is not his fault. If the trustee is faithful, all the members or insurers will get all they contracted for without seizing upon a brother's policy because the law forbade his paying the premium.

It is inappropriate for the companies to call it paying a *loss* when they pay a policy. A life policy is not a contract of indemnity. The company contracts that a certain sum of money shall, at the death of the party, be paid to his estate or to his children, and when he dies, the share of the money out of the common stock put in by all the insurers which he contracted for is paid, the *time* of payment to each being determined by the question of life or death. *Rawles* v. *American Life Ins. Co.*, 27 N. Y. 282, 289; *Dalby* v. *Indian and London Life Ins. Co.*, 28 Eng. L. and Equity, 312.

It is true that if the non-payment of premiums during the war had disenabled the company from paying the policies of those who died at the South during that time, the common law, as we have stated it, would not apply. But such was not the case. It is never to be forgotten that life insurance companies are trustees to take care of and invest the funds paid in by the insured members, and to pay out to such according to the terms of the policy. That they deal with every member upon terms that make the company a gainer if he withdraws, or, in other words, forfeits his policy before death. The power of forfeiture retained in every policy makes the company the master of the situation in regard to every member who fails to pay his premium. Every member is kept so far in advance as to payments that by withdrawal he forfeits not only the amount to become due on his policy at death, but his share of the profits and the large amount of premiums he has paid above what would have been necessary to insure his life from year to year. So the company has no occasion to bring suit or prosecution against any of its members, and is a gainer every way by each forfeiture.

The practical working of forfeiture in the life insurance business is most extraordinary. No less than 36,666 policies, insuring to the aggregate amount of

$98,263,698, were forfeited in 1868 for non-payment of premiums, by fifty-one companies then doing business in the state of New York, while during the same time only 2,069 policies of the same companies, insuring $8,549,785, were terminated by the death of the insured. In 1867, thirty-eight companies doing business in the same state forfeited 29,140 policies, insuring $78,069,344, while the number of policies terminated by death in that year was 2,803, insuring $8,187,222. The aggregate of these two years shows that over thirteen times as many policies are forfeited as are paid. Life Insurance Reports of New York for 1867 and 1868.

We find no statistics showing the amount of money realized by the companies from these forfeitures. It appears, however, from the Massachusetts Life Insurance Reports of 1860 and 1861, that thirteen companies doing business in that state in 1859 forfeited 2,180 policies, which insured $4,912,213, and were estimated to be of the cash value of $234,138.66, from which deduct the estimated value of the premium notes $90,000, and we have the aggregate loss of the policy holders, and gain by the companies, of $144,000. The same estimate would make the loss to the said policy holders, and gain to the said companies for the years 1867 and 1868, exceed $2,000,000 a year after due allowance for the lapsed policies that would be restored. The probability is, that before the Massachusetts law, which has had a large influence in restraining forfeitures beyond the limits of that state, more than half in number and amount of those who pay moneys for life insurance never receive a dollar in return, but the whole is forfeited. And since that law, we believe it may be safely said that fully 40 per cent of such payments are a dead loss, except as far as the policy holders had paid for the risk of dying before the forfeiture took place.

The loss to many individuals must be large. In 1859 there were 98 policies forfeited of the estimated aggregate value of $36,362.31, which insured $236,300, and on which ten or more premiums had been paid. One company forfeited 23 policies of the aggregate value of $11,361, which insured $58,800, and on each of which thirteen premiums had been paid. Another company forfeited 37 policies of the value of $10,362, which insured $92,000, on each of which ten or more premiums had been paid.

The above statements do not show the whole loss to the individuals, nor the whole gain to the companies by the said forfeitures. We thus see what vast sums are lost to individuals and gained to the companies by the ordinary business of life insurance without the intervention of war.

The effect of this business was regarded as so injurious in Massachusetts, that its legislature, in 1861, passed a law restraining in a large degree the right of forfeiture, thereby exercising a power which is more or less exercised by every good government in guarding its citizens against improvident contracts which can be used oppressively. We here say nothing further as to the moral, social, or pecuniary effect of the business upon the community, but we insist that companies which in this age are receiving through their contracts, by means of forfeitures, such large sums of money without the possibility of loss on their part are the last parties in the world to claim that the law of the land, to save a forfeiture, should not be construed as rigidly against them as any one else.

Can the companies suffer in regard to their Southern policies by our construction of the law? Not a whit. If this war did not excuse the non-payment of premiums, then the millions of money invested by the South in life insurance at the North became forfeited, and was legally a clear gain to the companies. If the war did excuse such non-payment, then companies became liable to pay all losses by death during the war, and they had abundant funds to do it. In every loss they settled they would fully reimburse themselves for non-payment of premiums in that case. All the policy holders who survived the war would forfeit their policies if they did not, within a reasonable time after peace was restored, pay up all arrearages of premiums with interest. If all did that, certainly nothing could be lost—if none did it, then nothing would be lost, but much gained by the companies, because the funds that would fall to them by the forfeitures would vastly more than pay all the losses by death during the war. The disasters of the rebellion bore so heavily on individuals at the South that a very large proportion of the surviving policy holders were compelled to forfeit their policies because they could not pay up their premiums. This would be clear gain to the companies. Indeed, it might as well be said that a company would not have funds sufficient to pay its losses for four years if all its policy holders should stop paying premiums, as to say that such company had not Southern funds sufficient to pay its losses during the war because its Southern premiums stopped during that time. The truth is that the war will be a large gain to the companies as it respects their Southern policies standing when the war begun, if they pay every loss that occurred during its continuance.

We see in the light of the foregoing facts and reasoning how much Chief Justice ROBERTSON was mistaken in supposing that the law forbidding commercial intercourse between belligerents was "a common calamity which operated equally on both parties." *O'Riley* v. *Mutual Life Insurance Co.*, 2 Abbott (New Series), 167, 174, and it shows that that learned and excellent judge was only, like nearly every body else, unlearned as to the business of life insurance. Instead of operating equally in the case before us, it divested and took from the policy holder $5,000 without his fault, and put this same $5,000 into the coffers of the company without its merit. If the war was no excuse for the non-payment of premiums, it was a godsend to those at the North, and annihilated all the rights of the policy holders at the South. It might as well be claimed that a partner at the North having $10,000 of partnership property could take the whole to the exclusion of his partner in the rebel states.

The insurers are partners, and why should not an insurance company at the close of the war hand over to the owner the $5,000 which has become his share as readily as any other partner?

Suppose one of the great northern companies had been located at Richmond during the war. The great majority of the partners or policy holders would

then have been unable to pay premiums, and could the company in that case insist that all the northern policies were forfeited, and seize upon the millions of its funds paid in from the North?

The judge doubtingly decides that it might have been lawful to pay premiums during the war to keep alive contracts made before the war, and cites *Buchanan* v. *Curry*, 19 Johnson, 137. But that case only decided that timber might be delivered *within* the United States in fulfillment of a contract with an alien enemy, made *before* the war. This no one would deny. But here if the company could claim that the premium of $302.50 should be paid in December, 1861, notwithstanding the war, it bound itself to pay the policy in 1862, when the holder died, notwithstanding the war. If our act of congress did not reach to the renewal of policies during the war, it did not reach to the payment of policies on the death of the party, and life insurance was the favored business that could be carried on throughout the war. We think the judge would have looked at this matter differently in view of the case since decided by the court of appeals, and before cited or consulted, 3 Kent, 355.

No less mistaken was the chief justice in supposing that the business of life insurance made it indispensable that there should not be in any event a relaxation of the condition requiring payment at a day certain (page 172). On the contrary, with the utmost deference we insist that there was never a class of contracts more completely and entirely adapted to give relaxation to their conditions as to the time of payment, so that all the rules of law and equity for preventing forfeitures might apply.

1. This abundantly appears from what we have before stated.

2. The companies have the remedies in their own hands, and can never lose by giving full scope to every cause which can be either a legal or equitable excuse for not paying at the day. In every case so large a premium is charged at the beginning to be continued annually through life; that is, so much is paid above the value of the actual risk of life for the current year, that when the year comes round the insured has already paid enough to continue his insurance from one to eighteen years, according to his age and the number of premiums he has paid. If a man was forty years old at the beginning of his policy, and he has paid ten premiums, he has paid for 8 years and 141 days further insurance; so, if he was fifty-six years old, and had paid twelve premiums, he would be entitled to 5 years and 20 days further insurance.

3. The law of Massachusetts forbids the forfeiture of policies until they have run the time above indicated, which clearly shows that the necessity supposed by the chief justice on page 172 cannot exist. When our attention was first called to the subject, we supposed such necessity existed, but as soon as we heard of the law of Massachusetts we saw that it could not be so.

4. In our view, not one of the numerous authorities cited on page 172 shows, or tends to show, that any cause legal or equitable will not excuse a failure to pay at the day in a life policy as soon as in any other contract.

5. There must be over 300,000 life policies issued in this country. Tens of thousands of families have embarked their all in life insurance. Yet their all, after the death of friends, hangs upon the contingency that a sum of money be paid at a day, and the rules of law and equity which would excuse a default in all other cases shall not excuse this. No good government would suffer its citizens to be so exposed to such loss.

In view of the business of life insurance and the manner in which it is conducted, we see no reason why all the usual equitable grounds of relief against forfeiture should not apply to life policies as well as to any other contract, and we find no adjudged case to the contrary. But the common law is a sufficient protection against forfeiture for those at the South who were unable to pay their premiums by reason of the war, and, as we think, ought to have made their investments in life insurance as safe and as sacred during the war as their deposits in savings banks or other moneyed institutions of the North.

CONCERNING EXAMINATIONS FOR ADMISSION TO THE BAR.

In most close corporations, or other bodies of like nature, which are intrusted with the power and duty of passing upon the qualifications of such individuals as contemplate admission within their borders, there is usually found a most jealous and careful scrutiny of each new candidate for the privileges and responsibilities appertaining thereto. No person may find an entrance to the charmed circle who shall not first have been submitted to a close examination, and have thus established his eminent fitness to become one of its fortunate number. And the selection thus carefully and judiciously made is a guaranty that the person so selected is fitted and qualified in such particulars as the body who selects him has adopted as its standard, to assume the duties and the honors of the position to which he is called.

In view of this general and natural exclusiveness, it is a matter of wonder that a profession like that of the law, whose affairs, so far as the selection of those who are to become its exponents and eventually its expounders, are entirely and exclusively within its own control, should be so utterly regardless of its own fair fame, and careless of the honors which ought to be connected with the practice of so noble a profession, as to readily admit horde upon horde, to make use of a phrase not, after all, exaggerative, within its precincts, with scarcely a voucher for the ability or worth, morally or intellectually, of such applicants as choose to present themselves.

It has come, at length, to be the case, that if a man shall have been unfortunate in any other trade or profession, he can find a ready opportunity for the display of his wits in the legal profession. A slight preparation only is needed. Indeed, for an individual who has had the ordinary experience of a layman in courts of law, there is absolutely no necessity for any preparation whatever. The writer is quite familiar with many instances of such a character. In one case which came within his observation, a young man was admitted to practice "in all the courts of this state," who had, prior to his admission, been engaged in re-

tailing grog over a counter in a liquor store, and whose sharpness and sagacity in his particular calling caused his friends to suggest, when, by a sudden turn of Fortune's wheel, he became bankrupt, that he should enter the legal profession, which he did *within one month thereafter*. So that, at the present time, he is, if not a shining, at least a noisy, practitioner at the bar. His occupation is changed in character, though not in name. If not a bar-tender, he is a bar-rester — the difference between which terms is but a few weeks' occasional examination of the "code."

Why is it? Are the honors which are to be won at the bar or the golden returns therefrom so enormous that they cannot all be conveniently gathered? Can the gates which admit to the legal forum be thrown wide ajar, and the populace be beckoned to hasten in without price or preparation, because of the superfluity of glory and shekels which is thus to be won? Well, then, what *is* the reason? Who can tell us why it is that all through this state, at intervals of two or three months, what ought to be occasions of the most solemn and deliberate nature are simply empty forms, which the rules of court require him to undergo who is to take upon himself the grave and solemn duties of an office so full of responsibility and trust as that of an attorney and counselor at law?

If politics had any thing to do with such matters, we might find a most potent reason and an easy solution in that fact. But they have not. There is no distinction made at all. None are excluded. The whole batch or "class" are swallowed at a gulp. No ill-luck attends him who happens to be so ignorant as to be unable to answer the only question propounded to him. Once in a while we hear of such a case, where the name of one or two is omitted from the list of those marked approved as worthy to stand in the places filled by a Choate, a Brady, or an O'Conor. But such cases are rare, mind you. The writer has known one such case. God help the poor fellow who was thus rejected. What, in the name of our patron saint, did or could the young man do for a living but go to the asylum for idiots, if there be such a place.

Nor has judicial favor, so important a consideration after admission, much, if any thing, to do with the result in such cases. The judges scarcely know who are the fortunate applicants. They have nothing to do with the examination or the fitness of the person seeking admission, after they have appointed a committee of three or more learned gentlemen to do their work. It puzzles us to know — to go back to our querry — what the reason of all this laxity really is, but no one can dispute the fact, whatever the reason, that the standard of examination for admission to the bar is in these days of character the like of which is known in no other profession or trade. The manufacturer of shoes has to undergo a certain apprenticeship before he can be accounted worthy to manufacture such gear, but a law cobbler can be evolved from nothing in no time.

The legal profession would soon present a sorry plight were it not that there is after all in the heterogeneous mass a steady influx of leaven sufficient to save it from utter degradation. The student who enters its ranks from the regular law school comes, as a general thing, comparatively fairly fitted and qualified for his work; blockheads can have no show there. But what a burning disgrace it is that after a man has given years to the acquirement of a sound and intelligent conception of the duties he is about to assume, under the tuition and guidance of masters famed in legal lore, to find, on entering the arena, that he is surrounded by men who have just a sufficient smattering of the practice in courts to be able, by dint of blundering and picking up information from others, to get a case into court. An unobservant person, who thought himself otherwise, might conclude that this disparity would tell immensely in favor of the well trained student. Well, it may be so, so far as ultimate reputation and honor are concerned, but it is not so financially or immediately. It is surprising how many dupes are made by these charlatans of the legal profession. They seem to thrive most miraculously, some of them, especially in our cities. A worthy and skillful young practitioner, whose present aim is to become still more capable and intelligent, and who is bending all his energies in that direction, finds himself easily outstripped in the race for patronage by his less able but more blatant and unscrupulous antagonist. Generally, in the long run, as the saying goes, "learning will tell," but the race is made exceedingly difficult and tortuous sometimes, and he who finds that shrewdness and chicanery are superior in their advantages to brains and patient study will too often either ignore the latter for the former, or retire from the contest altogether.

The effect of all this is to lessen the honor and respect which ought to attach to this high calling, and which would belong to it but for the bad reputation which is being given to it by reason of the continual admission of those who are unfitted by temperament, by capacity or education, to honorably discharge its functions. Not until the bar shall awaken to the necessity of imposing the most stringent requirements for admission to practice, and thus preclude therefrom all such as have not the most undoubted qualifications, will the profession of law be an honor unto itself, or any thing but a target for idle and sarcastic remark and ridicule.

LAW AND LAWYERS IN LITERATURE.*

XVII.

MARTIAL.

This Roman poet satirized the tedious and irrelevant orations of lawyers, in an epigram on Postumus, an advocate, the cause of action being trover for the conversion of three kids:

> "Tu Cannas, Mithridaticumque bellum,
> Et perjuria Punici furoris,
> Et Sullas, Mariosque, Muciosque,
> Magna voce sonas, manuque tota,—
> Jam dic, Postume, de tribus capellis."

This has been thus imitated by Hay:

> "My cause concerns not battery nor treason;
> I sue my neighbor for this only reason,
> That late three sheep of mine to pound he drove;
> This is the point the court would have you prove.
> Concerning Magna Charta you run on,
> And all the perjuries of old King John;
> Then of the Edwards and Black Prince you rant,

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

And talk of John o' Stiles and John o' Gant
With voice and hand a mighty pother keep;
Now pray, dear sir, one word about the sheep."

This has been again imitated:

"A weighty lawsuit I maintain;
'Tis for three crab trees in a lane.
The trees are mine, there's no dispute,
But neighbour Quibble crops the fruit.
My counsel Bawl, in studied speech,
Explores beyond tradition's reach,
The laws of Saxons and of Danes;
Whole leaves of Doomsday book explains;
The origin of tithes relates,
And feudal tenures of estates.
If now you've fairly spoke your all,
One word about the crab-trees, Bawl!"

And again, in a translation from the French of La Harpe:

"About three sheep that late I lost,
I had a lawsuit with my neighbour;
And Glibtongue, of our bar the boast,
Pleaded my cause with zeal and labour.
He took two minutes first to state
The question that was in debate;
Then showed by learn'd and long quotations,
The law of nature and of nations;
What Tully said, and what Justinian,
And what was Puffendorf's opinion.
Glibtongue, let those old authors sleep,
And come back to our missing sheep."

I have tried my own hand at Martial thus:

On Cannæ's fatal field, and Mithridate's war,
And all the perjuries of Carthaginian fury,
And Sullas, Mariuses, Muciuses, by the score,
With loud voice and sweeping hand you harangue the jury.
Your rhetoric irrelevant good sense forbids:
The action, Postumus, is trover for three kids.

The following is to Rufus, on a pretended lawyer:

"He whose left arm loaden with books you see,
And throng'd with busy clerks to that degree,
Whose face composed attentively does hear
Causes and suits poured in at either ear,
Most like a Cato, Tully, or a Brutus,
If put upon the rack, could not salute us,
In Latin, with 'good morning,' nor in Greek:
And if thou doubt the truth, let's to him speak."

To Gargilianus:

"For twice ten years you to the hall resort,
And now pursue your cause in the third court.
Would any madman let a process last
For twenty years, who sooner could be cast?"

Thus imitated:

"Full twenty years through all the courts,
One craving process George supports.
You're mad, George—twenty years! you're mad:
A nonsuit's always to be had."

The three courts were the old Roman court, that of Julius Cæsar, and that of Augustus. The following is to Titus:

"Thou urgest me to plead, and dost repeat,
'How great the gain when you the wrong defeat!'
That which the ploughman does is also great."

But the ploughman has to *share* his gains.

"Cinna, is this to plead? and wisely say
Only nine words in ten hours of the day?
But with a mighty voice thou cravs't for thee
The hour glass twice two times reversed to be.
Cinna, how great's thy taciturnity!"

To Naevolus:

"Still in a crowd of noise thy voice is heard,
And think'st thyself a lawyer for thy prattle;
In this account each man that wears a beard
May be as wise. Lo, all men peace! Now prattle."

"Seven glasses, Cecilian, thou loudly did'st crave;
Seven glasses the judge full reluctantly gave.
Still thou bawl'st, and bawl'st on, and as ne'er to bawl off,
Tepid water in bumpers supine dost thou quaff.
That thy voice and thy thirst at a time thou may'st slake,
We entreat from the glass of old Chronos thou take."

I. e., drink from the water clock itself.

"You said, ten guineas when your cause was done:
What! do you think to fob me off with one?
Now you pretend that I could nothing say—
The more you owe, my blushes to repay."

On a lawyer turned farmer:

"A little farm you purchase near the town,
With a poor timber house, just dropping down,
And business quit, a better farm by far—
I mean the certain profits of the bar.
Of wheat, oats, beans and barley, large supplies
The lawyer got: which now the farmer buys.

JUVENAL,

in his "Seventh Satire," draws the following picture of the Roman lawyers, their fees, their state, and their revelries; the translation is by Charles Dryden, son of "glorious John":

"Next show me the well-lung'd Civilian's gain,
Who bears in triumph an artillery train
Of chancery libels; opens first the cause,
Then with a pick-lock tongue perverts the laws;
Talks loud enough in conscience for his fee,
Takes care his client all his zeal may see;
Twitch'd by the sleeve, he mouths it more and more,
Till with white froth his gown is slaver'd o'er.
Ask what he gains by all his lying prate,
A captain's plunder trebles his estate.
The magistrate assumes his awful seat;
Stand forth, false Ajax, and thy speech repeat,
Assert thy client's innocence; bawl and tear
So loud thy country judge at least may hear,
If not discern; and when thy lungs are sore,
Hang up the victor's garland at thy door;
Ask for what price thy venal tongue was sold,—
A rusty gammon of some sev'n years old,
Tough, withered cabbage, ropy wine, a dish
Of shotten herrings, or stale, stinking fish.
For four times talking, if one piece thou take,
That must be cantled, and the judge go snack.
'Tis true, Emilius takes a five-fold fee,
Though some plead better, with more law than he;
But then he keeps his coach, six Flanders mares
Draw him in state, whenever he appears;
He shows his statues, too, where plac'd on high
The ginnett [jenett?], underneath him, seems to fly;
While with a lifted spear, in armor bright,
His aiming figure meditates a fight.
With arts like these, rich Matteo, when he speaks,
Attracts all fees, and little lawyers breaks."

He then depicts a needy attorney:

"Tongillus, very poor, has yet an itch
Of gaining wealth by feigning to be rich,
* * * * * *
Nor can I wonder at such tricks as these,
The purple garments raise the lawyer's fees,
And sell him dearer to the fool that buys.
* * * * * *
Not Tully now could get ten groats by pleading;
Unless the diamond glittered on his hand;
Wealth's all the rhetoric clients understand."

HORACE,

in the fifth Satire of the second book, has a humorous dialogue between Ulysses and Tiresias, in which the latter gives the former some useful hints about earning an easy living, by being appointed the beneficiary of rich old men, of which I offer the following translation:

In truth I've told you, and tell you again,
Put trust in wills of moribund old men;
Though one or two escape by biting off the bait,
Relinquish not your hope, nor quit the art, but wait.
In every suit that's at the bar contested,
Or small or great, you should be interested;
If any rich and childless rogue should supplicate
The law against the good, be thou his advocate;
Despise the man of purer cause and life,
If he's a son at home or fruitful wife.
"Quintus," or "Publius" (prefixes charms will lend
To ears polite), "your virtue has made me your friend;
I causes plead of substance various,
And guide through legal quirks precarious;
And any one shall sooner snatch my eyes,
Than cheat a nut's worth, or your cause despise.
My care's to keep you safe from loss or jest."
Bid him go home, and nurse himself, and rest.
Be his solicitor, steadfastly persevere,
By summer or by winter, heat or cold, whene'er
Unseasoned statues split with glaring Sirius,
Or Alps are spued upon with snow by greasy Furius.*

"Do you not see," says one, jogging his neighbor,
"How sharp he is, how lavish of his labor?"
By such acute inventions you shall clients fleece;

* Furius, in a poem on the Gallic war, had said: "Jupiter hibernas cana nive conspuet Alpes."

More tunnies swimming in, your fish-ponds shall increase.
If any affluent man an ailing son shall rear —
Lest too much complaisance should make your plot appear,
Crawl humble, in the hope of being second heir,
And if the boy should die by casualty,
Perchance your name may fill the vacancy.
Whoever offers you his will t' peruse,
Seem to decline the parchment, and refuse;
But if you're quick, you'll catch, with sidelong squint,
From the first page a pretty certain hint
Of what's in th' second clause † — if you take all,
Or only are co-heir with several.
A lawyer, bailiff-born and old, will sometimes cheat
The gaping, greedy raven, and his purse deplete,
And Coranus will laugh at Nasica's defeat.

AMMIANUS MARCELLINUS,

in his Roman history, draws the following terrible picture of the Roman lawyers, which evidently has so much of exaggeration and fiction in its composition, that it becomes appropriate to quote it under our subject:

"Of these the chief is that tribe of men who, sowing every variety of strife and contest in thousands of actions, wear out the doorposts of widows and the thresholds of orphans, and create bitter hatred among friends, relations or connections, who have any disagreement, if they can only find the least pretext for a quarrel. And in these men, the progress of age does not cool their vices as it does those of others, but only hardens and strengthens them. And amid all their plunder, they are insatiable and yet poor, whetting the edge of their genius in order by their crafty orations to catch the ear of the judges, though the very title of those magistrates is derived from the name of justice.

"In the pertinacity of these men, rashness assumes the disguise of freedom — headlong audacity seeks to be taken for constancy, and an empty fluency of language usurps the name of eloquence.

"There is a second class of those men, who, professing the science of the law, especially the interpretation of conflicting and obsolete statutes, as if they had a bridle placed in their mouths, keep a resolute silence, in which they rather resemble their shadows than themselves. These, like those men who cast nativities or interpret the oracles of the sibyl, compose their countenances to a sort of gravity, and then make money of their supine drowsiness. And that they may appear to have a more profound knowledge of the laws, they speak of Trebatius, and Cascellius, and Alfenus, and of the laws of the Aurunci and Sicani, which have long become obsolete, and have been buried ages ago with the mother of Evander. And if you should pretend to have deliberately murdered your mother, they will promise you that there are many cases recorded in abstruse works which will secure your acquittal, if you are rich enough to pay for it.

There is a third class of these men who, to arrive at distinction in a turbulent profession, sharpen their mercenary mouths to mystify the truth, and, by prostituting their countenances and their vile barking, work their way with the public. These men, whenever the judge is embarrassed and perplexed, entangle the matter before him with further difficulties, and take pains to prevent any arrangement, carefully involving every suit in knotty subtleties.

†The testator's name was written on the first page. *prima cera;* the names of the beneficiaries in the second line, *secundo versu.*

When these courts, however, go on rightly, they are temples of equity; but when they are perverted, they are hidden and treacherous pitfalls, and if any person falls into them, he will not escape till after many years have elapsed, and till he himself has been sucked dry to his very marrow.

"There is a fourth and last class, impudent, saucy and ignorant, consisting of those men who, having left school too early, run about the corners of cities, giving more time to farces than to the study of actions and defenses, wearing out the doors of the rich, and hunting for the luxuries of banquets and rich food. And when they have given themselves up to gains, and to the task of hunting for money by every means, they incite men, on any small pretense whatever, to go to law; and if they are permitted to defend a cause, which but seldom happens, it is not till they are before the judge, while the pleadings are being recited, that they begin to inquire into the cause of the client or even into his name; and then they so overflow with a heap of unarranged phrases and circumlocutions, that from the noise and jabber of the vile medley you would fancy you were listening to Thersites. But when it happens that they have no single allegation they can establish, they then resort to an unbridled license of abuse, for which conduct they are continually brought to trial themselves, and convicted when they have poured ceaseless abuse upon people of honor; and some of these men are so ignorant that they do not appear ever to have read any books. And if in a company of learned men the name of any ancient author is ever mentioned, they fancy it to be some foreign name of a fish or other eatable. And if any stranger asks (we will say) for Marcianus, as one with whom he is as yet unacquainted, they all at once pretend that their name is Marcianus. Nor do they pay the slightest attention to what is right; but, as if they had been sold to and become the property of avarice, they know nothing but a boundless license in asking. And if they catch any one in their toils, they entangle him in a thousand meshes, pretending sickness by way of protracting the consultations. And to produce an useless recital of some well known law, they prepare seven costly methods of introducing it, thus weaving infinite complications and delays. And when at last days and months and years have been passed in these proceedings, and the parties to the suit are exhausted, and the whole matter in dispute is worn out with age, then these men, as if they were the very heads of their profession, often introduce sham advocates along with themselves. And when they have arrived within the bar, and the fortune or safety of some one is at stake, and they ought to labor to ward off the sword of the executioner from some innocent man, or calamity and ruin, then, with wrinkled brows and arms thrown about with actor-like gestures, so that they want nothing but the flute of Gracchus at their back, they keep silence for some time on both sides; and, at last, after a scene of premeditated collusion, some plausible preamble is pronounced by that one of them who is most confident in his power of speaking, and who promises an oration which shall rival the beauties of the oration for Cluentius or for Ctesiphon. And then, when all are eager for him to

make an end, he concludes his preamble with a statement that the chief advocates have as yet only had three years since the commencement of the suit to prepare themselves to conduct it, and so obtains an adjournment, as if they had to wrestle with the ancient Antæus, while still they resolutely demand the pay due for their arduous labors.

"Finally, the profession of a lawyer, besides other things, has in it this, which is most especially formidable and serious (and this quality is almost innate in all litigants), namely, that when, through one or other out of a thousand accidents, they have lost their action, they fancy that every thing which turned out wrong was owing to the conduct of their counsel, and they usually attribute the loss of every suit to him, and are angry, not with the weakness of their case or (as they often might be) with the partiality of the judge, but only with their advocate."

JOSHUA SYLVESTER

dedicated the following sonnet to Chancellor Egerton:

THE LAW.

"Most humbly shewes to thy great worthiness,
(Great moderator of our Britain lawes),
The muses abject (subject of distress)
How long wrong-vext, in a not needless cause,
Not at the King's Bench, but the Penny-less,
By one, I Want (the son of simpleness);
Unable more to greaze the scraping paws
Of his Attorney Shift, or oil the jaws
Of his (dear) coun ell, Sergeant Pensiveness;
He is compell'd, *in forma pauperis*,
To plead himself, and shew his (little) law
In the free court of thy mild courtesies.
Please it, therefore, an Injunction grant,
To stay the Suit between himself and Want.
For thee and thine, for ay,
So he and his shall pray."

JOHN STEPHENS,

in 1615, published "Essays and Characters, ironical and instructive. With a new Satyre, in defense of common Lawyers, mixt with reproofe against their common Enemy." The following extract is said to allude to Ruggles' Latin play of "Ignoramus;" which was a severe attack on law and lawyers:

"It hath been tolde
Sound wits are modest, shallow wits are bolde;
And, therefore, did the law-tearme Poet weene
To please a publike eare with private spleene.
Now, O the pitty, that a misconceite
Of *some*, should *all* the Law and Lawyers baite.
Content yourselfe (saith Ignoramus), I
Am well acquainted with your pollicy;
You in the fencer's trick are deeply read,
And off'ring at the foot, you mean the head.
As doth a rebell who hath taken armes,
He promises to helpe his countries harmes;
But hath a meaning to surprise the towne,
And make the total regiment his owne.
Such was the meaning, to disgrace the Law
Under a colour'd trick, and wisely draw
That honor to yourselves which follows them."

He also gives the character of an honest lawyer: "He is a precious diamond set in pure gold; the one gives glory to the other; and, being divided, they be lesse valuable. He knows Law to be the mistres of man, and yet he makes Honesty the mistres of the Law. He hath as much leasure to dispute with Conscience in the most busie tearme, as in the deadest vacation. He rails not against the vices of his profession, but makes his profession commendable by his owne practise of vertue. He may well be a president to the best physicians, for he undertakes no cure when he perceives it inclining to be desperate. He makes the cause, and not the client, the object of his labour. He hath no leasure to protract time, or save his client's opinion with jests premeditated, or windy inferences. He owes so much worship to desert and innocence, that he can as faithfully applaud sufficient worth, as not to insult over, or exclaime against, dull ignorance. He dares know and professe, in spight of potency; hee dares be rich and honest, in despight of custome."

EDWARD MOORE

published "Fables for the Female Sex," in London, upwards of a century ago, and among his lucubrations is the following:

'Past twelve o'clock, the watchman cry'd;
His brief the studious lawyer plied;
The all-prevailing fee lay nigh,
The earnest of to-morrow's lie.
Sudden the furious winds arise,
The jarring casement shatter'd flies;
The doors admit a hollow sound,
And rattling from their hinges bound,
When Justice, in a blaze of light,
Reveal'd her radiant form to sight.

"The wretch with thrilling horror shook,
Loose every joint, and pale his look;
Not having seen her in the courts,
Or found her mentioned in reports,
He ask'd, with fault'ring tongue, her name,
Her errand there, and whence she came?

"Sternly the white rob'd shade reply'd,
(A crimson glow her visage dy'd),
Canst thou be doubtful who I am?
Is Justice grown so strange a name?
Were not your courts for Justice rais'd?
'Twas there, of old, my altars blaz'd.
My guardian thee I did elect,
My sacred temple to protect.
That thou and all thy venal tribe
Should spurn the goddess for the bribe!
Aloud the ruin'd client cries
That Justice has neither ears nor eyes;
In foul alliance with the bar,
'Gainst me the judge denounces war,
And rarely issues his decree
But with intent to baffle me.

"She paus'd. Her breast with fury burn'd.
The trembling lawyer thus return'd:

"I own the charge is justly laid,
And weak th' excuse that can be made;
Yet search the spacious globe and see
If all mankind are not like me.
"The gownsman, skilled in Romish lies,
By faith's false glass deludes our eyes;
O'er conscience rides, without control,
And robs the man to save his soul.
'The doctor, with important face,
By sly design mistakes the case;
Prescribes, and spies out the disease,
To trick the patient of his fees.
"The soldier, rough with many a scar,
And red with slaughter, leads the war
If he a nation's trust betray,
The foe has offered double pay.
"When vice o'er all mankind prevails,
And weighty interest turns the scales;
Must I be better than the rest,
And harbor justice in my breast?
On one side only take the fee,
Content with poverty and thee?

"Thou blind to sense, and vile of mind
The exasperated shade rejoin'd,
If virtue from the world is flown,
Will others' faults excuse thy own?
For sickly souls the first was made;
Physicians for the body's aid;
The soldier guarded liberty;
Man woman, and the lawyer me.
If all are faithless to their trust,
They leave not thee the less unjust.
Henceforth your pleadings I disclaim,
And bar the sanction of my name;
Within your courts it shall be read,
That Justice from the law is fled."

At a recent meeting of the board of regents of Michigan University, the degree of B. L. was conferred upon 120 members of the graduating class in the law school.

CURRENT TOPICS.

The state senate, just prior to its adjournment, passed a resolution directing its clerk to cause to be prepared a continuation of the index of the statute laws of the state, covering the period between 1865 and 1870. There are two indexes now extant, both compiled by authority. One was prepared by T. S. Gillet, and is a very inaccurate and worthless thing; the other, purporting to have been prepared by H. H. Havens, was really compiled by Mr. Charles King, of Albany, and is accurate and well arranged. The clerk of the senate could not do better than to employ Mr. King to make the new index.

Just prior to the close of the New York legislature, Mr. Fields, of New York, offered, and the assembly passed, a resolution authorizing the judiciary committee to investigate, during the summer, the conduct of the New York judiciary, and of members of the bar. Precisely what object Mr. Fields had in view in offering this extraordinary measure is a mystery to most honest men. It may be safely asserted, however, that the purification or elevation of either the bench or bar were not aimed at or thought of. Whatever may be its motives, its effect will be about as appalling as that of Don Quixote's attack on the windmill. We had supposed that Mr. Fields, after being so severly worsted by Mr. Justice POTTER, in the breach of privilege case, would adopt it as one of the articles of his faith that the supreme court was a co-ordinate branch of the government, and about as amenable to the assembly, or its committees, as "the man in the moon." We have no doubt that should the judiciary committee attempt to proceed in the investigation, the bench and bar of New York will treat the resolution with the contempt it deserves.

We have before spoken of the condition in which the practice before justices of the peace still remains. Notwithstanding the code professes to simplify and abridge the practice of the courts of the state, and specifically names the courts of justices of peace, as among those whose practice is simplified, it actually renders their proceedings more intricate. Not to name other things, in the single matter of the direction of a summons it creates an inconsistency. An ordinary summons is directed to a constable commanding him to summon the defendant, and the processes of warrant and attachment have a similar direction; but under the code, in proceedings to recover possession of personal property, the summons is directed to the defendant. This incongruity of proceeding in cases of replevin may not, with a careful practitioner, lead to any trouble, but those doing business in justices' courts are not always careful. Would it not be better if the provision of the code requiring all civil actions to be commenced by a summons, were extended to justices' courts? Cannot the same reform spirit which has swept from the courts of record the useless technicalities of another age have full play in these, the courts of the people? We call the attention of the gentlemen who have been appointed to revise our statute law to this matter.

The editor of the New York *Underwriter* was recently arrested at the suit of the Knickerbocker Life Insurance Co., on a charge of libel, and held to bail in the sum of $10,000. The order of arrest was afterward vacated on motion, and the bail discharged. And now the editor publishes an article denouncing the provisions of the code relating to arrest on a charge of libel, as oppressive and unjust. We are constrained to admit that there is much truth in his complaint. Under the existing practice no one, be he editor or private citizen, can tell with certainty how soon he may be immured within the walls of a prison on some alleged charge of libel or slander. We should be glad to see the courts and the judges follow the rule laid down by Mr. Justice DALY, in *Davis* v. *Scott*, 15 Abb. 127, that an order of arrest should not be granted in actions for assault and battery, libel or slander, unless the defendant be a non-resident or transient person, or unless in extreme cases of violent and cruel batteries. While the language of the code would seem to preclude a construction so limited, we do not doubt that the courts could find abundant precedent for such a construction in furtherance of justice and equity.

The house of representatives has passed the bill to which we have heretofore alluded, providing for a department of justice. The bill provides that there shall be an executive department of the government, to be called the department of justice, of which the attorney-general shall be the head; that there shall be in such a department a solicitor-general, and two assistants of the attorney-general, and that the solicitor of the treasury, and his assistants, the solicitor of the internal revenue bureau, the naval solicitor, and judge-advocate general, and their clerks and assistants, and the examiner of claims in the state department, shall be transferred to the department of justice. The salary of the attorney-general shall be the same as at present; that of the solicitor-general $7,500; that of the assistants of the attorney-general, $5,000, and of the other officers the same as at present. No fees are to be hereafter allowed for legal services required of the officers of the department of justice.

The benefits likely to accrue from such a department are beyond question. Heretofore the government has been in the habit of paying over a hundred thousand dollars a year for legal services from other than its regular law officers. This expenditure will be rendered unnecessary by the bureau of justice. But beside this there will be a permanent establishment or staff of lawyers to advise the government upon the legal aspects of all sorts of public questions. But in order to reap the greatest good from a department of this character there should be intrusted to it the drafting or supervision of all laws of a public nature. The effect of this would be to prevent the recurrence of many of the disgraceful pieces of botching and patchwork now in the statute books.

The Democratic State Convention, for the nomination of judges of the court of appeals, nominated the following ticket:

For Chief Justice — SANFORD E. CHURCH, Orleans county.
For Associate Justices — CHARLES A. RAPALLO, New York city; RUFUS W. PECKHAM, Albany; MARTIN GROVER, Allegany county; WILLIAM F. ALLEN, Oswego county.

Mr. Church is known as one of the ablest lawyers in the state, as well as a prominent politician, but is without experience on the bench. Mr. Rapallo is likewise without experience, though said to be a good lawyer. The other members of the ticket have severally achieved an eminent reputation as jurists. Judge PECKHAM was elected as a judge of the supreme court for the third district in 1861, and was re-elected in 1867. There is probably no judge in the state who stands higher for legal attainments, strict integrity, and independence, than does he.

Martin Grover is a member of the present court of appeals, having been elected in 1867, and he has justly been regarded as one of the ablest judges on that bench. William F. Allen has served one term as judge of the supreme court, and is present comptroller of the state. While on the bench he displayed an abundance of those qualities necessary to an able jurist, and we have no doubt that should he be elected he would take rank among the foremost of the new court of appeals judges.

While we regret that the convention did not see fit, in one or two instances, to make different selections, we believe that the ticket is in the main a very good one. And if our electors will so far forget politics as to elect the best men on both tickets our new court of appeals will be worthy of the state.

The Republican State Convention, held at Rochester on the 28th ult., nominated the following ticket:

For Chief Justice. — HENRY R. SELDEN, of Monroe.
For Associate Justices. — CHARLES MASON, of Madison; CHARLES ANDREWS, of Onondaga; CHARLES J. FOLGER, now of New York; ROBERT S. HALE, of Essex.

Judge SELDEN is well known to the profession of the state. In 1851 he was appointed reporter of the court of appeals, and held that office till 1854. In 1862 he was appointed one of the judges of that court *vice* Samuel L. Selden, who had resigned. In 1863 he was elected to a full term for that court, but resigned his seat in 1865. He is a lawyer of undoubted ability, and as a judge was above reproach. A large number of the daily papers of the state have got confused by a similarity of names, and have credited to Henry R. Selden the exalted judicial abilities and protracted service on the bench due to Samuel L. Selden. Judge MASON is one of the members of the present court of appeals, having been appointed to that position in 1868 *vice* Wm. B. Wright, deceased. He was elected to the bench of the supreme court in 1847, and held that position until he resigned to accept the appointment for the court of appeals. Charles Andrews has never occupied a seat on the bench, but is known as one of the ablest lawyers of Central New York. Charles J. Folger and Robert S. Hale have never filled any other judicial position than that of county judge, though both have been prominent as politicians. This ticket, though it contains names of some good men, is not such as we had expected. It is our opinion, that none but *tried* men should have been nominated; men who had had experience on the bench, and had acquired reputations not only as lawyers, but as judges. The qualities essential to a good judge are, to a great extent, different from those essential to a good lawyer; however eminent as a legist a man may be, his fitness for a judicial position can only be fully determined after he has had a fair trial on the bench; and we may as well add here, that we do not regard the bench of a county court as exactly calculated to subject a man to such a trial as we should deem satisfactory.

OBITER DICTA.

A cross bill — Bill Sykes.

Abandoned to underwriters — Grub street.

The effect of duplicity in pleading — breach of promise suits.

"The man with a broken ear" would not be allowed to sit on the jury unless he could hear both sides.

A debating society has decided that it is all right to cheat a lawyer, but that it is a hard thing to do.

Talking of electing an arbitrator, some one urged a particular individual, on the ground that he was "the most arbitrary man he ever saw."

It is supposed that Methusaleh might have pleaded infancy up to about the age of two hundred; but it must have been rather mean for him to do it.

"A lawyer," says Lord Brougham, "is a very polite gentleman, who assists you in rescuing your estate from the hands of your enemy and keeps it himself."

Curran, in cross-examining the chief witness of a plaintiff in an assault case, obliged him to admit that plaintiff had put his arm around the waist of Miss ——, which provoked the defendant to strike him. "I presume," said Curran, "he took that *waist* for *common*."

A poor, broken-down vagabond, who was sent to the House of Correction for drunkenness, answered to the name of John Rich. A member of the bar remarked, as the prisoner was led away: "Only rich in that strange spell — a name!"

Counsel occasionally are a little unintelligible. We remember once hearing one ask: "Mr. Witness, where was you, when you *see that whistle sound?*" Another rather difficult question to answer was: "How did he seem to get out of that wagon, of his own accord, or jump out, or voluntarily, or how?"

In the supreme court, District of Columbia, objection was made that the interlineation in an indictment was written in blue ink — the instrument having been written in black ink. Judge CARTER said: "Now, in this period of the abolition of all distinction on account of color, it appears to me that this criticism is hypercritical."

An old bachelor, who finally concluded to marry, was serenaded on the wedding night by a lot of mad wags, and a little roughly handled when he came out to endeavor to put a stop to proceedings. He brought an action for assault, and his claim was ably set forth by an indignant attorney: "Gentlemen of the jury, when a man is married for the first time, and has retired to his rest; and some of his neighbors come and kick up a row in his henpen, gentlemen; and he goes out to protect his rights, as a good husband had ought to do, gentlemen; and a bucket of cold water is thrown all over him from head to foot, gentlemen of the jury, then and there, and *the law don't give that man a remedy — then it ain't no use!*" A jury, more pathetic than critical, gave the injured man a substantial verdict. "Ain't no use" comes under the head of what is properly termed "climax."

COURT OF APPEALS ABSTRACT.

MARCH TERM, 1870.

Delaus W. Herrick v. *George A. Wolverton.*

A promissory note, payable on demand, *with interest*, where the holder and the maker are doing business in the same street, is due, so as to be dishonored, as between the *maker* and one to whom it is transferred two and a half months after date.

Such a transferee takes it subject to all equities between the payee and the *maker*, even though he take it for a valuable consideration without actual notice thereof.

A note payable on demand must, as between the holder and the *maker*, be presented within a *reasonable time*, or it will be deemed due and dishonored so as to let in an equity against it. There is no distinction between such notes expressly payable *with interest* and those which are not. What is a reasonable time is a question of law, under all the circumstances, for the court.

Merritt v. *Todd*, 23 N. Y. Rep. 78, only determined that, as between an *indorser* and the holder of a note payable on demand, *with interest*, such a note is a continuing security, and the holder is not, under the circumstances of that case, guilty of laches, which discharges the indorser by not presenting and protesting the note. Decision below (42 Barb. 50) *reversed.*

Cornelius D. Hicks v. *Robert C. Dorn.*

Section twenty-three of the revised statutes (1 R. S. 221, Edm. ed.) furnishes no protection to a superintendent of canal repairs, who, for the purpose of restoring navigation of the canal, cuts up a canal boat lying between the gates of a lock so they cannot be closed.

A canal boat in such a position is not a nuisance in such a sense that the superintendent is justified in destroying it if he can by adopting some other method restore navigation.

He has no right to destroy the boat simply because it is more convenient to thus repair the breach, nor because such a destruction is the cheapest or the speediest way to do it.

To justify the destruction of private property the case must be one of overruling or pressing necessity. Such destruction should be a last resort, after all other reasonable expedients fail; and he who destroys private property under a claim of such necessity takes upon himself the burthen of showing it.

Where several methods of restoring navigation are open to the superintendent he does not, in deciding to cut up the boat, exercise a judicial discretion which protects him from liability in a civil action, for its destruction.

In making repairs, the superintendent acts ministerially, and is bound to discharge his duties in a prudent and careful manner, without infringing upon the rights of individuals, or unnecessarily injuring them.

If he improperly discharge such duties he is liable to an individual injured thereby.

Decision below (54 Barb. 172, 1 Lansing) affirmed.

Joseph N. White, Respondent, v. *Daniel L. Carroll, Appellant.*

In a proceeding before a surrogate to test the testamentary capacity of a deceased person, the defendant, an allopathic physician, being under examination as a witness, answered the question: "Did not any physician attend him (the testator) at the time he was at Mrs. Morris', when you did not?" as follows: "Not as I know of; I understand he had a quack; I would not call him a physician; I understand that Dr. White, as he is called, had been there." The plaintiff, Dr. White, was a homœopathic physician. This action was brought for slander and libel. *Held*, that since the act of 1844, the allopathic and homœopathic physicians have equal and like remedies for slanderous or libellous attacks on their professional reputation or character.

Held, also, that the question whether the defendant, in making the above answer, in the proceeding before the surrogate, testified in good faith, or in the belief that his answer was pertinent and relevant, or whether he was actuated by malice and used the words for the purpose of defaming the plaintiff, was a question to be submitted to and passed upon by the jury.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CALIFORNIA.*

ACTION.

1. *Forcible entry: a deed as evidence of possession.* — Where in a forcible entry action the plaintiff, after introducing evidence tending to show an actual possession of the demanded premises by one C. up to the time of the alleged forcible entry, introduced in evidence, against the defendant's objection thereto, a deed to the premises from C. to plaintiff, dated one month prior to said entry, for the avowed purpose of showing that, at the time of said entry, the apparent possession of the premises by C. was the possession of plaintiff: *Held*, first, that there was no error in admitting the deed; and, second, that the fact sought to be established by the deed might properly have been proven by parol evidence. *Morgan* v. *Higgins.*

2. *Evidence of possession in forcible entry action.* — In forcible entry actions, evidence concerning the possession of the *locus in quo* must, to be relevant, be such as to connect the party asserting the same with the actual possession at the time of the alleged forcible entry. *Ib.*

ADVERSE POSSESSION.

1. An adverse possession of land for five years continuous in the party who first becomes the adverse possessor, or in him and his grantees and successors in interest, is requisite to acquire title by the statute of limitations. *San Francisco* v. *Fulde.*

2. A party, in order to make up five years' adverse possession of land, cannot add to his own possession that of the one who preceded him, when he did not enter into possession under or through the one who preceded him. *Ib.*

3. To work out the statute of limitations requires an actual possession, not an assertion of possession by words or an action; and if the continuity is broken, either by fraud or a wrongful entry, the protection given by the statute of limitations is lost. *Ib.*

4. If the person claiming the benefit of the statute of limitations has not been in possession five years, but claims to add the possession of his predecessor to his own, his predecessor will be deemed to have held in subordination to the true title, unless he shows a privity between himself and his predecessor, and if he does not show this privity, he cannot dispute this presumption and show that his predecessor did hold adversely. *Ib.*

5. *Construction of stipulation.* — If, in ejectment, where five years' adverse possession is pleaded, the parties stipulate that the plaintiff was never in possession, but the stipulation admits title to have been in the plaintiff, the stipulation will be construed as referring to actual possession. *Ib.*

AGREEMENT.

1. *Against public policy.* — An agreement by which a candidate for office receives from another person money to aid him in securing his election, and in consideration thereof agrees to share with such other person a portion of the proceeds and emoluments of the office when elected, is immoral, against public policy, and *malum in se*, and is totally void. *Martin* v. *Wade.*

2. *Action on contract against public policy.* — Whether a contract against public policy be executory or executed, no action can be brought, either on the contract, or to recover back the consideration, or to recover judgment on a

* From Sumner Whitney, Esq., Law Publisher, San Francisco. To appear in 37 California Reports.

promissory note made in consideration of a cancellation of such contract. *Ib.*

3. *Contract against public policy cannot be rescinded.* — There can be no rescission of a contract against public policy. Such contract is void at its inception, and there is nothing to rescind. *Ib.*

4. *Contracts malum prohibitum.* — There is a distinction between contracts which are *malum in se* and those which are merely *malum prohibitum*. In certain cases, remedies are afforded to one of the parties in the latter class of contracts. *Ib.*

APPEALS.

1. *Appeal in certiorari case.* — Appeals to this court may be taken in cases of *certiorari*. *Morey* v. *Elkins*.

2. *Statement on appeal in criminal case.* — In a criminal case, wherever the alleged error appears upon the face of the complaint, or in the record of the justice, or upon the face of the proceedings before the justice, a statement is unnecessary on an appeal to the county court. *Ib.*

3. *Certiorari to county court.* — If the county court erroneously refuses to hear an appeal in a criminal case because no statement was made, it is error within the jurisdiction of the county court, for which no relief can be had by *certiorari*. *Ib.*

4. When the defendant appeals in a criminal case the county court has no jurisdiction to inquire into errors committed to the prejudice of the people who have not appealed, and, if it does so, *certiorari* lies to correct the error. *Ib.*

BANKRUPT LAW.

1. *Power to enact bankrupt laws not exclusive in congress.* — The power conferred upon congress by the eighth section of the first article of the constitution of the United States, "to establish uniform laws upon the subject of bankruptcies throughout the United States," is not exclusive, and therefore, except when congress has actually exercised its power upon the same subject, the several states may pass insolvent or bankrupt laws. *Martin* v. *Berry*.

2. *Effect of passage by congress of bankrupt law upon state insolvent or bankrupt laws.* — When congress enacts a bankrupt law it is supreme; and from the time it takes effect until it ceases to be in force all state laws on the same subject and in conflict therewith are suspended, and the states placed under a disability to exercise power of the like nature. *Ib.*

3. *Conflict of statutes.* — The statute of this state for the relief of insolvent debtors and protection of creditors (Stats. 1852, p. 69), is in conflict with the federal bankrupt law, passed March 2d, 1867, and has been suspended in its operations from the time said bankrupt law went into effect. *Ib.*

4. *When federal bankrupt law went into effect.* — The federal bankrupt law, passed March 2d, 1867, did not go into effect so as to suspend the operations of the insolvent law of this state, until June 1st, 1867. *Ib.*

5. *Effect of passage by congress of bankrupt law on insolvent proceedings pending in a state court.* — Where a state court has acquired jurisdiction under a state law of a case of insolvency, and is engaged in settling the debts and distributing the assets of the insolvent before or at the date at which an act of congress upon the same subject takes effect, the state court may nevertheless proceed with the case to its final conclusion, and its action in the matter will be as valid as if no law upon the subject had been passed by congress. *Ib.*

6. *When state court acquires such jurisdiction.* — Under the insolvent law of this state, the court in which a proceeding under it is commenced acquires the legal custody of the estate of the insolvent petitioner from the time of making an order staying the creditors from all further judicial proceedings against the petitioner or his estate, as provided in the ninth section of said statute; at which time the court acquires jurisdiction to conduct said proceedings to a conclusion, without being affected therein by a federal bankrupt law which goes into effect at any time after the acquisition of said jurisdiction. *Ib.*

CONTRACT.

1. *To find purchaser of land.* — A contract by which P. agrees that if H. will, within a fixed time, find a purchaser of P.'s land at two hundred dollars per acre, P. will sell and convey the land to the purchaser, and that H. may have for his services all that can be obtained from the purchaser over two hundred dollars per acre, is not a contract for the sale of any land or interest in land, within the meaning of the eighth section of the statute of frauds. *Heyn* v. *Phillips*.

2. *Liability on contract to find purchaser of land.* — A contract between P. and H., by which P. agrees that if H. will find a purchaser of P.'s land at a certain price, P. will sell to the purchaser at such price, and that H. may have for his services all that the purchaser will pay over such price, is a mere contract of employment; and if H. finds the purchaser, and P. refuses to sell, H. may recover from P. for his services what the purchaser was willing to pay over the price. *Ib.*

COURTS IN CALIFORNIA IN 1849.

1. The correctness of the proceedings of the courts exercising civil jurisdiction in California between the time of its acquisition by the United States and the time when the code of laws enacted in 1850 went into effect are not to be tested by the strict rules of either the civil or common law. *Ryder* v. *Cohn*.

2. The judgments of such courts, and the titles acquired under them, are valid, notwithstanding they might be void if tested by the strict rules of the common law. *Ib.*

3. *Court of first instance.* — The court of first instance was a *de facto* court, exercising general and unlimited jurisdiction in civil cases, and in matters of administration on the estates of deceased persons, prior to the enactment of a code of laws in this state in 1850. *Ib.*

4. *Judgments of court of first instance.* — The judgments of the court of first instance, when offered in evidence in a collateral action, will not be held to be void for want of jurisdiction of parties, unless it appears affirmatively from the record that the court did not acquire jurisdiction of the parties. *Ib.*

5. *Jurisdiction of courts of first instance in probate matters.* — The courts of first instance in California, between the time of its acquisition by the United States and the passage of a probate act in this state, had jurisdiction of matters pertaining to administration on the estates of deceased persons, and could make valid orders for the sale of the property of the deceased, for the payment of debts, etc. *Ib.*

The court of first instance will be deemed to have acquired jurisdiction over the parties, in matters relating to administration on the estates of deceased persons, unless the record of its judgment therein shows affirmatively that it had not such jurisdiction. *Ib.*

CRIMINAL LAW.

1. *Distinction between larceny and embezzlement.* — The chief distinction between larceny, as defined in section sixty of the crimes and punishments act, and embezzlement, as defined in section seventy of the same act, is that in the former case the guilty party has, and in the latter he has not, the possession of the property at the time of the commission of the offense. *People* v. *Belden*.

2. *Embezzlement.* — The provisions of the seventieth section of said act were framed to comprehend only those cases in which property is intrusted to servants, clerks, etc., by or for their masters, employers, etc.; and no cases fall within said section except where the servants, clerks, etc., have the custody or possession at the time of the commission of the offense. *Ib.*

3. *Larceny.* — B. was indicted and convicted of the larceny of two horses, the property of M. At and before the commission of the alleged offense, B., who was in the employ of M. for that purpose, performed general work

in and about M.'s livery stable, from which, as charged, said horses had been stolen, and together with M. performed the labor in, and had charge of the stable and stock therein, including the stolen horses. *Held*, that said horses were, at said time, in the possession of M., and that B. had not such custody of them as to prevent his conviction for a larceny of the horses under an indictment therefor framed under the sixtieth section of the crimes and punishments act. *Ib.*

DAMAGES.

1. *For injury by railroad car.* — In a suit brought by a boy sixteen years old for damages for injury sustained by being forcibly expelled from a railroad car, if the testimony tends to show that the plaintiff is told he cannot ride, and that he is ordered by the conductor, with a show of force, to get off the car, a nonsuit should not be granted upon the ground that the carelessness and negligence of the plaintiff contributed to his injury. *Kline* v. *C. P. R. R. Co.*

2. *Forcible ejection from railroad car.* — If a boy, sixteen years of age only, leaps from a railroad car while in motion, in obedience to the command of the conductor, accompanied by a show of force, the court cannot say judicially that the act of the boy was voluntary, but should leave it to the jury to say whether, under all the circumstances, the conduct of the conductor did not amount to compulsion. *Ib.*

3. *Liability for removing person from railroad car.* — Although a person gets upon a railroad car wrongfully and as a trespasser, for the purpose of riding without paying his fare, yet the conductor, if he resolves to exercise his right to remove him, must do so prudently, and in such a manner as not to endanger his personal safety. If he do not exercise this prudence, and injury result, the company cannot absolve itself from liability on the ground that the wrong was mutual. *Ib.*

4. If, in such case, the conductor sees the person attempting to get on the car, he may use force to prevent him, and no liability will result from injury, but if the person is once fairly on the car, care must be exercised in his removal. *Ib.*

5. *Damages where both parties are in wrong.* — The rule that the plaintiff cannot recover damages if his own wrong, as well as that of the defendant, conduced to the injury, is confined to cases where the plaintiff's wrong or negligence has immediately or proximately contributed to the result. *Ib.*

6. *When act of agent binds principal.* — If the act of the agent is within the general scope of his authority, or is specially approved by the principal, the principal is liable for all damages sustained thereby. *Ib.*

7. *Liability of company for act of railroad conductor.* — It is within the scope of the general authority of a railroad conductor to remove persons from the cars who get on wrongfully; but if, in so doing, he does not exercise care and caution, but acts maliciously, and injury results, the company is liable. *Ib.*

8. *Company liable for act of railroad conductor.* — A railroad conductor is not acting outside of his authority in admitting on its cars all persons properly seeking admission as passengers, or in excluding all who do not come as passengers, or are not fit to be admitted, and the company is liable for his wrongful performance of either. *Ib.*

9. *Damages where both parties are to blame.* — The reason why the law does not hold the defendant responsible for damages where the plaintiff has by his negligence or wrongful act contributed to the result complained of, is, not that the wrong of the plaintiff justifies or excuses the defendant, but because it is impossible to apportion damages between the parties; and whenever this impossibility does not exist the defendant's exemption from liability does not exist. *Needham* v. *S. F. & S. J. R. R. Co.*

10. The rule releasing the defendant from responsibility for damages, in cases where the plaintiff by his negligence or wrong contributed to the result, is confined to cases where the act of the plaintiff is the proximate cause of the injury. Proximate cause means negligence at the time the injury happened. *Ib.*

11. *Justifying one wrong by another.* — No more in law than in morals can one wrong be justified or excused by another. *Ib.*

12. *Liability for injury to a wrongdoer.* — A person is bound to conduct himself with reasonable care and prudence toward a wrongdoer, and if he can so conduct himself and does not, he is liable if injury is sustained by the latter. *Ib.*

13. *Injury to animals by railroad company.* — If the plaintiff is guilty of negligence, or even of possible wrong, in placing his animals on a railroad track, yet the company are bound to exercise reasonable care and diligence in the use of their road; and if for want of that care the animals are injured the company is liable. In such case the company is also bound to use reasonable care and diligence in removing the animals. *Ib.*

14. *Negligence.* — Negligence is not absolute or intrinsic, but always relative to some circumstance of time, place, or person. *Ib.*

DEED.

1. *Filing of deed for record.* — If after a deed is filed for record, but before it is recorded, it is withdrawn from the recorder's office by the grantee, and kept away from the said office some time and then returned for record — during the time the deed is away from the office the law making the filing of a deed for record notice to subsequent purchaser is suspended. *Lawton* v. *Gordon.*

2. *Notice of prior deed.* — If a person, when about to purchase property, is told by the recorder that the seller has already given a deed of the property to another person, which was filed for record, but has been taken away before being recorded, this information is sufficient to put him on inquiry; and it is not necessary that such information should come from a person interested in the property in order to constitute notice of an adverse title to the property. *Ib.*

3. *Evidence of cancellation of deed.* — Testimony is not admissible to show that a deed was withdrawn from the recorder's office before it was recorded, for the purpose of being canceled, to revest the title in the grantor. *Ib.*

EJECTMENT.

1. *Landlord bound by judgment against tenant.* — In an action of ejectment against a tenant, if the landlord assumes the defense and puts his title in issue, the judgment rendered therein binds him, as evidence by way of estoppel, the same as though he was made a party defendant. *Valentine* v. *Maloney.*

2. *Title acquired after judgment in ejectment.* — Although a judgment in ejectment does not estop a party against whom it is rendered from relying on a title acquired subsequent to its rendition, or a title not in issue in that action, yet the holding and production in evidence of such after acquired title does not preclude the party in whose favor the judgment was rendered from producing it also in evidence. *Ib.*

3. *Rebutting evidence.* — If the plaintiff in ejectment relies on title by possession, he cannot introduce evidence on that point and rest; and then, if the defendant proves a prior possession, introduce evidence of a still older possession in himself by way of rebuttal. *Ib.*

EQUITY.

1. *Courts of equity regard the substance only.* — If A, for his own benefit, and without the knowledge of B. who paid no consideration, has a conveyance of land made to B by a third person, a court of equity, in dealing with the transaction at the instance of creditors of A, or those claiming under him, will treat the land as the property of A, and regard him as the real party in interest. *Quincy* v. *Baker.*

2. *Conveyance in fee carries after-acquired title.* — If A, having no title, makes a conveyance in fee of land to B,

and afterward for his own benefit procures the holder of the real title to make a conveyance thereof to C (C paying no consideration), this conveyance to C will, in equity, inure to the benefit of B and his grantees in all proceedings between C and B or his grantees. *Ib.*

3. *Deed in fee carries after-acquired title taken in name of stranger.* — The principle that if a vendor convey the fee in land to which he has no title, and to which he afterward acquires the true title, the title thus acquired shall inure to the benefit of his vendee, cannot be defeated in equity by taking the after-acquired title in the name of a third person who has no real interest in the transaction. *Ib*

4. *Quitclaim deed does not carry after-acquired title.* — The principle that a title acquired by the vendor after a conveyance by him in fee inures to the benefit of his vendee, does not apply when the vendor's deed was a quitclaim, even if it contains a qualified warranty against a specified adverse claim set up by a third party. *Ib.*

5. *Equity reforms decrees and sheriffs' deeds.* — A court of equity will reform a mortgage by correcting a mistake, and after it has been merged in a decree of foreclosure, and the mortgaged property has been sold, will, if the mistake in the mortgage has been carried into the decree and sheriff's deed, reform them. It will go back to the original mistake and correct all subsequent mistakes which grow out of it. *Ib.*

6. *Mistake in mortgage and decree of foreclosure.* — If there was a mistake in the mortgage in the description of the property, and the same mistake exists in the decree and sheriff's deed, equity will go back to the original transaction and reform all three so as to make them conform to the original intention of the parties. *Ib.*

7. *Jurisdiction of the person: judgment by default.* — A judgment by default is valid if it contains a recital that the defendant was personally served with process, although the certificate of service of summons found in the judgment roll fails to show that the service was sufficient. *Ib.*

ESTOPPEL.

1. *By judgment.* — A judgment, to operate as an estoppel must be a judgment of a court of competent jurisdiction upon the same subject-matter, in a cause regularly tried on its merits, upon issues duly joined by proper pleadings in such court, between the same parties or their privies. *Boggs* v. *Clark.*

2. F. recovered judgment against H., foreclosing a mortgage on certain lands, and under an order of sale duly issued thereon the sheriff sold and in due course conveyed the said lands by deed to B., who, under a writ of assistance, duly issued, procured C. to be dispossessed of a certain tract of land as being within said deed. C. subsequently procured from the court rendering said judgment, upon proper motion and notice thereof to B., and after trial on the merits of the issues arising thereon, an order to be restored to said possession, on the ground that said tract of land was not within said deed, and was so restored, under said order, which became final. Subsequently B. brought ejectment against C. to recover said land, to which C., in answer, after setting up said facts, and that B. had and claimed no other tittle to said land except under said deed, pleaded that, as between B. and C., the title thereto was *res adjudicata*. *Held*, that the facts so impleaded constituted no bar or legal defense to B.'s action against C. to recover said land, and that the court below did not err in striking out so much of C.'s answer as set up the same. *Ib.*

EVIDENCE.

1. *Threats.* — Threats made by the defendant are admitted for the purpose of showing malice, and thereby increasing the probabilities that he committed the offense. *People* v. *Scoggins.*

2. *Threats by the deceased or injured party as evidence.* — Threats made by the deceased or injured party, if known to the defendant at or prior to the transaction, are admitted, for the purpose of showing that the circumstances of the offense were such as to excite the reasonable fears of the defendant that his life was in danger, or that he was in danger of serious bodily injury, and thus justify his act. *Ib.*

3. *Idem.* — In a case of homicide where it is doubtful which party commenced the affray, threats made by the deceased are admissible on the part of the defendant, although unknown to him at the time of the homicide, as *facts* tending to illustrate the question as to which was the first assailant. *Ib.*

(To be Continued.)

UNITED STATES SUPREME COURT DECISIONS.

Noonan v. *Bradley.* — Error to the circuit court for the district of Wisconsin. — The question in this case was whether a bond given for the balance of purchase-money for lands, on which the parties stipulated that it shall be void in case the title sought to be conveyed shall fail, may be recovered upon, notwithstanding the agreement made thereon when it was executed. The court below held the bond to be valid, and rendered judgment for recovery upon it. This court sustains the theory of the plaintiff in error, that the indorsement of the vendor on the bond, that he would not enforce it in case the title failed, should be taken as a part of the bond, and that the intention of the parties thus expressed was the law of the contract, and reverse the judgment, remanding the cause, etc. Mr. Justice FIELD delivered the opinion of the court, Justices CLIFFORD, SWAYNE, and DAVIS dissenting. Justices STRONG and BRADLEY, not sitting in the cause when argued, took no part in the decision.

Hool et al. v. *Wilson.* — Appeal from the supreme court of the District of Columbia. — In this case the receiver of certain property at the time of a judicial sale thereof became the purchaser. A bill was filed to obtain a decree of resale, on the ground that the receiver, by reason of his fiduciary relations to the property, could not become the purchaser. The court taking the view that his fiduciary relations did not extend to the corpus of the property, but only to the rents and income, dismissed the bill. This court now reversed the decree, holding, in substance, that a receiver, as the executive hand of the court, and as the fiduciary agent of all parties, as trustee, could not become the absolute purchaser at such a sale of the property over which he had exercised such official authority. Mr. Justice SWAYNE delivered the opinion of the court.

The Michigan Insurance Bank v. *Eldred.* — Error to the circuit court for the district of Wisconsin. — This was an action against the indorsers of a promissory note, and the defense was that there had been collusion between certain members of the firm whose indorsement was obtained, and the maker and the bank, to bind other members of the firm, without their knowledge; and evidence was put in to show, that, by the articles of copartnership, the firm name was not to be used except for the benefit of the firm business, and to show further that the note was indorsed in blank. Upon this evidence the court charged the jury that "if the note in suit was never actually negotiated to the bank, but was got up by the maker, and accepted by the bank, in pursuance of a corrupt agreement between the maker and the bank, to defraud the complaining member of the firm, then the plaintiff cannot recover." This court hold that such charge was error, and that a court should not charge the jury upon a supposed or conjectured state of facts, of which no evidence has been offered. It is also held that it was error to allow the clause in the partnership agreement to be read in evidence, without any proof of notice to the plaintiff of the facts alleged. Mr. Justice CLIFFORD delivered the opinion of the court.

Steam-tug Quickstep v. *Christopher Byrne.* — Appeal from the circuit court for the southern district of New York. — This libel was filed to recover for injuries done a canal

boat and loss of cargo, in consequence of the alleged negligence of the tug which was towing her. The court below found as matter of fact that both were in fault, and divided the damages. This court affirmed that decree, Mr. Justice DAVIS delivering the opinion.

The City of Chicago v. *Green.* — Error to the district court for the northern district of Illinois. — In this case the city accepted the bid of Green to manufacture certain hose for its fire department, but afterward the hose were rejected on the ground that they did not stand the test required by the contract. Green demanded a public test of the hose, which the city refused; he thereupon had them tested by scientific persons, and they were found equal to the requirements of the bid. The court below gave him judgment, which was affirmed here. Mr. Justice STRONG delivered the opinion.

The United States v. *Ayres.* — Appeal from the court of claims. — Appeal dismissed. Mr. Justice NELSON delivered the opinion of the court.

Mahoney v. *The United States.* — Appeal from the court of claims. — The claimant was a consul of the United States at Algiers, from 1854 to 1859, and returning to the United States, in 1865, he brought this suit to recover his salary which the state department had declined to pay, claiming that since Algiers became a province of France the statute of 1800, giving a fixed salary to consuls there, did not apply. The court of claims found for the government, holding that the changed condition of Algiers rendered the act of congress fixing the salary inoperative for want of a proper subject. The same question was presented to this court and the judgment of the court of claims was affirmed. Mr. Justice FIELD delivered the opinion.

Wise, Jr., v. *Allis.* — Certificate of division from the circuit court for the district of Wisconsin. — In this case the court held, that notice to the plaintiff in a patent case that the defendant would prove a prior invention and use of the improvement in different cities, was sufficiently specific and definite without naming the different mills or manufactories in those cities where the improvement claimed had been used, and that under such notice the defendant was entitled to give evidence of the invention by others prior to the date of the patent in suit. Mr. Justice MILLER delivered the opinion.

Hancox v. *Steamer Syracuse.* — Appeal from the circuit court for the southern district of New York. — This was a case of collision on the Hudson river, near Percy's Beach, between a tow of the Syracuse and the steamboat Rip Van Winkle, owned by the appellant. The questions were of fact, the case turning on the position and maneuvers of the boats, as proven. The decision of the district court was in favor of the Rip Van Winkle, which was reversed by the circuit, and the decree of the circuit was now affirmed. Mr. Justice SWAYNE delivered the opinion.

The Ship Maggie Hammond v. *Moreland et al.* — Appeal from the circuit court for the district of Maryland. — In August, 1866, the Hammond took on board a cargo of iron to be transported from Androssan, Scotland, to Montreal, Canada, and sailed, but subsequently, in consequence of stress of weather, returned to England and discharged cargo for repairs at Cardiff, the captain protesting that the repairs could not be made in time to complete the voyage. The decision is, that the Hammond should either have released the iron in November, after repairs, or proceeded on her voyage with the chance of completing it before the close of navigation in the St. Lawrence river, or if, when it became necessary to unload, it was apparent the repairs could not be made in time to justify her proceeding on the voyage, the cargo should have been transferred to some other vessel for transportation. Mr. Justice CLIFFORD delivered the opinion.

Stimpson v. *Woodman.* — Error to the circuit court for the district of Massachusetts. — This was an action to recover for the infringement to Woodman for an improvement in the means of ornamenting leather. The question here was whether the court should have submitted certain matters of evidence to the jury for their determination, or whether they were properly decided by the court. The court held, that there should have been a submission of the facts to the jury, and reversed the judgment below, remanding the case to be tried accordingly. Mr. Justice NELSON delivered the opinion of the court. Mr. Justice CLIFFORD dissented.

United States ex rel. Bourn v. *Goodyear, executor.* — Appeal from the circuit court for the southern district of New York. — This suit was commenced in the name of the United States, for the purpose of setting aside the Goodyear patent, on the ground of fraud in the procurement of its extension; and the question was whether the alleged fraud in the procurement of the extension can be investigated in the name of the United States on the relation of a private party. The decision is that it cannot. The chief justice delivered the opinion.

The Propeller Allegany v. *Wolverton et al.* — Appeal from the circuit court for the district of Wisconsin. — This was a case of collision between the schooner *H. C. Winslow* and the propeller at the mouth of the Milwaukee river. The schooner was bound out, in tow of a tug, and the propeller was bound in, under a high rate of speed. Both the district and the circuit courts below held that the propeller was in fault, and the decrees were for the owner of the *Winslow*. Those decrees are affirmed by this court. Mr. Justice STRONG delivered the opinion.

Pierce v. *Dox, trustee.* — Appeal from the supreme court for the District of Columbia. — This appeal was dismissed, as the amount involved does not bring the case within the jurisdiction of the court. Decision announced by the chief justice.

The United States, claimants of 600 *bales of cotton*, v. *Douglas.* — Appeal from the circuit court for the southern district of New York. — In a passage from Savannah to New York the schooner *Ann & Susan*, owned by Douglas, fell in with the schooner *Davis*, loaded with government cotton and bound also for New York. The condition of the *Davis* at this time was hopeless; her masts were gone, and her boats were gone. The schooner *Ann & Susan* towed her to a place of safety, and subsequently, before the cotton was delivered to the United States, filed a libel against both the *Davis* and her cargo, for salvage service. The district court allowed $19,750 for the service against ship and cargo, the former valued at $8,000, and the latter at $150,000, and fixed the amount against the vessel at $1,000. But the cotton having subsequently passed into the possession of the government, and it intervening and claiming that no lien for salvage service could exist against the property in its possession, so much of the decree as affected the cotton was dismissed. Appeal was taken to the circuit court, when Mr. Justice NELSON affirmed the decree in all respects, except as to the cotton, and as to that, the decree of the district court was reversed, and a decree passed charging the cotton with contribution and costs. In his opinion Mr. Justice NELSON said: "The mere fact of ownership of the cotton by the United States, in the act of its conveyance to the port of destination, for the purpose of a market as merchandise, we think did not exempt it from the lien in case of salvage service. We shall not enter into an argument in support of the position, as the subject is a kindred one. The liability of the government for general average, and the present questions, incidentally, have been most elaborately examined by Mr. Justice STORY. We are inclined also to the opinion it is the decision in admiralty in England, and of the most approved modern elementary writers on the subject in the country. The question in this court, therefore, is whether cotton, the property of the United States, saved from peril when in course of being transported on the high seas to its port of destination, to be delivered to an agent of the United States there, is liable to be proceeded against in a district court by a libel in admiralty for salvage contribution, without the consent of any officer of the United States having been obtained to such proceedings. The government insists upon the negative of this proposition."

MR. ABBOTT AND THE CODE.

We recently published from the Columbia, S. C., *Guardian* a letter from the Hon. Charles O'Conor, on the New York Code of Practice; we have received from Austin Abbott, Esq., one of the well known authors of that name, the following copy of a letter addressed by him to the *Guardian*, in answer to Mr. O'Conor's letter:

NEW YORK, April 20th, 1870.

Editor of the Columbia Guardian:

I see in the last number of the Albany LAW JOURNAL a letter from Mr. O'Conor, printed by you, in reference to practice under the Code of Procedure, and the various editions of the New York statute, in which he recommends *Abbott's Edition* as preferable.

Allow me to explain that the commendation expressed is due to John Townshend, Esq., an esteemed brother author, whose edition is doubtless the one to which Mr. O'Conor intended to refer. The mistake into which he fell is not perhaps surprising, that edition having been published anonymously, and the name of myself and brother having been so long connected with the law and the new procedure, in New York, both in practice and in the authorship of the New York Digest, Practice Reports, and kindred works.

While I am writing allow me to say a few words as to the code itself.

What is the New York Code?

The essential principle which the "Code" has introduced is, allowing, so far as seems practicable, *uniformity of procedure in all classes of actions.*

All actions, whether common law or equitable, are now commenced by summons; judgment on a money demand on contract may be had, of course, if no defense be interposed; plaintiff's pleading must be a plain statement of the facts constituting his cause of action, instead of the former mixed allegations of law and fact, and the setting forth of evidence; the defendant's answer must deny the plaintiff's averments, or state the facts constituting his defense; and he may set up, against a legal demand, an equitable defense such as formerly he could only avail himself of by bringing a cross suit in chancery; plaintiff can only reply when new facts are stated in the answer; the court now has power to order discovery, grant injunctions, appoint receivers, etc., without putting the party to a new suit in chancery. It has also power to adapt the mode of trial, whether by a judge, by a jury, or by a referee, to the requirement of each case; a judgment creditor may summarily examine his debtor, as to property, without being put to a second suit on the judgment; and judgments of all kinds are reviewed in one way, by appeal.

This is the gist of the new practice. To compare it with the former procedure we must describe ten or twelve different forms of suit, each of which imperatively required a method of its own, and which together constituted two great classes of suits, *the principal object of one of which was to correct the deficiencies of the other.*

Mr. O'Conor forcibly presents the objections that have been urged against the new system, by some of those lawyers who were trained exclusively under the old. These objections may be summed up in two propositions:

1. That the codifiers are entitled to no credit, for there was a general desire for reform, and their work was not original.

2. That the system of procedure adopted confounds necessary distinctions, and confuses the administration of justice.

On the first point nothing better could be said in favor of any reform. The merit of a reform lies rather in the general need of it, than in its originality; and the success of a reformer consists in his getting the community *to adopt* it.

The utility of the change is the only question. The most recent, and, I think, the ablest presentation of the merits of old modes of proceding, as compared with the code, is a pamphlet by Wm. H. Greene, Esq., of Buffalo, published at the office of the *Commercial Advertiser*. It is entitled "The Code of Procedure: or the New and the Old Modes of Proceeding compared; showing the necessity of restoring the forms of actions and pleadings in cases at common law."

Without here discussing the question, a few facts as to the cause of public and professional opinion on this subject may surprise some of those unacquainted with what has taken place.

The New York Code, the pioneer in this reform, was prepared in 1847–1850. As reported complete to the legislature, in 1885 sections, it is an entire system of regulations for uniform procedure in civil remedies, including rules of evidence, etc. Considered as a scheme, proposed for a trial, it had the disadvantage of being but partly adopted. Those provisions (473 sections), which regulated civil *actions* only, and without the rules of evidence, etc., were adopted, and constitute what is known as "the New York Code."

The reform thus initiated has spread by its own force, until now codes of practice, embracing substantially the uniform system I have above described, have been adopted in the following states and territories:

New York, Ohio, Indiana, Kentucky, Wisconsin, Minnesota, Iowa, Missouri, Kansas, Nebraska, California, Oregon, Nevada, South Carolina, North Carolina, Washington, Montana, Idaho, Decota, Wyoming, Arizona. I think I might add several others if their recent statutes were accessible to me at the moment.

A code of criminal procedure, a penal code and a civil code, the former prepared by the same commissioners, and the latter by Mr. Field, in connection with the late Wm. Curtis Noyes and Surrogate Bradford, have not been adopted in New York, but have been substantially, or in part, adopted in several of the states or territories above named.

The tendency of jurisprudence toward the uniform procedure in civil cases is not confined to this country. It is becoming general, like the tendency to adopt steam instead of wind and water powers, and telegraphs instead of mail-bags. The steps in this direction taken in England in respect to the common law procedure, some years ago, proved so satisfactory, that a judicature commission, appointed by the British government, have recently unanimously reported in favor of the adoption of what we may call the American system. This commission consists of eminent lord chancellors, common law, equity, civil law and admiralty judges, attorneys and solicitors-general, barristers, solicitors, etc. In their report, made in March 1869, and now before parliament, they propose the merging of their respective courts in one supreme court, having a consolidated jurisdiction of all cases now cognizable in law, equity, probate, divorce and admiralty. Although this goes beyond our reform, but one of the commission (Phillimore) dissents, and only as to merging admiralty jurisdiction. They propose that all suits of whatever class shall be "commenced by a document to be called a writ of summons." As to pleadings they say: "The systems of pleading now in use, both at common law and in equity, appear to us to be open to serious objections. Common law pleadings are apt to be mixed averments of law and fact, varied and multiplied in form, and leading to a great number of useless issues, while the facts which lie behind them are seldom clearly discoverable. Equity pleadings, on the other hand, commonly take the form of a prolix narrative of the facts relied upon by the party, with copies or extracts of deeds, correspondence, and other documents, and other particulars of evidence, set forth at needless length. The best system would be one which combined the comparative brevity of the simpler forms of common law pleading with the principle of stating, intelligibly and not technically, the substance of the facts relied upon as constituting the

plaintiff's or the defendant's case, as distinguished from his evidence. It is upon this principle that most modern improvements of pleading have been founded, both in the United States and in our own colonies and Indian possessions, and in the practice recently settled for the courts of probate and divorce.

"We recommend that a short statement constructed on this principle of the facts constituting the plaintiff's cause of complaint, not on oath, to be called the declaration, should be delivered to the defendant. Thereupon the defendant should deliver to the plaintiff a short statement, not on oath, of the facts constituting the defense, to be called the answer. When new facts are alleged in the answer, the plaintiff should be at liberty to reply. The pleadings should not go beyond the reply, save by special permission of a judge; but the judge should, at any stage of the proceedings, permit such amendment in or addition to the pleadings as he may think necessary for determining the real question or controversy between the parties, upon such terms, as to costs and otherwise, as he may think fit." * * *

"With regard to the trial and determination of disputed questions of fact, the mode of trial varies according to the court in which the litigation happens to be pending, without any sufficient power of adaptation to the requirements of particular cases.

"We therefore recommend that great discretion should be given to the supreme court, as to the mode of trial, and that any questions to be tried should be capable of being tried in any division of the court—1. By a judge; 2. By a jury; 3. By a referee.

"The plaintiff should be at liberty to give notice of trial by any one of these modes which he may prefer, subject to the right of the defendant to move the judge to appoint any other mode."

This report, which approves the code system and proposes to extend it still further, is signed by the following names: Cairns, lord chancellor, judge of court of appeals in chancery, etc.; Hatherly, lord chancellor and formerly as Sir Wm. Page Wood, vice-chancellor; Sir Wm. Erle; Sir James P. Wilde, judge of probate, divorce, etc.; Justice Blachburn, of the queen's bench; Justice Montague E. Smith, of the common pleas; Sir John B. Karslake, queen's counsel; Sir Roundell Palmer; Sir Wm. M. James, vice-chancellor; Henry C. Rothery, registrar in admiralty, and a number of other names eminent in jurisprudence, both for experience and sound opinion.

These facts show that the reform is demanded by the age, and that its progress is irresistible. They suggest the importance, both to the bar and to the bench, of a candid examination of the merits of the system, and a fair, unprejudiced trial of it where it is actually adopted. Those who enter most fully into the spirit in which it was conceived, find an advantage in the ease if not in the success of practice under it.

I am, respectfully, yours,

AUSTIN ABBOTT.

TERMS OF THE SUPREME COURT FOR MAY.

2d Tuesday, General Term, Poughkeepsie.
2d Monday, Circuit and Oyer and Terminer, Ballston Spa, James.
2d Monday, Circuit and Oyer and Terminer, Oswego, Morgan.
2d Monday, Circuit and Oyer and Terminer, Ontario, Johnson.
2d Tuesday, General Term, Broome.
3d Monday, Special Terms (Issues), Kings, Barnard.
3d Monday, Circuit and Oyer and Terminer, Albany, Hogeboom.
3d Monday, Circuit and Oyer and Terminer, Chemung, Boardman.
3d Monday, Circuit and Oyer and Terminer, Delaware, Balcom.
3d Monday, Circuit and Oyer and Terminer, Chautauqua, Talcott.
3d Monday, Circuit and Oyer and Terminer, Orleans, Daniels.
3d Tuesday, Special Term, Lewis.

LEGAL NEWS.

Chief Justice Appleton, of Maine, refuses to naturalize liquor sellers.

Senator Ira Harris has been engaged as counsel for the *Anneke Jans Heirs* v. *Trinity Church*.

The death penalty has been abolished in Yucatan and imprisonment for a term of years substituted.

A New Hampshire paper suggests that "justifiable insanity" is the form in which verdicts in many cases should be rendered nowadays.

A Dansville (Ind.) lawyer, who had a large practice of ten years' standing, has left the bar and gone to preaching in the Methodist church.

Charles Reed, a Boston barkeeper, has been arrested for marrying a couple last week who thought he was qualified to perform the ceremony.

A San Franciscan who sued the city for $100,000 on account of the death of his daughter, who was run over by a fire-engine, has recovered $5,000.

Some feeling has been caused in Portland, Me, by the action of a judge in committing a witness, in the midst of a trial of a case, for "probable perjury."

Judge Paine, of Cleveland, Ohio, recently decided that a debt made for intoxicating liquors sold, to be resold at retail, cannot be collected by the law of Ohio.

Judge Humphreys, of Alabama, is to be associate justice of the supreme court of the District of Columbia, in place of Judge Fisher, who has been nominated for United States district attorney for the district.

According to the Providence *Press* they prosecute children only eight years old in that city for theft and assaults. A little girl eight years of age was recently brought before the court of magistrates and bound over in $300 to appear for trial on a charge of theft!

NEW YORK STATUTES AT LARGE.*

CHAP. 408.

AN ACT relating to the supreme court and to the election of a judge of the court of common pleas in and for the city and county of New York.

PASSED April 27, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The general terms of the supreme court, as organized under existing laws, are abrogated from and after the first day of May next; and thereafter all causes and matters then pending in such general terms, or which according to law might be brought before them, shall be cognizable before the general terms organized under this act. Provided, nevertheless that the said general terms of the supreme court, as now organized, shall meet on some day to be designated by the justices composing the same, for the purpose of deciding all matters pending before them on the said first day of May, and that appeals may be taken from the judgments and orders entered on such decisions, in the same manner as in like cases from the judgments and orders of the general terms organized under this act.

§ 2. The state is hereby divided into four departments. The first department shall consist of the first judicial district; the second department of the second judicial district; the third department of the third, fourth and sixth judicial districts; and the fourth department of the fifth, seventh and eighth judicial districts. The general terms shall be held in each year in the first department at the court-house in the city of New York on the first Tuesdays in January, February, April, June, September and November; in the second department at the court-house in the city of Brooklyn on the second Tuesdays in January, April, September and December; and at the court-house in the city of Poughkeepsie on the second Tuesday in June; in the third department at the capitol in the city of Albany on the first Tuesdays in February and October; at the court-house in the village of Platts-

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

burgh, in the county of Clinton, on the first Tuesday in July; at the court-house in the city of Elmira on the first Tuesdays in April and September; at the court-house in the city of Binghamton on the first Tuesdays in June and December; and at the court-house in the city of Ogdensburgh on the first Tuesday of November; in the fourth department at the court-house in the city of Syracuse on the first Monday in May and the second Monday in November; at the court-house in the city of Oswego on the first Monday in October; at the court-house in the city of Rochester on the first Mondays in January, March and September; and at the court-house in the city of Buffalo on the first Mondays in February and June.

§ 3. The governor, by a writing to be filed in the office of the secretary of state, shall, immediately after the passage of this act, designate from the whole bench of justices of the supreme court a presiding justice and two associate justices for each of said departments to compose the general term therein. After such first designation of presiding and associate justices, the judicial force herein provided for the holding of such general terms shall be maintained and supplied from time to time, as may be necessary, and for that purpose, other presiding and associate justices shall from time to time be designated, and such other and further designations shall be made by the governor in manner aforesaid. In all cases any person designated as presiding justice shall act as such during his official term; and any person designated as associate justice shall act as such for five years from the thirty-first of December next after the time of his designation, or until the earlier close of his official term. The governor shall in like manner, as aforesaid, designate presiding and associate justices to sit in such general terms as often as vacancies therein shall occur for the unexpired terms.

§ 4. In case no presiding justice shall be present at the time and place appointed for holding a general term, the associate justice present having the shortest time to serve shall act as presiding justice until the presiding justice shall attend, and in case one or both of the associate justices shall not be present at the time and place appointed for holding a general term, the presiding justice present may select any justice or justices of the supreme court to hold with him such general term until such associate justice or justices shall attend.

§ 5. The general terms shall have all the powers and jurisdiction which under existing laws now belong to the general terms of the supreme court; and all laws relating to general terms, as now organized within the judicial districts, and to the hearing of appeals from judgments pronounced and orders made within such districts, if not inconsistent with the constitution or this act, shall apply, so far as the same are applicable, to judgments pronounced and orders made within the judicial departments, and to the general terms instituted by this act.

§ 6. Causes and matters pending in any general term instituted by this act may be entitled in the supreme court. The concurrence of two justices shall be necessary to pronounce a decision. If two shall not concur a re-argument may be ordered. In case of such disagreement, when any one of the three justices shall not be qualified to sit, the cause may be directed to be heard in another department. The associate justices, designated to any department, shall be competent to sit in the general term of any other department, in place of any justice in such other department.

§ 7. To prevent the failure of circuit courts, special terms, and courts of oyer and terminer, as the same have been heretofore appointed for the years eighteen hundred and seventy and eighteen hundred and seventy-one, in consequence of the designation to be made of justices for service in the general terms, as provided by this act, it shall be the duty of the governor, on the request of a justice in any judicial district, to assign justices to hold such circuit courts, special terms and courts of oyer and terminer within such district; provided, however, that the justices in any district may themselves make provision for the holding of such courts. At least one month before the expiration of the year eighteen hundred and seventy-one, the justices of the supreme court resident in each judicial department mentioned in this act shall appoint the times and places of holding special terms, circuit courts and courts of oyer and terminer within their department, for two years, commencing on the first day of January, eighteen hundred and seventy-two, and the like appointment shall be made for every two succeeding years thereafter.

§ 8. Pursuant to the twelfth section of the said sixth article of the constitution, it shall be the duty of the governor, whenever the public interest shall require, to designate one or more judges of the superior court, or court of common pleas of the city and county of New York, to hold circuits and special terms of the supreme court in that city; such designation shall be in writing, and shall specify the time and place of holding any such circuit or special term. When a case or bill of exceptions shall be made in any cause tried at such circuit or special term, the same shall be settled before the judge holding the same, and the review shall be had at a special or general term of the supreme court in the same manner, and with the same effect, as if such circuit or special term had been held by a justice of the supreme court.

§ 9. The justices of the supreme court shall receive an annual compensation of six thousand dollars each, payable quarterly, in lieu of all other compensation, except that they shall receive, in addition to such stated salaries, a per diem allowance of five dollars per day for their reasonable expenses when absent from their homes and engaged in holding any general or special term, circuit court or court of oyer and terminer, or in attending any convention, as hereinafter provided, to revise the rules of said court, and no greater sum shall be paid to the chief judge or any associate judge of the court of appeals, or to any commissioner of appeals, than five dollars per day for their reasonable expenses, when absent from their homes and actually engaged in holding any court of appeals, or commission of appeals, and all provisions of law inconsistent with the provisions of this act are hereby repealed. But this section shall not be construed to diminish the compensation now received by the justices of the supreme court of the first and second judicial districts.

§ 10. All appeals and other matters proper to be brought before any general term shall be heard and determined in the department in which the judgment or order appealed from shall be entered, or in which the matter brought up arose, unless two of the general term justices in such department shall be incapable of sitting on the appeal or acting in the matter, in which case the appeal or other matter shall be ordered to be heard in some other department; and in that case such appeal or other matter shall be heard and determined in the department to which the same shall have been ordered as aforesaid.

§ 11. Each general term shall be attended by the sheriff of the county in which any session shall be held, or one of his deputies, and by two constables or police officers, to be summoned by the sheriff; and by a crier for courts within the county, and by the county clerk or his deputy, all of whom shall act under the direction of the court or of the presiding justice; and the sheriff of the county shall see that the room in which the general term shall be held is properly heated, ventilated, lighted, and kept comfortable, clean, and in order; and he shall provide the court with necessary stationery during its sittings.

§ 12. The fees of criers, sheriffs, constables and police officers for attending general terms, and all expenses incurred by sheriffs under and pursuant to the preceding section of this act, shall be audited by the comptroller and be paid out of the treasury of the state. All fees and proper charges of clerks for services rendered at or preparatory to any general term, not legally chargeable to attorneys or parties in cases or matters brought before the general term, shall be a counter charge.

§ 13. All rules of the supreme court now in force not inconsistent with the constitution or any statute of the state shall remain in force until abolished or altered by the general term justices, the chief judges of the superior courts of cities, the chief judge of the court of common pleas of the city of New York and of the city court of Brooklyn, in convention assembled, at the capitol in the city of Albany. A convention of such justices and chief judges shall be held at the place aforesaid, on the first Wednesday in August, eighteen hundred and seventy, and every two years thereafter; and such convention shall revise, alter, abolish and make rules, which shall be binding upon all courts of record so far as they may be applicable to the practice thereof. A majority of said justices shall constitute a quorum to do business in the premises, whether said chief judges shall be present or absent; but each justice and chief judge shall be entitled to vote on all matters which shall come before the conventions.

§ 14. The governor may, whenever in his judgment the public good shall require it, appoint extraordinary general terms, circuit courts, and special terms of the supreme court and courts of oyer and terminer, and he shall designate the time and place the same shall be held, and name the justice who shall hold the extraordinary circuit or special term, or preside in such court of oyer and terminer, and he shall give notice of such appointment in such manner as he may believe the public good requires.

§ 15. In any action which was referred to a justice of the supreme court, and was pending and undetermined on the first day of January, eighteen hundred and seventy, and in which testimony had been taken, the supreme court, at a special term thereof, may in its discretion order the evidence so taken, and the proceedings had in such action, to stand, and have the same force and effect in the further prosecution of said action, or the defense thereof before the court, as if such evidence had been taken or proceedings had before the court.

§ 16. At the election directed to be held on the third Tuesday of May, eighteen hundred and seventy, under the provisions of chapter eighty-six of the laws of eighteen hundred and seventy, there shall be chosen, by the electors of the city and county of New York, a judge of the court of common pleas of said city and county, in the place of John R. Brady, who has resigned his office, and the said judge, so to be elected pursuant to this act, shall enter upon his official duties on the first day of January next, at which time the term of office of the present incumbent, holding by appointment from the governor, will by law expire.

§ 17. This act shall take effect immediately.

The Albany Law Journal.

Albany, May 14, 1870.

CONSOLIDATION OF BRITISH LAW.

The bill reviving the act of 1866 for consolidating the statutes of the United States reminds of the colossal scheme of codification in progress in England. That nation has now two great legal reforms on hand. Indeed, the present period is a sort of jural revival in the old country. During the reign of William the Fourth great and beneficial changes were made in the law of British conveyancing. The first year of Queen Victoria's reign prolonged the beneficial era of law reform, and gave to the British world the Wills act, 1 Vict. c. 26, and the Judgment act, 1 and 2 Vict. c. 110 (the latter now unhappily repealed). But, except the Short act, 8 and 9 Vict. c. 106, no other important conveyancing act, nor indeed any other great measure of legal reform, has been passed in the reign of her present majesty. Now, however, British ex-chancellors, life peers, and aspirants to the bench, are engaged in a mutual contest as to which shall excel in the vigorous and radical nature of his suggestions. Even the question, Where should the new law courts be built? has led to an amount of debate and partisanship that indicates the high temperature to which the British legal world is at present excited.

The want of a code, or digest of English law, has been long felt in that country. British law, like the British empire, is scattered over vast regions, having hardly any mutual intercourse. Nay, even a statute will often contain a jumble of provisions, some of the most important nature, and others almost ludicrous, from the paltry matters for which they provide. Upon cases, however, the success of a suit usually depends; and, therefore, though an English lawyer had mastered all the statutes passed since magna charta, all such knowledge profiteth him nothing unless he is acquainted with the latest judicial decision, or possibly even dictum, upon the point in question. To remedy this want of arrangement in the British legal system, a law digest commission are now preparing a consolidation of the whole law of England, upon the following plan:

The commissioners do not propose to make any change in the existing law. "Whatever is is right," so far as their present labors are concerned. They will merely separate the chaotic elements into distinct classes, and make the waters and the dry land assume definite boundaries. They intend placing under each title, as in a law dictionary, every rule of common law, every statute, or part of a statute, and every judicial decision or dictum illustrating the point. To use a common example, they will sort the cards, placing all of each species together, with minor varieties of detail in equally felicitous apposition.

This is not a code, which consists only of general propositions; nor is it a digest, which treats only of particular points; but it will enunciate general rules where the cases will warrant them, and it will also give particular cases in somewhat of detail, wherever the point appears to be *sui generis*.

Consolidation then, and not a code or digest *pur et simple*, appears to be the aim of the law digest commission. Their work, complete, will be, like our civil code, a large, handy book or law dictionary, of use as well to the student as the practitioner. We doubt whether law can be made easy to the layman, or that any consolidation will preclude the necessity for resort to professional advice in every case of difficulty.

The English plan is, as we have shown, to a great extent, founded upon our own method of codification. It seems, however, to have been prematurely adopted in England, until the proposed abolition of the distinction between law and equity had been carried into effect. As the judicature bill now before parliament will revolutionize practice in general, we presume that department will be left untouched by the digest commission. We wish the commissioners, at all events, every success in their praiseworthy attempts to reduce the present *disjecta membra* of British jurisprudence to something like "law and order."

COL. EDWARD D. BAKER.*

The work of the soldier may be more brilliant, but that of the legislator is more enduring. The one will, at the most, affect the condition of a few generations and a limited number of individuals, while the other is liable to spread its influences beyond the people among whom and the age in which it was performed, to survive and control the actions of men, not only when the labors of the legislator are finished, but when his people and their civilization have passed away; nay, when even the monuments of that civilization and that people have been destroyed and their history become a myth. Gibbon, in the opening of his well known chapter on the civil law, draws a beautiful comparison between the military triumphs of the Roman emperor and the peaceful triumph of the code which bears that emperor's name. And the result indicated by the historian must ever be peculiarly gratifying to the members of the legal profession. The great empire, whose power and riches were infinite, the material wealth of a generation which had succeeded to the accumulations of upward of a thousand years of national prosperity, the vast and well-disciplined army, the productions of art, the conveniencies and customs which had resulted from long continued civilized social intercourse, the language, almost the literature of that age, have been destroyed. The pomp of successful warfare, the long procession, the magnificent music, the enthusiastic multitude have become as nothing. But the silent, unnoticed labors of Trebonian and his associates exert an influence upon, aye, form and control, the judicial legislation of to-day. We live under another civilization, between which and that of Rome the law is the only connecting link.

So, too, with the Hebrew law. What care we to

* Sketch of the "Life and public services of Edward D. Baker, United States senator from Oregon, and formerly representative in Congress from Illinois, who died in battle, near Leesburg, Va., October 21, A. D. 1861." By Jos. Wallace, Springfield, Ill; 1870.

know whether the Israelite or the Philistine was victorious in battle. We can read the song of Moses and neither appreciate the discomfiture of the Egyptian nor the triumphant joy of the sons of Jacob. But the statutes enacted in the wilderness are present with us and restrain the daily action of our lives.

Nevertheless, the glitter, the circumstance, the immediate rewards of military fame, lead many, especially in a time of public commotion, when that sentiment which the republican names "love of country" and the monarchist "loyalty," is peculiarly strong, to seek either to achieve reputation or fulfill a duty by entering the lists of battle. With no one is this feeling stronger than with the lawyer. Ambitious, earnest to reach the rewards of successful effort, oftentimes discouraged with the hope deferred which maketh the profession sick, he is ready to abandon the sure but long-delayed results of laborious devotion to his peaceful calling, and find, if possible, amid the dangers of war, a quicker though more uncertain conclusion.

There are, however, those among us who, having already reached the highest position possible to be attained, enter the military service simply from devotion to the country from which they have received so many honors. They can gain no advancement from the army; they there peril with their lives all the pleasures and the emoluments belonging to the station they already occupy. Every great war witnesses such sacrifices, and the late war for the suppression of the rebellion formed no exception to the rule.

Among the foremost to leave the higher walks of civil life during that war was Edward D. Baker, then United States senator from Oregon. An Englishman by birth, his life had been from infancy spent in America. In his early years he had served with distinction in the Black Hawk war, and, having chosen the law, he removed to the capital of Illinois, where he soon achieved reputation, and was elected to the state legislature. Here he gave such satisfaction to his constituents that he was, in 1844, elected to congress. Upon the breaking out of the Mexican war, however, he entered the army, leaving his seat in congress for that purpose. After returning from Mexico, he was re-elected to congress. Subsequently he took an active interest in the Panama railway, and removed to California, and thence to Oregon, from which state he was elected senator in 1860, and took his seat in the senate in December of that year.

His career in the senate was destined to be brilliant and brief. Upon the breaking out of the war of the rebellion in April, he at once announced his intention of taking active part therein, and in a few weeks was found upon the "tented field."

Here, too, he was fated to have but a brief experience. On the 21st of October, 1861, he fell in battle at Ball's Bluff, Va.

Almost every person who reads this will remember that battle. They will remember, also, as chief among the incidents of that battle, the death of Senator Baker. During the continuance of the war, others as popular, as able as he, gave up their lives for their country. But he came so early on the list, his sacrifice was so great, his reputation and his eloquence were so well known, that his death added a great disaster to the already too many disasters then happening to the country. The military profession had lost a veteran, experienced and prominent in three wars. The highest legislative body of our nation had seen taken from their number an eloquent man, whom they had already named as a leader. The followers of the profession he had chosen felt that with his departure had passed away one whose future career would add much to the already glorious record whereby they are distinguished. And the laborers in the vineyard of Him whom Christians call the Master, mourned the loss of a brother whose earnest and active efforts had gloriously advanced the cause of that Master, while they bowed in humble submission to the Providence that had decreed his end.

The war, in whose early battle this man fell a sacrifice, has closed; the civic and military honors which were rendered to his memory are now remembered but as an incident of the great conflict through which we were then passing. But it is fitting now for the profession to which he belonged, and to which he was educated, in these peaceful days — the days of their triumph — to produce an enduring tribute to his memory. That has been done in the only manner in which the bar has ever perpetuated the fame of one of its number. Mr. Wallace, a well-known lawyer of Illinois, has, at the suggestion of the profession, published a biographical memoir of Senator Baker. It is ably written, but not as well printed and bound as we could wish. An excellent photograph of Col. Baker, well executed, and, we are told, a good likeness, accompanies the work.

But we cannot dwell longer on the memoir. It is the MAN about whom we have been speaking, and we thank Mr. Wallace for his biography, and for placing in an enduring form the history of one who did so much honor, not only to his adopted state, but to the country in whose service he gave up his life.

LAW AND LAWYERS IN LITERATURE.*

XVIII.

LEGAL SONGS AND BURLESQUES

"Law, a Comic Song," set to the music of Malbrook, is perhaps old enough to bear resuscitation:

"Come list to me a minute,
A song I'm going to begin it,
There's something serious in it,
So, pray, attention draw,
'Tis all about the Law,
So, pray, attention draw.
Experience I have bought it,
And now to you I've brought it;
Will you or not be taught it?
I sing the charms of Law.
L-A-W — law,
Which has met with a deuce of eclat.
If you're fond of pure vexation,
And long procrastination,
You're just in a situation
To enjoy a suit at law.

"When your cause is first beginning,
You only think of winning,
Attorneys slyly grinning,
The while the cash they draw;
Your cause goes on see-saw,
As long as your cash they draw;
With brief and consultation,
Bill and replication,
Latin and — botheration,
While the counsel loudly jaw;
J-A-W — jaw,
Is a very great thing in law.
If you're fond, etc.

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

"Snail-like your cause is creeping,
It hinders you from sleeping,
Attorneys only reaping,
For still your cash they draw;
D-R-A-W—draw,
Is the mainspring of the law,
Misery, toil, and trouble,
Make up the hubble bubble,
Leave you nothing but stubble,
And make you a man of straw.
L-A-W—law,
Divides the wheat from the straw.
If you're fond, etc.

"And when your cause is ending,
Your case is no way mending,
Expense each step attending,
And then they find a flaw.
Then the judge, like any jack-daw,
Will lay down what is Law.
In a rotten stick your trust is,
You find the bubble burst is,
And though you don't get justice,
You're sure to get plenty of Law.
And L-A-W—law,
Leaves you not worth a straw.

"So, if life is all sugar and honey,
And fortune has always been sunny,
And you want to get rid of your money,
I'd advise you to go to law.
Like ice in a rapid thaw,
Your cash will melt awa';
Comfort 'tis folly to care for,
Life's a lottery—therefore
Without a why or a wherefore,
I'd advise you to go to law.
And L-A-W—law,
Does like a blister draw.
If you're fond, etc."

A case of crim. con.:

"The charge prepared, the lawyers met,
The judges on the benches wriggling:
Orators fine, with speeches set,
Put all the signoras giggling.
Culprit here, with heart of coal,
From Mister Gudgeon stole his soul.
Hymen's couch, where cheek-by-jowl,
A fry of cherubs blest their nursery,
To this Tarquin she did harken,
Serpent, Eden, poison, flattery,
Jury, fury, bother, pother,
Pillory, fine, assault and battery."

Old father Antic—the law:

"Old father Antic—the law,
With his wig full of wisdom and awe,
He'll coax and amuse ye,
Confound and confuse ye,
Till fast you get fixed in its claw;
Then lofty or low be,
He'll tickle your toby,
Will old father Antic—the law.

"Old father Antic—the law,
Will chatter like any jack-daw,
With justice in waiting,
With parchment and prating,
Descant on each quibble and flaw;
So quick in his notions,
So slow in his motions,
Is old father Antic—the law.

"Old father Antic—the law,
If once he can catch Johnny Raw,
In fighting his battles,
His goods and his chattels,
He'll swallow all into his maw,
For sin is his mother,
And Beelzebub's brother
Is old father Antic—the law."

"I'm thankful I'm not a lawyer:"

"A lawyer is thought to be clever,
And which I don't mean to deny,
From interest he never will sever,
Give him fees and he'll never grow shy.
Rich clients, involved in the law,
Are things which a lawyer desires,
And to lay on them softly his paw,
Then his costs he genteelly requires."

[*Spoken.*] "Here, sir, is my bill of costs, which I conceive, under the circumstances of this case, you will not think immoderate.' "Oh, no! not in the least; here's a draft for the amount." "Thank you, sir, I am extremely obliged to you, and I trust upon a similar, or any other occasion, when I may have the pleasure of seeing your face again, the like assiduity, attention and application will not be wanting on my part."

"With his latitat and capias,
Bill's and fieri-facias,
Parchment rolls and paper slips,
Honey tongue, but lying lips,
I'm thankful I'm not a lawyer.

"His coat then denotes his profession,
For in black things a lawyer delights,
He's afraid it won't last till next season,
When money will put it to rights.
Oh! how much will his clients now grieve
Since the lawyer is going to rack,
And unless they give him a reprieve
He will not have a coat to his back."

[*Spoken.*] Charity, charity, gentlemen, is the noblest passion of man; pray endeavor to get into law, and let me endeavor to get you out of it; for believe me, gentlemen, it is an indisputable, incontrovertible and undeniable fact, as times now go, that a lawyer can scarcely get an honest piece of bread, or corks sufficient to keep his head above water.

"With his dedimus and alias,
Chancery suits and habeas,
Old settlements and abstracts,
Briefs and other rotten tracts,
I'm thankful I am not a lawyer."

The Lawyer's Clerk—air: Poor Jack:

"Go, lawyers, and scriveners, and clerks, d'ye see,
'Bout parchment, pens, stamps, and the like;
A snug little desk, and a good office give me,
And 'taint to a little I'll strike:
Though the deed should be long, sir, and I pressed for time,
And intricate and hard to draw,
Clear the desk, stow the books, and set all in a line,
And I'll do it in due form of law.
Avast, then, don't think me a milksop so soft,
To be taken with trifles aback,
For in Westminster Hall the judge sits up aloft,
The guard and protector of Jack.

"I heard my good master palaver one day,
'Bout writs, bonds and deeds, and the like,
So many fine things to me he did say,
He made law as plain as a pike;
For says he, how our client can founder, d'ye see,
Without orders that come down below;
And many fine things that proved clearly to me,
The chief justice would take us in tow;
For says he, d'ye mind me, though you should e'er so oft,
Delay pleadings and set them aback,
That same noble judge that sits perched up aloft,
Will be guard and protector of Jack.

"I says to a client (for d'ye see, he would swear),
When he lost his last cause all through me,
I give you my word the proceedings were fair,
And to doubt it a fool you must be;
For d'ye see, the law's just, and a verdict for all
Can't be had, one must win and no more,
And if, my dear sir, you should be in the wrong,
Your antagonist then gets before;
Come, then, all's a hazard, now don't be so soft,
Next cause you'll recover it back,
For, d'ye see, those twelve men that sit perched up aloft,
They'll then give a verdict for Jack.

"D'ye mind me, a lawyer should be every inch
All in one, as the skins of a deed,
And well brave the court, too, without off'ring to flinch,
If ever he'd wish to succeed;
As to me in all causes, all briefs, pleas and suits,
Nought's a trouble if money it brings,
My advice I will give to reap the first fruit,
Charge high, and the blame is the king's.
If cause comes to trial, don't think me so soft,
To be taken with conscience aback,
For that same noble judge that sits perched up aloft,
Will be guard and protector for Jack."

From "An Hundred Years Hence:"

"You chancery lawyers,
Whose subtilety thrives,
In spinning out suits
To the length of three lives;
Such suits which the clients
Do wear out in slavery,
Whilst pleader makes conscience
A cloak for his knavery,
May boast of his subtilety
In the present tense,
But *non est inventus*
An hundred years hence."

Consequences of Sunday traveling, — founded on fact:

"Three eminent men of the law
Lately traveled on Sunday together,
Through roads that were cover'd with snow,
Not regarding the day nor the weather;
At length they got into a pit,
(How dismal the tale to be told!)
Where they and their horses, *to wit*,
Had like to have perish'd with cold.
Tho' they often before, none can doubt,
Had waded thro' thick and thro' thin,
Yet the more now they tried to get out,
The deeper, alas, they sunk in.
Oh, Fortune! now lend 'em thine aid,
Or how cans't thou answer thy charge?
Thou hast Coke upon Littleton laid,
And pull'd down the statutes at large.
The goddess was mov'd with their cries,
And determin'd to save all their lives
Then quick to their succor she flies,
To the joy of their clients and wives.
Ye lawyers remember their doom,
And be warn'd at the fall of these men;
I hope you will never presume
To travel on Sunday again."

A CROSS-EXAMINATION IN CHIEF.

Sorrister. Call John Tomkins. *Witness.* Here! (is sworn.) *B.* Look this way — what's your name? *W.* John Tomkins. *B.* John Tomkins, eh! And pray, John Tomkins, what do you know about this affair? *W.* As I was going along Cheapside — *B.* Stop, stop! not quite so fast, John Tomkins. When was you going along Cheapside? *W.* On Monday, the 26th of June. *B.* Oh, oh! Monday, the 26th of June; and, pray, how came you to know that it was Monday, the 26th of June? *W.* I remember it very well. *B.* You have a good memory, John Tomkins; here is the middle of November, and you pretend to remember your walking along Cheapside in the end of June? *W.* Yes, sir, I remember it as if it was but yesterday. *B.* And pray, now, what makes you remember it so very well? *W.* I was then going to fetch a midwife. *B.* Stop there, if you please. (Gentlemen of the jury, please to attend to this.) So, John Tomkins, you, a hale, hearty man, were going to fetch a midwife? Now, answer me directly — look this way, sir; what could you possibly want with a midwife? *W.* I wanted to fetch her to a neighbor's wife who was ill abed. *B.* A neighbor's wife! What, then, you have no wife of your own? *W.* No, sir. *B.* Recollect yourself; you say you have no wife of your own. *W.* No, sir; I never had a wife. *B.* None of your quibbles, friend; I did not ask you if you ever had a wife. I ask you if you have now a wife; and you say no. *W.* Yes, sir; and I say truth. *B.* Yes, sir! and no sir! and you say truth! We shall soon find that out. And was there nobody to fetch a midwife but you? *W.* No, my neighbor lay ill himself. *B.* What: did he want a midwife, too? (A loud laugh.) *W.* He lay ill of a fever; and so I went to serve him. *B.* No doubt; you are a very serviceable fellow, in your way. But pray, now, after you had fetched the midwife, where did you go? *W.* I went to call upon a friend. *B.* Hold; what time in the day was this? *W.* About seven o'clock in the evening. *B.* It was quite daylight, was it not? *W.* Yes, sir; it was a fine summer evening. *B.* What! is it always daylight in a summer evening? *W.* I believe so (smiling). *B.* No laughing, sir, if you please; this is too serious a matter for levity. What did you do when you went to call upon a friend? *W.* He asked me to take a walk; and when we were walking, we heard a great noise — *B.* And where was this? *W.* In the street. *B.* Pray attend, sir; I don't ask you whether it was in the street; I ask you what street? *W.* I don't know the name of the street; but it turns down from — *B.* Now, sir, upon your oath, do you say you don't know the name of the street? *W.* No, I don't. *B.* Did you ever hear it? *W.* I may have heard it; but I can't say I remember it. *B.* Do you always forget what you have heard? *W.* I don't know that I ever heard it; but I may have heard it, and forgot it. *B.* Well, sir, perhaps we may fall upon a way to make you remember it. *W.* I don't know, sir; I would tell it if I knew it. *B.* Oh! to be sure you would; you are remarkably communicative. Well, you heard a noise, and I suppose you went to see it, too. *W.* Yes; we went to the house where it came from. *B.* So! it came from a house; and, pray, what kind of a house? *W.* The Cock and Bottle; a public house. *B.* The Cock and Bottle! why, I never heard of such a house. Pray, what has a cock to do with a bottle? *W.* I can't tell; that is the sign. *B.* Well; and what passed there? *W.* We went in to see what was the matter, and the prisoner there — *B.* Where? *W.* Him at the bar there; I know him very well. *B.* You know him? How came you to know him? *W.* We worked journey work together once; and I remember him very well. *B.* So, your memory returns; you can't tell the name of the street, but you know the name of the public house, and you know the prisoner at the bar. You are a very pretty fellow! And pray what was the prisoner doing? *W.* When I saw him he was — *B.* When you saw him! Did I ask you what he was doing when you did not see him? *W.* I understand he had been fighting. *B.* Give us none of your understanding, tell what you saw. *W.* He was drinking some Hollands and water. *B.* Are you sure it was Hollands and water? *W.* Yes; he asked me to drink with him, and I just put it to my lips. *B.* No doubt you did, and I dare say did not take it soon from them. But now, sir, recollect you are upon oath; look at the jury, sir; upon your oath, will you aver that it was Hollands and water? *W.* Yes, it was. *B.* What, was it not plain gin? *W.* No, the landlord said it was Hollands. *B.* Oh! now we shall come to the point — the landlord said? Do you believe every thing the landlord of the Cock and Bottle says? *W.* I don't know him enough. *B.* Pray what religion are you of? *W.* I am a protestant. *B.* Do you believe in a future state? *W.* Yes. *B.* Then what passed after you drank the Hollands and water? *W.* I heard there had been a fight, and a man killed; and I said, "Oh, Robert, I hope you have not done this;" and he shook his head. *B.* Shook his head; and what did you understand by that? *W.* Sir? *B.* I say, what did you understand by his shaking his head? *W.* I can't tell. *B.* Can't tell! can't you tell what a man means when he shakes his head? *W.* He said nothing. *B.* Said nothing! I don't ask you what he said; what did you say? *W.* What did I say? *B.* Don't repeat my words, fellow; but come to the point at once. Did you see the dead man? *W.* Yes; he lay in the next room. *B.* And how came he to be dead? *W.* There had been a fight, as I said before. *B.* I don't want you to repeat what you said before. *W.* There had been a fight between him and the —

B. Speak up, his lordship don't hear you, can't you raise your voice? *W.* There had been a fight between him and the prisoner — *B.* Stop there; pray, when did this fight begin? *W.* I can't tell exactly; it might be an hour before; the man was quite dead. *B.* And so he might, if the fight had been a month before; that was not what I asked you. Did you see the fight? *W.* No, it was over before we came in. *B.* We! what we? *W.* I and my friend. *B.* Well, and it was over, and you saw nothing? *W.* No. *B.* Gem'men of the jury, you will please to attend to this; he positively swears he saw nothing of the fight. Pray, sir, how was it that you saw nothing of the fight? *W.* Because it was over before I entered the house, as I said before. *B.* No repetitions, friend. Was there any fighting after you entered? *W.* No, all was quiet. *B.* Quiet, you just now said you heard a noise, you and your precious friend. *W.* Yes, we heard a noise — *B.* Speak up, can't you? and don't hesitate so. *W.* The noise was from the people crying and lamenting. *B.* Don't look to me, look to the jury. Well, crying and lamenting. *W.* Crying and lamenting that it happened, and all blaming the dead man. *B.* Blaming the dead man! why, I should have thought him the most quiet of the whole (another laugh). But what did they blame him for? *W.* Because he struck the prisoner several times without any cause. *B.* Did you see him strike the prisoner? *W.* No; but I was told that — *B.* We don't ask you what you was told; what did you see? *W.* I saw no more than I have told you. *B.* Then why do you come here to tell us what you heard? *W.* I only wanted to give the reason why the company blamed the deceased. *B.* Oh! we have nothing to do with your reasons, or theirs either. *W.* No, sir, I don't say you have. *B.* Now, sir, remember you are upon oath, you set out with fetching a midwife; I presume you now went for an undertaker. *W.* No, I did not. *B.* No! that is surprising; such a friendly man as you. I wonder the prisoner did not employ you. *W.* No, I went away soon after. *B.* And what induced you to go away? *W.* It became late, and I could do no good. *B.* I dare say you could not; and so you come here to do good, don't you? *W.* I hope I have done no harm. I have spoken like an honest man; I don't know any thing more of the matter. *B.* Nay, I shan't trouble you further (witness retires, but is called again). Pray, sir, what did the prisoner drink his Hollands and water out of? *W.* A pint tumbler. *B.* A pint tumbler! what? a rummer? *W.* I don't know; it was a glass that holds a pint. *B.* Are you sure it holds a pint? *W.* I believe so. *B.* Ay! when it is full, I suppose. You may go your ways, John Tomkins. A pretty hopeful fellow that. (Aside.)

The following from *Punch* are too good not to be rendered more accessible than the newspaper columns:

"MONODY ON THE DEATH OF AN ONLY CLIENT.

"Oh! take away my wig and gown,
Their sight is mockery now to me:
I pace my chambers up and down,
Reiterating, 'where is *he?*'

"Alas! wild echo, with a moan,
Murmurs above my feeble head;
In the wide world I am alone;
Ha! ha! my only client's dead!

"In vain the robing-room I seek,
The very waiters scarcely bow;
Their looks contemptuously speak,
'He's lost his only client now.'

"E'en the mild usher, who of yore,
Would hasten when his name I said,
To hand in motions, comes no more,
He knows my only client's dead.

"Ne'er shall I, rising up in court,
Open the pleadings of a suit;
Ne'er shall the judges cut me short,
While moving them for a compute.

"No more with a consenting brief
Shall I politely bow my head;
Where shall I run to hide my grief?
Alas! my only client's dead.

"Imagination's magic power
Brings back as clear as clear can be,
The spot, the day, the very hour,
When first I signed my maiden plea.

"In the Exchequer's hindmost row
I sat, and some one touched my head,
He tendered ten-and-six, but oh!
That only client now is dead.

"In vain I try to sing — I'm hoarse
In vain I try to play the flute,
A phantom seems to flit across —
It is the ghost of a compute.

"I try to read, but all in vain;
My chamber listlessly I tread;
Be still, my heart; throb less, my brain;
Ho! ho! my only client's dead.

"I think I hear a double knock;
I did — alas! it is a dun.
Tailor, avaunt! my sense you shock;
He's dead! you know I had but one.

"What's this they thrust into my hand?
A bill returned! — ten pounds for bread!
My butcher's got a large demand;
I'm mad! my only client's dead."

LINES TO BESSY BY A STUDENT AT LAW.

My heart is like a title-deed,
Or abstract of the same;
Wherein my Bessy, thou may'st read
Thine own long-cherish'd name.

Against thee I my suit have brought,
I am thy plaintiff lover,
And for the heart that thou hast caught,
An action lies — of trover.

Alas! upon me every day
The heaviest costs you levy;
O give me back my heart — but nay!
I feel I can't replevy.

I'll love thee with my latest breath,
Alas! I cannot *you* shun,
Till the hard hand of sheriff death
Takes me in execution.

Say, Bessie dearest, if you will
Accept me as a lover?
Must true affection file a bill
The secret to discover?

Is it my income's small amount
That leads to hesitation?
Refer the question of account
To Cupid's arbitration.

In 1851, at the time of the World's Exhibition in London, Samuel Warren wrote a very peculiar and extraordinary poem, styled "The Lily and the Bee," called out by the exhibition; of which *Punch* published a burlesque, entitled "The Dilly and the D's." The "Dilly" was the Oxford coach. The poem describes the upsetting of this coach, and finally the safe arrival of Mr. Warren at Oxford, where, in company with Derby and D'Israeli, he has the degree of LL. D. conferred on him. I extract some passages applicable to our subject:

"Oh, Spirit! Spirit of Literature,
Alien to Law!
Oh Muse, ungracious to thy sterner sister, THEMIS,
Whither away? Away!
Far from my brief —
Brief with a fee upon it,
Tremendous!

And probably — before my business is concluded —
A REFRESHER; Nay, several!!
Whither whirlest thou thy thrall?
Thy willing thrall?
'*Now and then;*'
But not just at this moment,
If you please, Spirit!
No, let me read and ponder on
THE PLEADINGS.
Declaration!
Plea!!
Replication!!!
Rejoinder!!!!
Surrejoinder!!!!!
Rebutter!!!!!!
Surrebutter!!!!!!!
ETC! ETC!! ETC!!!
It may not be. The muse,
As ladies often are,
Though lovely, is obstinate,
And will have her own way.
* * * * *
I obey, Spirit.
Hang my brief, 'tis gone!
To-morrow let my junior cram me in court.
* * * * *
Behold! and thank thy stars
That led thee — Worm —
Thee, that art merely a writer
And a barrister,
Although a man of elegant acquirements,
A gentleman and a scholar —
Nay, F. R. S., to boot —
Into such high society,
Among such SWELLS,
And REAL NOBS!
Behold! ten live LORDS! and lo! no end
Of ex-Cabinet Ministers!
Oh! happy, happy, happy,
Oh, happy Sam!
Say, isn't this worth, at the least,
'*Ten thousand a year?*'
And these are all, to-day at least,
Thy fellows!
Going to be made
L. L. D.'s, even as thyself:
And thou shalt walk in silk attire,
And hob and nob with all the mighty of the earth."

Southey, in a letter to his three young daughters, gives an amusing account of his being double-ell-deed at Oxford. "When the theater is full the vice-chancellor and the heads of houses and the doctors enter. Those persons who are to be ell-ell-deed remain without in the divinity schools, in their robes, till the convocation have signified their assent to the ell-ell-deeing, and then they are led into the theater one after another, in a line, into the middle of the area, the people first making a lane for them. The professor of civil law, Dr. Phillimore, went before, and made a long speech in Latin, telling the vice-chancellor and the dignissimi doctores what excellent persons we were who were now to be ell-ell-deed. Then he took us one by one by the hand, and presented each in his turn, pronouncing his name aloud, saying who and what he was, and calling him many laudatory names, ending in issimus. The audience then cheered loudly, to show their approbation of the person; the vice-chancellor stood up and, repeating the first words in issime, ell-ell-deed him; the beadles lifted up the bar of separation, and the new-made doctor went up the steps and took his seat among the dignissimi doctores."

Thackeray, under the title of "Jacob Omnium's Hoss," makes "Pleaceman X" thus discourse of the Palace Court:

"One sees in Viteall Yard,
Vere pleacemen do resort,
A wenerable hinstitute.
'T is called the Pallis Court.
A gent as got is i on it,
I think will make some sport.

"The natur of this court
My hindignation riles;
A few fat legal spiders
Here set and spin their viles;
To rob the town theyr privlege is,
In a hayrea of twelve miles.

"The judge of this year court
Is a mellitary beak,
He knows no more of Lor,
Than praps he does of Greek,
And prowides hisself a deputy
Because he cannot speak.

"Four counsel in this Court —
Misnamed of Justice — sits;
These lawyers owes their places to
Their money, not their wits;
And there six attornies under them,
As here their living gits.

"These lawyers, six and four,
Was a livin at their ease,
A sendin of their writs abowt,
And droring in the fees,
When their erose a cirkimstance
As is like to make a breeze."

Then follows an account of how a gentleman's horse was stolen and recovered, and how the liveryman, with whom the horse had been lodged by the thief, "summingsd" the owner into the "Pallis Court" to pay for said keeping; the result is thus narrated:

"Pore Jacob went to court,
A counsel for to fix,
And choose a barrister out of the four,
An attorney of the six;
And there he sor these men of Lor,
And watched 'em at their tricks.

"The dreadful day of trile
In the Pallis Court did come;
The lawyers said their say,
The judge looked wery glum,
And then the British jury cast
Pore Jacob Hom-ni-um.

"O a weary day was that
For Jacob to go through;
The debt was two seventeen;
(Which he no mor owed than you)
And then there was the plaintives costs,
Eleven pound six and two.

"And then there was his own,
Which the lawyers they did fix
At the wery moderate figgar
Of ten pound one and six.
Now Evins bless the Pallis Court,
And all its bold verdicks!

"I cannot settingly tell
If Jacob swaw and cust,
At aving for to pay this sumb,
But I should think he must,
And av drawn a cheque for £24 4s. 8d.,
With most igstreme disgust.

"O Pallis Court, you move
My pitty most profound.
A most amusing sport
You thought it, I'll be bound,
To saddle hup a three pound debt,
With two and twenty pound.

"Good sport it is to you
To grind the honest pore;
To pay their just or unjust debts,
With eight hundred per cent for Lor;
Make haste and git your costs in,
They will not last much more!

"Come down from that tribewn,
Thou Shameless and Unjust;
Thou Swindle, picking pockets in
The name of Truth august;
Come down, thou hoary Blasphemy,
For die thou shalt and must.

"And go it, Jacob Homnium,
And ply your iron pen,
And rise up, Sir John Jervis,
And shut me up that den;
That sty for fattening lawyers in,
On the bones of honest men."

BARHAM,

in "Look at the Clock," has a few stanzas applicable to our subject. The story is of a Welchman who killed his scolding wife:

"The fatal catastrophe
Named in my last strophe
As adding to grim Death's exploits such a vast trophy,
Made a great noise, and the shocking fatality
Ran over, like wild fire, the whole principality.

And then came Mr. Ap Thomas, the Coroner,
With his jury to sit, some dozen or more, on her.
Mr. Pryce to commence
His 'ingenious defense,'
Made a 'powerful appeal' to the jury's 'good sense,'
The world he must defy
Ever to justify
Any presumption of 'Malice Prepense;'—
The unlucky lick
From the end of his stick
He 'deplored'—he was 'apt to be rather too quick;'
But really her prating
Was so aggravating,
Some trifling correction was just what he meant; all
The rest, he assured them, was 'quite accidental.'
Then he calls Mr. Jones,
Who depones to her tones,
And her gestures and hints about 'breaking his bones.'
While Mr. Ap Morgan and Mr. Ap Rhy
Declared the deceased
Had styled him 'a Beast,'
And swear they had witnessed, with grief and surprise,
The allusion she made to his limbs and his eyes.

The jury, in fine, having sat on the body
The whole day, discussing the case and gin-toddy,
Returned about half-past eleven at night,
The following verdict: 'We find, *serve her right!*'"

"LAWYERS: WHERE THEY GO TO!"

Under this title the following was printed in the form of a broadside ballad, and circulated among the author's friends, by a gentleman whose merits would be more apt to be disclosed by a personal than by a poetical acquaintance; in other words, who is stronger in piety than in poetry, and who gives better measure in his dealings with his fellow men than in his rhymes. He is an elder in the church, and naturally enough his verses, like the parables of which he is such an admirer, do not "go on all fours." We once heard of an auctioneer who put up a volume "by a poor and pious girl who wrote poor and pious poetry;" the elder does not resemble that girl in regard to pecuniary circumstances, nor is his poetry like hers, in the latter respect at least. But let us not be too critical. Our subject forbids it. We must consider poesy in all its forms, as well in the elephantine gambolings of a cart-horse as in the graceful curvetings of Pegasus. So let us send the elder down to posterity.

"I heard a story once which sounded well,
Which, with your leave, I now propose to tell:
'T is 'bout the Lawyers, those oft slandered men,
Unjustly slandered too, perhaps, but then
The maxim is: It may be false or true,
Give to the devil, if you can, his due.
Without a prologue let me then proceed
As best I can to verify this creed,
Or, rather, maxim, hoping I may throw
Light on the subject from the world below.
When, in New York, near Fulton street, one day,
I saw a hearse slow moving up *Broad*way,
The very '*way*' or road, it has been said,
That living lawyers seem inclined to tread.
And as I stood reclining on my cane,
Watching the progress of the funeral train,
I asked an urchin standing by my side,
If he could tell a stranger who had died.
It is a Lawyer, was his prompt reply:
They're never buried, but they often die!
Are never buried! I, astonished, said!
Are never buried when it's known they're dead!
No—never buried—shortly 'twill appear,
At any rate they are not buried here!
Why then that hearse? I asked, in self-defense;
He quick replied, 'It's nothing but pretense.'
I looked amazed! a smile played o'er his face,
As thus he spake, with much becoming grace:
'I'll tell you, stranger, beg you not to scoff,
How, in New York, things of this kind pass off.
When Lawyers die they're left throughout the night
Without a watcher, 'till the morning light
Breaks from the east, and then, at early dawn,
A search is made, and, true as guns, they're gone!
The question is, then, whither do they go,
If, when defunct, they're seen no more below?
I do not know and therefore cannot tell,
But this I know, there is a brimstone smell
Throughout the room which is, to souls discerning,
Instinctive proof that *something* must be burning!
Besides all this, a smoke is seen whose hue
Tells that for Lawyers things look rather blue.
Without reflection some, acute of smell,
Infer, at once, they must have gone to ——;
Others more hopeful, with more love than hate,
Affirm they're saved, but in a *damaged state!*
But of their fate quite little here is known,
Still, there's a proverb. 'Satan gets his own.'"
Thus spoke the boy, then quietly withdrew,
And passed away forever from my view.
Thus spoke the boy, and it must be confessed
That much of truth is often spoke in jest."

CURRENT TOPICS.

Here is a story good enough to be put in the Sunday school books for the edification of the embryo lawyers of the future. The Milwaukie *Wisconsin* gives it as follows and vouches for its accuracy:

About twelve years ago a well-known member of the bar of this city, upon opening his mail one day, found a bright looking $10 bill in a letter. The letter was not signed, and said simply that the money rightfully belonged to the lawyer, and he must use it as his own and ask no questions. The lawyer did so. Next year, about the same time, another letter, with another new bright $10 bill and the same request, came; and every year since that time a similar letter, with a similar bill, has reached the lawyer. Naturally, he has felt some anxiety to know who the donor is, but all his attempts failed, and until a few days ago he was in ignorance. At that time a letter came with $10 and an explanation. It seems that over twelve years ago the sender was in the city, got into trouble and could get nobody to defend him because he had no money. The lawyer in question learned of the case, felt interested in it, defended the man and got him clear. His bill would have been $10, and the client was so grateful that every year he sent as a present the amount of the defense.

The constitutional convention, now in session in Illinois, has declined to pass the resolution to instruct the legislature to provide for the revision and codification of the laws and the adoption of codes of civil and criminal procedure. We understand that this result was brought about mainly by the opposition of the members of the bar to the proposed reform. We can very well understand the inconveniences attending a change from a system to which one has become used—no matter how absurd and technical—to a new and radically different system; but we had supposed that the members of a liberal profession would be themselves sufficiently liberal to countenance any reform likely to result in general good. The Chicago *Tribune* suggests that the maintenance of the old system operates as a "protection" to the lawyers of Illinois against the importation of lawyers from New York, Kansas, Wisconsin, Iowa and other states, where a code has been adopted. While we do not believe that this has been a moving cause of the opposition, yet the result is as stated by the *Tribune*. Any competent lawyer, after studying and practicing under the code, must waste a deal of time on going to a state having the old system in the study of points and proceedings which he has not only forgotten or never known, but which he has learned to despise.

In the examination of titles to real estate, one of the most annoying difficulties that meets one is to discover the existence of what is known as the right of dower. Every other claim affecting the title to realty must,

to secure its possessor against the acts of those through whom he derives it, be entered in the public records. But the claim of dower needs no such notice. A private contract without form, made in the presence of unknown witnesses, and then concealed from the public whose property rights it affects, is sufficient to create the lien; and against the inchoate lien runs no statute of limitation, but it may lie hidden for a generation and spring up to vex and rob innocent purchasers. Now, while we are taking away from married women the disability thrown around them by the feudal law, would it not be well to place upon them some of the liabilities and duties of their fellow-citizens. The newer states have, many of them, wisely modified the statutes relating to dower, but in New York it exists to-day in the unchanged form of the common law. While we would not deprive the widow of her rights, we believe the public should demand that, if she desires to secure those rights, she must do it by giving to those liable to be affected by them some intimation of their existence. A simple notice, properly authenticated and filed in the office of the registry of deeds, would be sufficient. This act would cause her little trouble, and would save purchasers of real estate much vexation, and oftentimes much loss.

We have watched with interest the progress of two trials before an ecclesiastical tribunal. In one the accused was, by the prosecution, claimed to be guilty of the heinous offense of preaching in the chapel of another order of christians, without leave of his presiding officer first had and obtained. He was, of course, convicted, and, we believe, censured — censuring being an ecclesiastical punishment equivalent in the church to imprisonment in the state prison under the rules of our municipal law. We believe, however, that the prisoner undergoing that sentence still lives a worthy worker in the cause of that MASTER to whom he has devoted the best efforts of his life. The other trial, in which the same punishment was inflicted upon the criminal, but under another dispensation, occurred in consequence of a minister so far forgetting the ordinances of a portion of his church as to indulge in the potation known as gin and milk. It is with no desire to cast reproach upon the religious faith of any one that we speak concerning these things. The church sees fit, in imitation, we believe, of the customs of men, to establish a tribunal wherein shall be determined the differences arising between its members. The solemn ceremony of a trial is gone through, but before men already concluded as to their verdict. It may not be the duty of the legal profession to intrude upon the deliberations of a body whose decisions are founded upon a law higher than the enactments of any human assemblage. But when we see the trifling acts of good men taken up and made a matter of public scandal, we cannot forget to call the attention of the ecclesiastical court to the action of the Man who supped with publicans and sinners, and who did not hesitate at the marriage feast in Cana of Gallilee to produce, by his miraculous power, a drink whose excellence surprised and delighted men familiar with the rich wines of that fertile country. The publican may be a poor companion, and the juice of the vine a dangerous drink, but can the courts of the Christian church condemn either the publican or the wine?

The beneficial results of the New York Bar Association are beginning to make themselves manifest, even thus early. At the recent examination of candidates for admission to the bar, the committee, unlike most committees of the kind, rejected a number of applicants, and reported their reasons for so doing to the court, with some suggestions as to the manner of conducting examinations, which are worthy of consideration. The following is from the report:

Such examination was had upon the various subjects specified in the second rule of this court. It disclosed the fact that there was great inequality among the applicants in the extent and thoroughness of their studies. Some of them were well versed in the principles of the law; others had confined their studies to particular subjects, and stated the fact with frankness. Others, perhaps from timidity, seemed to have no knowledge of any portion of the law. Under these circumstances it is not possible for the committee to say, in the language of the rule already referred to, that every "applicant has sustained a satisfactory examination." In addition to this, and in justice to the applicants themselves, a distinction should be made between knowledge and ignorance; and unless an examination is to be considered purely formal, some recognition and privilege should be accorded to the former. Besides, a profession which calls itself, and is known as, a learned profession, should, for its own sake, take care that its reputation is not diminished by admissions to its ranks of those who are unlearned in the law. Our profession owes a duty also to the public, that those whom it authorizes to bear the honored name of attorney and counselor, and thus asserts their ability to protect life, liberty and property, should have at least some knowledge of legal remedies, to whom they are to be afforded, and the methods by which they are to be procured.

For these reasons the committee have been obliged to discriminate between the various applicants. Those who are named in the annexed list the committee certify to have sustained a satisfactory examination upon the various subjects upon which they were required to be examined, and they recommend them as worthy of admission as attorneys and counselors of this court.

The committee respectfully recommend that the rule which requires the examination to be in open court should be rescinded, and that in lieu thereof each applicant should be required to submit to a private examination, separate and apart from other applicants, before an examining committee. Such an examination, it is believed, will be more satisfactory to the applicant, as it would be, of necessity, to the committee.

We print, in another column, the special message of Governor Alcorn to the Mississippi legislature, which proposes a novel method of dealing with the question of insanity in cases of murder, manslaughter, and the like. He recommends a law providing that in cases of the character mentioned, where insanity is relied upon as a defense, such defense must be specially pleaded under oath of the attorney or of some other competent person, and that the issue thereon shall be tried separately by a court of chancery. In the cases mentioned, if the question of insanity is raised before the committing magistrate, that magistrate, if he hold that the proof has shown a pre-

sumption of insanity, coupled with a presumption of murder, manslaughter, etc., shall order the accused to be committed to jail to await the examination before the chancery court. The prisoner being, in that event, presumed to be insane, he is to be denied the privilege of bail; is to be deemed incapable of making an oath, and is not to be removed by a writ of habeas corpus. In the event of the chancery courts deciding the accused to be not insane, the trial of the indictment is to go forward to the exclusion of that plea; but in case such court shall decide affirmatively on the issue, the accused is to be confined in the part of the lunatic asylum set apart for the dangerous insane. In the latter event, the accused shall not be set at large until there shall be furnished most undoubted proof showing a "soundness of mind undisturbed by any aberrations for periods graduated with a view to the gravity of the consequences contingently involved to the public by a premature release" — the period for murder being five years.

We give elsewhere a special message of the governor of Mississippi, concerning the plea of insanity as a defense to an indictment for a crime. This plea is usually set up in answer to a charge of murder. We have known the plea of *moral insanity* urged in behalf of forgers; but the lower grade of criminals, such as hen stealers and vagrants, have not as yet urged it. In the case of the inferior transgressor it is safer to have committed the offense than to be known as crazy. A few months' confinement answers the one, the other is the reproach of a lifetime. But when the crime which demands the shedding of man's blood is clearly and conclusively proved, the plea of insanity at the moment or instant gives a jury an excuse for the acquittal of a murderer. We do not wish to shut out the defense of insanity, but we believe that the person who is so far gone in mind as to deliberately kill a human being is not the one to walk without check the streets of our cities. The insane impulse may have passed away with commission of the terrible deed, but who can say at what moment that impulse may return. The way to test insanity is by the careful investigation of experienced men, and if the criminal be found insane it is the duty of the state to guard its members against his acts. Governor Alcorn, in his message, suggests a law to meet the difficulty which is worthy of the consideration of the public as well as of the profession. We should not inflict unnecessary suffering upon an individual bereft of his reason, but restraint is required when the mind is so far gone or disturbed as to cause one to do an irreparable injury to his fellow. But we all know the defense of insanity to be, in most cases, a humbug, and that were it certain to bring upon the criminal a prolonged confinement we should not see it so frequently advanced. Let it be once understood that when a man has so far lost his reason as to unrestrained shoot down a human being, he must be placed beyond the reach of the *habeas corpus act*. We may thereby possibly sometimes do a wrong to some one, but our streets will be safer, and some fewer murderers will escape the gallows.

OBITER DICTA.

When women come to sit in the jury box, possibly infants may get to be criers in court.

It has been decided when a man so far forgets himself as to bite off a portion of another individual's nose, he ought to be bound over to *keep the piece*.

He is the same practitioner of whom it was said that he ought to have a writ of perpetual *scire facias* served upon him so as to *make* him *to know* something!

An Irishman sent to the Wisconsin state prison was asked what trade he preferred to learn. He said that if it was all the same to them he preferred to be a sailor.

A third rate lawyer rather amused the court, the other day, in discussing a point upon failure to pay purchase money in the sale of land, etc., by remarking upon that fundamental principle of equity: "No pay — no trust!"

Judges who try "railroad cases," with passes in their pockets, should ponder over that passage of the Scriptures which declares that "a gift perverteth the ways of judgment."

A lawyer had an Irish client named McMinimys, one of whose cases was non-suited. The excuse he offered was that the court overlooked his rights. "In other words I found," said he, "that *de McMinimys non curat lex*."

Judge Story and Edward Everett were once the prominent personages at a public dinner in Boston. The former, as a voluntary toast, gave the following: "Fame follows merit where Everett goes!" The gentleman thus delicately complimented at once arose, and replied with this equally felicitous impromtu: "To whatever height judicial learning may attain in this country, there will always be one Story higher."

Another instance is that of a client who said he had an eye witness that knew all about the transaction in dispute, only he was incompetent to testify. On being asked the reason, the answer he gave was: "Oh, because he is a butcher!" This ridiculous idea probably originated in some reference to an old rule of law once in existence in England, whereby butchers were excluded from the jury in capital cases. It was thought they might be hard-hearted from their occupation.

In an assault and battery case (woman the cause) the defendant's attorney, in his address to the jury, made use of the expression "that on several occasions when the plaintiff had approached too near the lips of the damsel she had always *demurred*." "On what ground," interrupted West, the plaintiff's counsel, and somewhat of a wit, "that *the facts were not sufficient to constitute a cause of action?*" "No, sir," was the reply, "but that there was not *a proper joinder of parties*."

Some people have very queer notions about what is and what is not competent evidence. A man, who was about to go upon the stand as a witness, was telling counsel what he knew of the case, and remarked: "I saw A strike him, but I suppose I can't testify to that?" "Why not?" he was asked. "Because," was the reply, "I was looking out of the window, and I believe they don't allow you to swear to what you see through glass, do they?" He was assured that as long as it was not through the bottom of a tumbler that the view was had, it might be given in evidence.

When General —— was a young man, a student in his office named W. thought he would apply for admission. The general tried to dissuade him, as W. really knew no law, but had devoted his two years to literature, in which he was greatly proficient. W., however, went before Judge S——, who probably never opened any book other than a law book since he left school, unless it were the bible, or an almanac. The judge was a practical, hard-headed lawyer, and there he stopped. The examination began, and W. floundered around to the astonishment of the judge and the infinite amusement of the general, who was the only other person present. The judge resolved, as a grand finale, that he would blaze away at the presumptuous youngster with the "rule in Shelley's case." "Oh, yes, that is when a man is an infidel and an atheist, and the chancellor takes his property in charge for his children," said the applicant, with a gleam of satisfaction in marked contrast to his previous look of anxiety. Judge S—— was aghast at this reply. He might have hurled a volume of the statutes near by at the head of poor W., had not the general quickly interrupted: "The trouble is, gentlemen, neither of you ever heard of the other's Shelley!"

HARRISON V. THE NEW JERSEY STEAMBOAT COMPANY.—Supreme Court, First District, General Term, April, 1870. —The defendant received, at the city of Albany, in the early part of December, 1865, a trunk, which is the subject of this action, with other goods belonging to the plaintiff, brought them safely to New York and landed them on its pier. The plaintiff claimed to have seen all her goods, including the trunk, on the defendant's dock. About a week after their arrival one load was sent to a public warehouse, the remainder, including the said trunk, at the request of the plaintiff, at her risk and without cost of storage, remained on the defendant's dock during the winter. In the spring, when navigation opened, the trunk was lost to both the plaintiff and defendant, until at a subsequent period it was found in a baggage-room of the defendant on the dock where it had been placed for safe keeping. While in the defendant's possession there had been no marks on the trunk to distinguish it, and it was not identified by the plaintiff until after suit had been brought. The other goods had, in the mean time, been sent to a public warehouse, and were afterward received by the plaintiff. In an action to recover the value of the trunk, the court held that the defendant was not liable, either as a common carrier or bailee.

TERMS OF THE SUPREME COURT FOR MAY.

3d Monday, Special Terms (Issues), Kings, Barnard.
3d Monday, Circuit and Oyer and Terminer, Albany, Hogeboom.
3d Monday, Circuit and Oyer and Terminer, Chemung, Boardman.
3d Monday, Circuit and Oyer and Terminer, Delaware, Balcom.
3d Monday, Circuit and Oyer and Terminer, Chautauqua, Talcott.
3d Monday, Circuit and Oyer and Terminer, Orleans, Daniels.
3d Tuesday, Special Term, Lewis.
4th Monday, Circuit and Oyer and Terminer, Sullivan, Peckham.
4th Monday, Circuit and Oyer and Terminer, Onondaga.
4th Monday, Circuit and Oyer and Terminer, Genesee, Daniels.
4th Monday, Circuit and Oyer and Terminer, Niagara, Marvin.
4th Tuesday, Circuit and Oyer and Terminer, Plattsburgh, Bockes.
Last Monday, Circuit and Oyer and Terminer, Otsego, Parker.
Last Monday, Special Term, Corning, Johnson.
Last Tuesday, Special Term, Albany, Miller.

The committee appointed at the last general term of the supreme court at New York to examine applicants for admission to the bar, have reported that only thirty-eight out of a class of seventy-seven are sufficiently qualified to entitle them to practice.

COURT OF APPEALS ABSTRACT.

MARCH TERM, 1870.

Emerson successors, etc. v. *Booth and another.*

This court has repeatedly held that it will not consider any objections not made on the trial, unless it is one that could not be obviated. A party should be required fairly to apprise his adversary and the court upon the trial of the objections upon which he relies, and the grounds of such objections. Opinion by INGALLS and GROVER, JJ.

Mack v. *Patchin.*

The measure of damages in an action against the vendor for breach of a contract for the sale of personal property is the difference between the contract and the market price. But the same rule has not been applied against the vendor or lessor of real estate. Ordinarily, in an action against the vendor of real estate for breach of covenant of warranty the vendee can recover only the consideration paid and interest for not exceeding six years; and when the contract of sale is executory, no deed having been given, in cases where no part of the purchase money has been paid, the vendee can recover only nominal damages; and in cases where purchase money has been paid he can recover the purchase money, interest, and nominal damages. In an action by the lessee against the lessor for breach of covenant for quiet enjoyment, the lessee can ordinarily recover only such rent as he has advanced, and such mesne profits as he is liable to pay over; and in cases when the lessor is sued for a breach of a contract to give a lease or to give possession, ordinarily the lessee can recover only nominal damages and some incidental expenses, but nothing for the value of his lease. These rules must be regarded as settled in this state; though there are cases that are either exceptions to or not within the rule, as when the vendor is guilty of fraud, or can convey but will not, either from perverseness or to secure a better bargain, or if he has covenanted to convey where he knew he had no authority to contract to convey, or where it is in his power to remedy a defect in his title, and he refuses or neglects to do so, or when he refuses to incur expenses which would enable him to fulfill his contract; in all these cases the vendor or lessor is liable to the vendee or lessee for the loss of the bargain, under rules analogous to those applied in the sale of personal property. Where an action was brought by a lessee against a lessor for failure of covenant for quiet enjoyment, the lessee having been evicted by a purchaser at a mortgage foreclosure sale of the premises, *held*, that the measure of damages was the market value of the lease at the time of the eviction, less the aggregate amount of rent which would accrue during the residue of the unexpired term.

McNaught v. *McClaughry, executor, etc.*

One Abram McClaughry, for a valuable consideration, made his promissory note to the plaintiff, and at the time of delivering the same promised and agreed, to and with the plaintiff, that he, Abram, would procure his father to sign said note as his surety, if, at any time, the plaintiff should deem himself insecure, or should desire further security, and the plaintiff accepted the note under such agreement. Shortly after, and after the note had become due, the plaintiff returned the note to Abram, with the request that he would procure his father, the defendant's testator, to sign the same as surety. Abram procured his father's signature, and returned the note—no new consideration having then passed between the parties. *Held*, that the defendant was liable; that the redelivery of the note to the plaintiff—signed by the father, after it was first due—was a new agreement upon a present and valid consideration, and obligatory upon all parties. *Held*, also, that Abram, having originally agreed with the lender that he would obtain the new indorser, and had obtained the money upon the faith of that promise, then his finding the additional indorser, was based upon a valid consideration, and the indorser was held by his signature. Opinion by HUNT and FOSTER, JJ.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF CALIFORNIA.*

(*Concluded.*)

GUARDIANS.

1. *At common law.*—There were four kinds of guardians at common law: by nature, for nurture, in socage, and in chivalry. *Lord* v. *Hough.*

2. *Testamentary guardians.*—Guardians in chivalry were abolished and testamentary guardians substituted by statute 12, Car. II, c. 24, and made to take precedence of all other kinds of guardians. *Ib.*

3. Like all other guardians, the testamentary guardian was subject to the supervision of the court of chancery, and could be removed for cause. *Ib.*

4. *Power of the court of chancery over guardians.*—Guardians of all kinds are trustees, and for that reason were subject to the supervision and amenable to the orders of the court of chancery. *Ib.*

5. The power of the court of chancery over guardians is no greater than it is over other trustees, and it cannot therefore remove a guardian except for good cause shown or apprehended. *Ib.*

6. *Guardians by the statute of this state.*—Under the statute of this state the power to appoint guardians is vested, first, in the father; second, in the mother; and third, in the probate court. *Ib.*

7. Under the statute of this state a testamentary guardian has only the powers of a probate guardian, and cannot, therefore, take the personal custody of the ward so long as there is a mother who is competent, willing, and worthy to have the custody and tuition of her child. *Ib.*

8. If the father dies, having appointed a guardian for his children by his last will and testament, but leaving a widow who is a qualified and fit person to have the personal custody of her children, such widow is entitled, if she so desires, to the personal care and custody of her children. In such case the power of the testamentary guardian only extends to such special directions as the father may have given in his will with reference to the education and settlement of his children, and the care and management of their property, and does not include the personal custody of the children, if objection thereto be made by the mother. *Ib.*

9. L. being the father of three children, aged respectively eight, six, and four years, made his will, by which he devised the custody of his children to his mother in these words: "The personal care, custody, and control of my said children I do hereby confide to my dear mother, *solely*, except in such cases as my said trustees and executors may deem contrariwise for the purposes of education," and died, leaving a widow who was in all respects a fit and proper person to be intrusted with the personal care and custody of her children. In an action by the widow against the testamentary guardian and executors of L. for the custody of the children, it was *held*, that, under the statute of this state, the widow's claim to the personal custody of the children was superior to that of the testamentary guardian. *Ib.*

HOMESTEAD.

1. The homestead represents the dwelling house of the family and necessary outhouses of every kind, and need not be in a compact form, and may be intersected by highways. It is not limited as to quantity, the only limitations being as to its use and value. The homestead dwelling house may also be used as a place of business by the family. *Estate of Delaney.*

2. *Tests of Homestead.*—The homestead and the tests by which it is ascertained are the same whether the question arises between a husband and wife, or one of them and a vendee, a mortgagee, a creditor, or the heirs of the deceased husband or wife. *Ib.*

3. *Value of homestead.*—If the homestead land increases in value after the filing of the declaration, so as to be worth more than five thousand dollars, the same will be decreased in quantity *pro tanto*. *Ib.*

4. The declaration of homestead is not evidence of the value of the homestead, even if it states the value; and if the declaration describes a tract of land worth more than five thousand dollars, the actual homestead will be enough of the tract described, including the dwelling house, to come within said value. *Ib.*

5. *Setting off homestead to surviving wife.*—The surviving wife inherits the actual homestead, that is, the dwelling house and sufficient land to be worth five thousand dollars. This value is that which the land bore at the time of the husband's death, and not what it bore at the time the declaration was filed, or at any previous time. *Ib.*

6. When the surviving wife petitions to have the homestead set off to her, she must show to the probate court what was the homestead at the time of the husband's death, and what was its value at that time, and the court should restrict the quantity of land set off to her to an amount worth five thousand dollars, or less, regardless of the quantity described in the declaration of homestead. *Ib.*

7. In such proceeding, it is not sufficient for the wife to prove that at the time the declaration was filed, several years before the husband's death, the homestead described in the declaration was worth less than five thousand dollars. *Ib.*

INJUNCTION BOND.

1. An order made to the court, dissolving an injunction, without assigning the grounds on which the dissolution was granted, is, *prima facie*, an adjudication that the plaintiff was not entitled to the injunction, and sufficient to enable him to maintain an action on the injunction bond. *Fowler et al.* v. *Frisbee.*

2. *Parties plaintiff in suit on injunction bond.*—If several parties are severally in possession of and cultivating in separate parcels a tract of land, and are sued jointly in ejectment to recover possession of the whole tract, and an injunction is obtained restraining them jointly from taking off the crops, these parties cannot maintain a joint action for damages on the injunction bond, provided their damages are not joint. They can maintain a joint action for such damages only as are joint, such as attorney's fees. *Ib.*

3. *Action on injunction bond for several damages.*—The fact that the plaintiff brings a joint action against several persons as trespassers, and obtains an injunction against them jointly, does not estop him, in an action brought against him on the injunction bond, from showing that the damages were several, and from claiming that they cannot maintain a joint action for several damages. *Ib.*

INSTRUCTION.

1. *Estoppel.*—On the trial of an action for the alleged trespass of defendants on the plaintiff's mining claim, in which the title to the *locus in quo* constituted the main issue, the court gave the following instruction to the jury, viz: "If the jury believe from the evidence that plaintiff, * * * more than five years prior to the commencement of his suit, in good faith, and under a claim of right, entered into the possession of said disputed ground, and have continued in possession thereof, and expended labor thereon (with the knowledge of defendants, * * * they making no objection thereto), and that defendants have not forbidden plaintiff's possession so acquired, then the plaintiff is entitled to a verdict." *Held*, that this instruction, as an abstract proposition, fails to state the essential elements of an estoppel *in pais*, and was improperly given. *Maine Boys' T. Co.* v. *Boston T. Co.*

2. *Possession of mining claim.*—In such case, where it appeared that the boundary line between the plaintiff's and defendant's mining claims had been in dispute for several years—the *locus in quo* being embraced between the adverse lines claimed by the parties respectively—the court

* From Sumner Whitney, Esq., Law Publisher, San Francisco. To appear in 37 California Reports.

refused the defendant's request to give to the jury the following instruction, to wit: "Where two mining companies take up adjoining claims, and the one last taken up overlaps the other, and neither company is working that portion of the claim which overlaps the other, but are working in different portions of their respective claims, the fact that the locators of the last claim located have been in possession of their claim for five years, does not divest the owners of the first claim of the right to their claim to the extent of the original boundaries, and such a possession by the locators of the last claim located is not adverse to the possession of those who located the first claim." *Held*, that the instruction correctly declared the law, and, in view of the fact that plaintiff's said instruction had been given, the court erred in refusing it. *Ib.*

JUDGMENT.

1. *Collateral attack of judgment for want of jurisdiction of the person of defendant.* — On a collateral attack of a judgment rendered by a court of record for want of jurisdiction of the person of the defendant: *Held*, first, that in ascertaining whether a want of jurisdiction appears, the whole record, which consists exclusively of the judgment roll, must be consulted; and, second, that in case of service of summons by publication, neither the affidavit nor the order for its publication form a part of the judgment roll. *Quincy* v. *Porter*.

2. Where, in an action brought in the district court by Q. against Joseph S. Ruckle, the return made by the sheriff of service of the summons showed only that *George S. Ruckle* had been served, while the judgment recited that *Joseph S. Ruckle* had been duly served with process, etc.; *Held*, that said recital in the judgment is not contradicted or overcome by said return of the sheriff, and that such judgment is not liable to a collateral attack for want of jurisdiction of the person of the defendant. *Ib.*

3. *Affidavit of publication of summons.* — Where the affidavit of the publication of a summons, made by one who therein styles himself "the proprietor" of the newspaper in which the publication was made, instead of "the printer," as required by the practice act: *Held*, that the terms "printer" and "proprietor" are, in the sense of the statute, synonymous. *Ib.*

JURY.

1. *Impaneling in a criminal case.* — Twelve names must be drawn from the box by the clerk, and the defendant must be allowed to examine the whole twelve before exercising his right of peremptory challenge as to any; and those not challenged or excused must then be sworn; after which as many more names as will make up the deficiency must be drawn, when the same process must be repeated until the jury is completed. (SANDERSON, J., and SPRAGUE, J., dissenting.) *People* v. *Scoggins*.

2. If a party omit to challege a juror peremptorily until after he has been sworn, he may be permitted to do so, for good cause shown, at any time before the jury is completed, but not thereafter. *Ib.*

3. It is error for the court to direct the clerk to draw but one name at a time, and require the parties to examine him for cause, and interpose, if at all, a peremptory challege before another name is drawn, and then direct him to be sworn to try the case. *Ib.*

MECHANIC'S LIEN ACT OF 1862.

1. *Written contracts under it.* — It appeared at the trial of an action by W. against H. to foreclose a mechanic's lien under the act concerning the liens of mechanics and others (Stats. 1862, p. 381), that H. entered into a contract with W., by which W. agreed to build upon the lot of H. a barn, "agreeable to the drafts, plan, and explanation hereto annexed, marked 'A,'" and H. agreed to pay for the same three hundred and twenty dollars, "upon the completion of said barn, as per specifications;" that, in fact, no draft, plan or specifications were attached to the contract, but an unsigned paper was produced, and testimony received, under the objection of H., tending to prove that it contained the plans and specifications alluded to in the contract. *Held*, first, that "the specifications" were an essential part of the contract; second, that the reference made in the contract to "the specifications" being false, cannot be helped out by oral evidence; and third, that without "the specifications" there was not such "a contract in writing, subscribed by the party to be charged thereby," as is required by the second section of said act to entitle the contractor to acquire the lien therein provided for. *Worden* v. *Hammond*.

2. *To what lien the interest attaches.* — Said act provides only for the acquisition by the contractor of a lien on the interest of the employer in the property sought to be charged, whether that be a fee simple interest or less. *Ib.*

3. T. was the owner of a lot of land, of which H. was in possession, under a contract of sale from T.; W. erected a building on the lot, under a contract made by him with H., and against T. and H. recovered judgment enforcing a lien for the contract price on the interests of both T. and H. in the land. *Held*, that W.'s lien did not affect the interest of T., and that T. was improperly made a party of the action. *Ib.*

MORTGAGE.

1. *Tender of sum due on mortgage.* — The question whether a tender by a subsequent mortgagee of the amount due on a prior mortgage, if made after the law day of the mortgage, or after judgment foreclosing the mortgage, discharges the lien of the mortgage or judgment, without keeping the tender good, discussed, but not decided. *Ketchum* v. *Crippen*.

2. *Dismissal of bill for want of equity.* — A subsequent mortgagee, who has been made a party to an action foreclosing a prior mortgage, cannot maintain a separate action to enjoin a sale under the judgment, and to be subrogated to the rights of the plaintiff, on the ground of a tender of the amount due on the judgment; his remedy is by motion in the action foreclosing the mortgage. *Ib.*

3. *Remedy for relief in equity.* — Where a party to an equitable action has a plain and speedy remedy by motion in the action, he cannot maintain a separate suit in equity to obtain the desired relief. *Ib.*

4. *Power of court to control its judgments.* — In a suit foreclosing a mortgage, the court has full power, on motion made by a subsequent mortgagee who is a party, to subrogate him to the rights of the judgment creditor, or to enter a discharge of the lien of the judgment, or to prevent a sale, or to enter a satisfaction of the judgment, upon a proper showing being made. *Ib.*

NEW TRIAL.

1. *Conflict of evidence.* — This court, on review of the proper motion made in the court below and there denied, will order a new trial where the evidence given at the former trial was, without substantial conflict, opposed to the verdict. *Maine Boys' T. Co.* v. *Boston T. Co.*

2. *Notice of motion for new trial.* — The reasons for which a motion for a new trial will be made may be stated generally in the notice that such motion will be made. *Butterfield* v. *C. P. R. R. Co.*

3. *Statement for new trial.* — The judgment roll need not be inserted in a statement on motion for a new trial. *Ib.*

4. A statement on motion for a new trial must contain a specification of the particular errors upon which the party moving for a new trial will rely; and if one of the grounds is that the evidence is insufficient to justify the verdict, it must specify the particulars in which the evidence is insufficient, or it will be disregarded by the court. *Ib.*

5. An assignment of errors appended to the end of a transcript, but not included in the statement on motion for a new trial, is not a specification of the particular errors upon which the party will rely, even if sufficient in form as such specification. The specification must be in the statement itself. *Ib.*

6. *Specification of errors in statement.* — An assignment of errors at common law, even if included in a statement on motion for a new trial, is not such a specification of the errors upon which a party will rely as is required by our practice act. *Ib.*

7. *Conflict of evidence.* — On appeal from an order denying a new trial, this court will not in any case disturb the judgment because not supported by the evidence where there was a substantial conflict in the evidence. *Morgan* v. *Higgins.*

PAYMENT OF DEBT.

1. *By one not legally responsible.* — The payment of a debt by a person not legally responsible for it is a satisfaction of the debt, if the money is accepted for that purpose. *Martin* v. *Quinn.*

2. *Action to recover overpayment made by sheriff to judgment creditor on sale of judgment debtor's property.* — In 1861 Q. recovered a money judgment in justice's court against K. and C., from which, in 1862, K. and C. appealed to the county court, and procured M. and S. as sureties to execute an undertaking in the sum of five hundred dollars, in the usual form on appeal, to stay execution. The undertaking was not executed by K. and C. Thereafter judgment was rendered by the county court in said action against K. and C. for a sum greater than five hundred dollars. Thereupon Q. demanded of M. and S. said five hundred dollars expressed in their undertaking, to be applied in satisfaction of the last-named judgment, which they paid. Q., however, failed to enter satisfaction of said judgment *pro tanto*, but on an execution issued thereon, collected, under a sheriff's sale of K. and C.'s property, the whole amount of his judgment recovered in the county court. K. and C. then assigned their demand against Q. for the money received by him in excess of the unpaid balance due on his judgment after deducting said five hundred dollars, to M. and S., who brought action therefor, setting up said facts, and recovered judgment. The only defense was by way of demurrer to the complaint, which was overruled. *Held*, that said last named judgment was properly rendered. *Ib.*

PRACTICE.

1. *Defective complaint.* — If a complaint improperly unites two causes of action, or is ambiguous and uncertain, the defect must be taken advantage of by demurrer, or it is waived. *Lawrence* v. *Montgomery.*

2. *Party plaintiff in action for deceit.* — An action for deceit in the sale of land to which the grantor had no title, should be brought by all the grantees jointly, unless there has been a conveyance of the cause of action to the plaintiff. A conveyance by one of the grantees to the others, of his interest in the *land*, does not assign the cause of action for deceit, so as to enable the assignees to sue for the deceit in their names. *Ib.*

3. *Action for deceit.* — An action for deceit is a personal action founded on fraud, and not upon any covenant in the deed running with the land. *Ib.*

4. *Personal covenant in deed.* — A covenant in a deed, whether express or implied by law, that the grantor has not sold or incumbered the land, is a personal covenant, and does not run with the land. *Ib.*

5. *Plaintiffs in suit upon covenants in a deed.* — All the grantees should join as plaintiffs in an action upon either a direct or implied covenant in a deed that the grantor has not sold or incumbered the land, or that he is seized of and has a right to convey the same. A deed of the *land* by one of the grantees to another does not convey to him the cause of action upon such covenant. *Ib.*

6. *Defective pleading.* — Although the allegations of a pleading are defective, yet, if there is not an entire want of allegations constituting a cause of action, and no demurrer is filed, or objection made in the court below, the judgment will not be disturbed. *Lee* v. *Figg.*

7. *Conveyance to defraud creditors.* — A conveyance made by a debtor, *without consideration*, for the purpose of defrauding his creditors, can be set aside by the creditors on the ground of fraud, even if the grantee was ignorant of the fraudulent purpose for which it was given. *Ib.*

8. *Attack on judgment by confession.* — A judgment for money, by confession, upon a statement which does not sufficiently state the facts out of which the indebtedness arose, nor that the amount confessed is justly due, is not a nullity on its face. Such judgment cannot be collaterally attacked. It can only be called in question by the creditors of the defendant on the ground of fraud, and in a direct proceeding for that purpose. *Ib.*

9. *Admissions in pleading.* — If the complaint avers a judgment, and the issuing of an execution thereon, and a sale thereunder of land, and the answer denies the validity of the judgment, and avers that it was void for want of jurisdiction, and denies that the plaintiff acquired any title by the pretended sale by the sheriff, the execution and sale thereunder are not sufficiently denied to require the execution to be put in evidence. *Ib.*

10. *Defendants whose names are unknown.* — Where parties whose names are unknown are sued by fictitious names, the record should show these facts. *Ford* v. *Doyle.*

11. *Judgment against a person not a party.* — When the record does not disclose any service of summons, but a person not named as defendant answers, and judgment is afterward rendered against another person not named in the complaint and who does not appear, the judgment is void. *Ib.*

12. *Execution of writ of possession against strangers to the record.* — In an action against —— Doyle, John Doe, and Richard Roe, to recover land, wherein there was no service of summons, but *John* Doyle answered, and a judgment was subsequently entered against *James* Doyle. *Held*, that the district court properly refused to direct the sheriff to execute the writ of possession, by turning out James Doyle, Jr., James Doyle, Sr., and Catharine Doyle, who were in possession at the time of the commencement of the action, but who had not been made parties to the suit. *Ib.*

13. *Service of writ of possession.* — A person in possession of the demanded premises at the time of commencement of the action to recover possession cannot be removed under a writ issued on a judgment in the case, unless he is made defendant, and judgment is rendered against him after the court acquires jurisdiction of his person. *Ib.*

14. *Review of orders entered by consent.* — Although the supreme court will not review judgments and orders entered by consent, yet, if it appear by a fair construction of a stipulation consenting to an order denying a new trial, that the stipulation was only intended to facilitate an appeal, and not as an abandonment of the right to contest the correctness of the order, this court will review the order. *Mecham* v. *McKay.*

15. *Admission of pleading in evidence.* — If an answer has been superseded by an amended answer, the answer thus superseded is not admissible in evidence as an admission on the trial. *Ib.*

16. *What pleadings party bound by.* — Although a party is bound by the admissions contained in his pleadings, yet it is only the admissions in the pleadings upon which he goes to trial. *Ib.*

17. *Possession of tenant that of landlord.* — If A enters under a lease from and as a tenant of B, and C then recovers a judgment of eviction against A, after which A attorns to and pays rent to C, from this last period the possession of A becomes that of C. *Ib.*

PROBATE JUDGE.

1. *Interested in an estate.* — A probate judge who has a power of attorney from any of the persons claiming to be heirs of the deceased, authorizing him to receive for them any money or property to which they might be entitled from the estate, and also letters offering him a percentage upon said proceeds coming to said alleged heir, is interested in the estate, and cannot act as judge in any

matter pertaining to such estate, except to arrange the calendar or change the venue. *Estate of White.*

2. *Change of venue in probate court.* — When the probate judge is interested in an estate, or in money coming to the heirs therefrom, he has no jurisdiction to act as judge therein, and should grant a change of venue. It is no excuse for refusing a change of venue in such case to say that the judge decided correctly upon the matter before him after refusing such change of venue. *Ib.*

SALARY.

1. *Of an office.* — The salary of an office is incident to its title, and not to its occupation, and one elected to an office who has qualified and is ready to perform its duties, is entitled to its salary, even if it is occupied by an intruder. *Carrol* v. *Liebenthaler.*

2. *Payment of salary of office.* — A salary of an office which is fixed at a monthly rate becomes due and payable monthly. *Ib.*

3. The occupation of an office by an intruder does not have the effect of deferring the time of payment of the salary until the intruder is ousted. *Ib.*

4. *Claim against county.* — The board of supervisors of a county have no authority to allow an unaudited claim against a county, except it be done within one year after the claim shall accrue and become due. *Ib.*

STAMPS.

The waiver, by an indorser of a promissory note, of presentation, demand, notice of non-payment, and protest, written upon the back of the note, need not be stamped in order to be valid. *Pacific Bank* v. *De Po.*

TAXATION.

1. *Possessory claim to public land taxable.* — A possession of and claim to public land of the United States is property, and as such is taxable to the claimant, without violating the act of congress by which this state was admitted into the Union. *People* v. *Black Diamond Mining Co.*

2. *Revenue act.* — So much of the general revenue act as exempts possessory claims and improvements upon the public lands from taxation is unconstitutional and void. (*People* v. *McCreery*, 34 Cal. 433, and *People* v. *Gerke*, 35 Cal. 677, affirmed.) *Ib.*

TRUST DEED.

1. *Absolute deed as security for debt.* — A deed or an assignment of an interest in land, absolute on its face, may be shown by parol testimony to have been intended as a security for the payment of a debt. *Raynor* v. *Lyons.*

2. *Money held in trust.* — If A makes an absolute deed of his land to B, with the understanding between him and B and C that B is to sell the land and use the proceeds to pay the debt of A to C, C can compel B to account to him and pay over the proceeds. *Ib.*

WAGERS.

1. At common law, wagers made in respect to matters not affecting feelings, interest or character of third persons, or the public peace or good morals, or public policy, are legal contracts, which may be enforced by action. *Johnston* v. *Russell.*

2. *Wagers upon elections.* — Wagers upon the result of elections are against public policy, and are therefore void; and, hence, money put up in the hands of a stakeholder may be recovered, if the wager be repudiated and a return of the money be demanded at any time before the election has taken place and the result has become generally known, but not thereafter. *Ib.*

3. J. made a wager with F. that Seymour would receive a majority of the votes cast in this state at the presidential election in 1868, and F. made a wager with J. that Grant would receive a majority of said votes. The money was put in the hands of R. as stakeholder. After the election had taken place and the result had become known, J., having lost his wager, notified R. that he repudiated the wager, and demanded his money, but R., notwithstanding, paid the money to F., according to the terms of the wager. In an action by J. against R. to recover his stake, it was held that a recovery could not be had. *Ib.*

NEW YORK STATE DECISIONS.*

CONTRACT.

1. *Evidence: trial: witness.* — Under a contract for the sale of wood subject to the measurement and inspection of a third person, the buyer is entitled to actual measurement by such person, or something equivalent thereto. Supreme Court, General Term, 7th District, 1869. *McAndrews* v. *Lantee.*

2. In an action on such contract, the inspector having testified that he measured the dimensions of height and width by his eye, as was his custom; *Held*, that it was proper to charge the jury that they were to determine his capacity to measure correctly in that way, and that the plaintiff would not be bound by any estimate of the inspector, unless they were of opinion that his eye was, on a question of measurement, as reliable as a measuring rod. *Ib.*

3. On the second trial on a contract, the defendant and his witness testified to the terms of the contract, and stated that it was on a certain condition, and on cross-examination each stated that he had testified to that condition, on the former trial. *Held*, that the condition being material to the merits of the controversy, it was proper to permit the plaintiff to prove that on the former trial defendant and his witness, in testifying to the contract, omitted to state such a condition. *Ib.*

4. Such evidence is admissible, as in the nature of an admission as against the party, and of impeaching evidence against the witness. *Ib.*

COSTS.

1. *Satisfaction of part of plaintiff's claim: offer to allow judgment: recovery.* — After defendant had made an offer to allow plaintiff to take judgment for a sum less than sued for, which offer plaintiff did not accept, he answered, setting up a counter-claim, and plaintiff, on motion under section 244 of the Code of Procedure, compelled satisfaction of the balance of his claim, as admitted by the answer; and on the trial as to the counter-claim, defendant had a verdict. *Held*, that upon the entry of judgment, plaintiff was not entitled to costs after the time of the answer. The case of *Hoe* v. *Sanborn* (24 How. Pr., 26 and 36 N. Y., 93), explained. Supreme Court, General Term, 5th District, 1868. *Scoville* v. *Kent.*

2. *Actions of which justices of the peace have jurisdiction: allowance.* — The right of a plaintiff to costs of course, upon succeeding in an action in a court of record for recovery of money, is limited to cases where he recovers fifty dollars or more, notwithstanding the amount claimed in the complaint may have been too great to allow a court of a justice of the peace to take cognizance of the action. General Term, Supreme Court, 2d District, 1868. *Pinder* v. *Stoothoff.*

3. Jurisdiction of the action, and not of the claim of damages made in it, determines the plaintiff's right to costs, if the recovery in the court of record be for less than fifty dollars. *Ib.*

4. Where the plaintiff recovers a verdict, however small, the defendant is not entitled to an allowance, on recovering costs under the statute, because the verdict was for less than fifty dollars. The recovery of judgment entitling the defendant to the allowance of a commission on the plaintiff's claim, is a recovery on the issue tried, not a recovery of costs, merely, because of plaintiff's failure to recover enough to carry costs. *Ib.*

DIVORCE.

Foreign divorce: service of process: jurisdiction. — It is not essential to the validity of a foreign divorce, as against

* From Austin Abbott, Esq., to appear in 8 Abb.'s Practice Reports. (N. S.)

the plaintiff who obtained it, that both parties should have resided in the state where it was granted, if process was personally served upon the defendant without the state. Supreme Court, Sixth District, Sp. T., 1870. *Holmes* v. *Holmes.*

MARRIAGE.

1. *What testimony is admissible: competency of party as to transactions with deceased person against heirs, etc.: effect of verdict of jury on trial of special issues.* — A valid marriage is established by proof of an actual contract *per verba de præsenti* between persons of opposite sexes capable of contracting, to take each other from thenceforth for husband and wife, especially where the contract is followed by cohabitation. No solemnization, or other formality, apart from the agreement itself, is necessary, unless agreed on. Supreme Court, Sp. T. 2d Dis. 1869. *Van Tuyl* v. *Van Tuyl.*

2. Nor is it essential that the contract should be made before a witness. Under the code, the wife is a competent witness to prove the contract, in an action for partition. *Ib.*

3. In an action for the partition of real estate, in which the legitimacy of the children of such marriage is put in issue by other heirs of the husband, the widow, even though she be a party to the suit, is a competent witness on behalf of such children, to prove the contract and declarations and transactions of the deceased husband. *Ib.*

4. The fair construction of section 399 of the code is, that when adverse rights by succession are involved, one litigant shall not testify to a transaction with the deceased predecessor in title, invalidating or impairing the right or title of the other. *Ib.*

5. The declarations of the husband that he was not a married man, made in promiscuous conversations having no reference to his relations to his wife, are inadmissible as evidence. *Ib.*

6. The verdict of a jury upon the trial of special issues should not be disturbed, unless it appear that a fair trial has not been had, or that errors have been committed by the court or jury, affording a reasonable doubt as to the justice of the result. *Ib.*

PRACTICE.

1. *Appellate order: contempt, and proceedings to punish as for.* — An order punishing a party to an action as for contempt, by imposing a fine for the indemnity of the adverse party injured by his refusal to obey the order of the court, and by imprisonment to compel obedience, is appealable to the court of appeals. Court of appeals, June term, 1869. *Sudlow* v. *Knox.*

2. Such an order is not a proceeding in the action, within the meaning of subdivision two of section eleven of the code of procedure, which allows appeals from "an order affecting a substantial right made in an action, when such order in effect determines the action, and prevents a judgment from which an appeal might be taken," etc., but is "a final order affecting a substantial right, made in a special proceeding," within the meaning of subdivision three. *Ib.*

3. Upon appeal to the court of appeals from such an order, it will not be reversed merely because it does not affirmatively appear from the appeal papers that proof of the misconduct was made by affidavit, and due notice given.

4. It is not a contempt for a party, required to produce his books before a referee, to refuse to leave the books with the referee, if the order under which the referee acts only requires the production of the books. *Ib.*

5. Whether it is competent for the court to order the books of a party to be left with the referee for the purposes of an accounting — *query?* *Ib.*

6. It is a contempt for such party to refuse to obey the referee's order that he allows a witness, while testifying, to examine the books, to enable the adverse party to question him thereon. *Ib.*

7. In proceedings as for contempts to enforce civil remedies, under 2 Rev. Stat., 534-538, section 21 of which authorizes the court to impose a fine to indemnify a party for actual loss and injury, and to satisfy his costs and expenses, the costs and expenses must be ascertained by the rate of compensation fixed by statute for the services performed. *Ib.*

8. The amount of the fine to indemnify for the other loss and injury must be fixed upon proof of the damages sustained, according to the rules of law which would apply in an action for such damages. *Ib.*

9. The court cannot, for either purpose, summarily fix a gross sum in its discretion. *Ib.*

REFORMATION OF CONTRACT.

1. *Mistake: relief consistent with the case: redemption.* — To make a case for the reformation of a written contract, it must be shown that the written instrument does not express the real contract. N. Y. Superior Court, Special Term, 1869. *Boardman* v. *Davidson.*

2. This must be shown by clear and entirely satisfactory proof, and the relief will not be granted whenever the evidence is loose, equivocal or contradictory, or is in its texture open to doubt or to opposing presumptions. *Ib.*

3. As an element in the proof to establish that the written instrument does not express the true contract, it is necessary to show that by mutual mistake, accident, or fraud on the part of the defendant, the writings have failed to express the true agreement; if no such element is shown to exist, the conclusion is irresistible that whatever may have been the original propositions made and accepted, they were altered before the final completion of the contract, and that the agreement concluded on is that which is expressed in the written instrument. *Ib.*

4. The rule that where the complaint is answered, the court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issue, does not justify the court in granting relief upon a contract set up in the answer, which is materially different from that alleged in the complaint, unless the plaintiff accepts the contract as alleged in the answer, so as to waive his own version of it. *Ib.*

5. The rule laid down in the cases that where a plaintiff files a bill to compel a specific performance, and the agreement as alleged is admitted by the answer, with some modifications or variations, or is substantially proved, though the plaintiff has failed to establish the precise terms by him alleged, the court will look into the answer and proofs, and establish the terms of the agreement — is not to be extended, so as to allow a plaintiff, who fails to establish the case as made by his pleading, to have relief according to the allegations of the answer, without adopting them at the hearing as constituting his case. *Ib.*

6. After the forfeiture of a lease for non-payment of rent, and eviction of lessee, the landlord granted a new lease on payment of the arrears of rent, and, simultaneously with the execution of the new lease, the old lessee and the new lessee made an agreement by which both were interested therein, the nature of the old lessee's interest being the matter of dispute in this action. The plaintiff, the former lessee, alleged in his complaint that defendant, the new lessee, agreed with him to hold the lease as security for the advances; but by misrepresentations procured him to sign an instrument which provided that defendant should convey to him an interest in the lease, on payment of certain sums. *Held*, 1. That this was not the case of an admitted agreement, with a dispute only as to certain of its terms, but the two claims were totally inconsistent, and plaintiff must waive his claim to have the instrument reformed, if he would recover on defendant's version of the transaction. 2. That as between the lessor and the new defendant, the payment of arrears could not be deemed a redemption of the lease, because, upon the evidence, it appeared that it was not so intended by either of them; and that, as to the plaintiff, it could not be regarded as a redemption, in the absence of fraud on the part of the lessor. *Ib.*

ADVICE TO YOUNG LAWYERS.

The following is from the address delivered by Prof. H. A. Morrill to the graduates of the Ohio Law School:

Having reached the conclusion of our course, before our final separation it would seem proper for me to address a few words of a general character to the class, and more particularly to those of it whose steps along the devious pathway of the law, hitherto taken under the guidance of others, are now to be pursued singly and alone. Thus, perchance, a word may fall which shall add to the courage and brighten the hopes of such, and give to them a higher appreciation of the dignity and importance of the life-work upon which they are about to enter.

It seems to me that one of the earliest lessons for you to learn is, that our profession, generally speaking, is not a lucrative one, and that your highest reward is not likely to consist in the attainment of wealth; at least, it should not be your first and highest aim. If you have no other aim than this, it may prove better for you to have remained on the farm, in the workshop, or at the counting-room. And I count it one of your chief dangers that you enter upon your profession at the time of ebbing tide in the course of private and public works, and of unwonted adulation over every marked example of success in pecuniary acquisition and gain. Every age and every nation has its prominent characteristics.

Rome, as I have already intimated, in her best days, rendered her highest homage to law as a science she well-nigh defiled. The whole commonwealth bowed in blind adoration to its behests, as if founded in abstract truth, while its chief magnates applied its precepts with an iron hand and an inflexible purpose.

Greece, on the other hand, when at the acme of her power, worshipped at the shrine of beauty. Her golden age was the fruitage period of whatever man delights in as beautiful in art and architecture. It — the love of the beautiful — entered into and permeated her whole social and political organism, and we of to-day build upon and fashion and chisel after the exquisite models she has handed down to us, vainly essaying to compass the excellence she achieved therein. England and our fathers have reared on these foundations a superstructure tempered by the more humane and juster principles of a later age. Even the models of ancient art and architecture have by them been utilized to meet the wants and taste of a more practical era, and happy would it be for us did we walk more closely in their footsteps.

But, if I mistake not, the predominant motive power in the American mind, of this last half of the nineteenth century, is neither the love of abstract truth, as supposed to be embraced in any one or any number of sciences, nor devotion to any representative form of beauty, nor any high conception of justice or moral excellence, but rather a supreme devotion to, and a hot relentless pursuit after, those things which tend to increase one's worldly estate. And no where, I apprehend, is this tendency exerting a more baneful influence than among our own profession. I fear from this the profession stands in danger of becoming a business of "mere paltry traffic and barter," to a daily want of appliances, and maneuver to defeat rather than subserve justice, to encourage public and private rapacity and extortion rather than protect rights and promote honesty and fair dealing.

I am sometimes constrained to fear that the American lawyer never before stood in such peril of becoming what Cicero, in the days of Roman decline, was provoked to style the degenerate representatives of the profession in that day, to wit: "Sharp and cunning pettifoggers, retailers of law suits, canterers upon forms, and cavilers upon words." Certainly the influences calculated to seduce the lawyer from the path of rectitude, and to lower the standard of intellectual attainment, were never stronger with us than now. Let me say to you, in all earnestness, guard well against every temptation to sacrifice your manhood or your integrity, or to desert that high intellectual seal of thought and study to which the law introduces you, for the sake of slaking that greedy thirst for gain which is eating up the intellect of the American mind, and consuming the virtue of the American heart.

Another danger which you will encounter is the allurements which politics holds out to the young lawyer. Very justly the American lawyer wields a large influence in the domain of politics. His habits of thought, his fields of professional investigation, his relations with and extensive knowledge of men, eminently qualify him for its duties. And when the lawyer, at middle age, with habits firmly fixed, and a mind richly stored with useful information, accepts political honors which have sought him by reason of his fitness to become their recipient, and performs the duties connected therewith faithfully, he certainly subserves a high and noble purpose.

But that mania for office and political preferment which seizes so many novices in the profession, breaking up their habits of study, casting them upon the fickle waves of popular applauses and contumely, is a fruitful source of professional failure, and blasts and utterly destroys much of the best talent which has been consecrated to this high calling. Guard well, then, against this danger also. Cleave closely to this main lifework of your choice in these early years; and thus, should your country call you to its service at mature age, you will rise to a higher place of honor to yourselves, and usefulness to the commonwealth by reason of your early devotion to the profession.

In closing Mr. Morrel warned against skepticism and unbelief, and gave much good advice as to general behavior in practice and improvement.

BOOK NOTICES.

Reports of Cases Determined in the Supreme Court of the Territory of Kansas: together with an important case determined in the district court of the first judicial district of said territory before one of the judges of the supreme court, and several important cases determined in the circuit court of the United States for the district of Kansas, with preface, table of cases, notes and index. By James McCahon, attorney at law. Chicago: Callaghan & Cockroft. 1870.

In 1860 the Hon. Thomas Weans, since deceased, undertook the publication of the decisions of the supreme court of the territory of Kansas, and printed some forty-eight pages of the work, when it was abandoned. The object of the present book is to rescue "the decisions contained in it from oblivion," and to put "them in shape to be of some use to the profession." Mr. McCahon and the publishers, together, have accomplished this object in a very acceptable manner. We have seldom seen a report so admirably gotten up, so far as relates to its mechanical execution, while the labor of the reporter has been done in a very creditable manner. The index is especially worthy of mention as a model of completeness. Although purporting to be a report of the decisions of the territorial courts, a considerable portion of the work is taken up with decisions of the United States court rendered since Kansas was admitted as a state. We shall have occasion hereafter to give an abstract of those cases of general importance, of which the book contains several.

Bench and Bar.

The April number of this enterprising quarterly contains Chancellor Kent's Introductory Lecture before the Columbia College Law School; a very well written and sensible article on The Usury Law; several Decisions of the United States supreme court; Digest of recent Decisions; Book Reviews and Miscellany. The *Bench and Bar* is published by Messrs. Callaghan & Cockroft, law publishers of Chicago, and is furnished free of charge to members of the profession sending their names. It is edited with decided ability, and is a very entertaining and valuable periodical.

MURDER AND INSANITY.

MESSAGE OF GOV. ALCORN TO THE LEGISLATURE OF MISSISSIPPI.

The following special message was communicated by Gov. Alcorn to the Mississippi house of representatives on Thursday week, and by that body referred to the committee on the judiciary:

To the Senate and House of Representatives:

GENTLEMEN—Murder is made to rest in law on one group of facts; insanity is made to rest in law on another group of facts. Our jurisprudence makes the inquiry into each of these two sets of cases distinct in character as it is in kind. Many failures of justice can be referred properly to a blending of those different classes of investigation into one, in certain trials for murder, manslaughter, or assault with intent to kill. I propose, therefore, to assert by specific legislation the principle of the distinction between the two, with a view to the absolute restriction of inquiries into indictments for taking or attempting to take human life within the purview of the questions of fact which are made in law pertinent to trials for that class of crimes.

In the sixteenth section of article six, the constitution gives the chancery court "full jurisdiction" "in all cases of idiocy, lunacy, and persons *non compos mentis*." And the words "full jurisdiction" make the jurisdiction thus conveyed exclusive. I propose, therefore, in order to separate questions of insanity absolutely from questions of taking human life, that your honorable bodies alter our criminal law substantially as follows:

That in charges of murder, manslaughter, or assault with intent to kill, if the question of insanity shall be raised before the committing magistrate, that magistrate, if he hold that the proof has shown a presumption of insanity, coupled with a presumption of murder, manslaughter, or assault with intent to kill, shall order the commitment of the accused to the county jail, or other place of safe-keeping, to await his examination before the chancery court of the county in which the crime shall have been alleged to have been done.

That the person thus made subject to commitment shall be held incompetent to make a bond; and, whether at the time of the trial before the committing magistrate, or at any time between that and his examination before the court of chancery, he shall not be withdrawn from the safe-keeping of the officers of the law, on bail.

That pending the hearing of the case in the court of chancery, the commitment of the magistrate, showing a presumption under which the accused must be held incapable of making an oath, that commitment shall be a sufficient answer to all proceedings on his behalf under the right of the writ of habeas corpus.

That it shall be the duty of the sheriff, into whose custody the accused shall have been committed, thus to immediately report the facts of the commitment to the district-attorney of the judicial district in which the commitment shall have been made; and that it shall be the duty of that district-attorney to bring the accused, with all the proof accessible and necessary, before the chancery court, as above defined, for a final hearing of the case.

That the court of chancery deciding the person brought thus before it under commitment as an insane person on the charge of murder, manslaughter, or assault with intent to kill, to be *not* insane, it shall order his return to the place in which he had been held by the sheriff, and the record of the finding of the chancery court, settling absolutely the plea of insanity in that case, the trial for murder, manslaughter, or assault with intent to kill, shall go forward to the exclusion of that plea.

That in all charges of murder, manslaughter or assault with intent to kill, brought before the circuit court, on findings of a grand jury in the county in which the crime shall be charged to have taken place, the plea of insanity shall be pleaded specially, and, when offered, shall have been sworn to by the attorney of the accused or some other reputable person, and shall not be admissible under the plea of not guilty.

That the issue having been joined on the plea of insanity, the court shall order the accused to be transferred immediately to the court of chancery for the county in which the case has been brought for trial, and the chancery court, if then sitting, shall proceed at once to an examination of that issue to the exclusion of all other business.

That in the event of said chancery court not being sitting at the time of the said reference from the circuit court, the sheriff shall hold the accused under a commitment which the circuit court shall make without the option of bail; and to all proceedings in that case under the right of the writ of habeas corpus, it shall be held a sufficient answer, pending the decision of the chancery court, that the accused is held in restraint for murder, manslaughter or assault with intent to kill under a commitment from the circuit court on the oath of his attorney, or some other reputable person, in affirmation of his insanity.

That in all charges of murder, manslaughter, or assault with intent to kill, wherein the plea of insanity shall have been interposed before either the committing magistrate or the circuit court, it shall be the duty of the prosecuting attorney above described to follow the accused into the chancery court, there to maintain the issue on the part of the state.

That the chancery court deciding the person brought before it, as provided above, under a charge of murder, manslaughter, or assault with intent to kill, whether on the commitment of the committing magistrate or on a reference, as above provided, from the circuit court, to be insane, it shall order his duress in a ward or wards to be set apart for the restraint and safe keeping of the dangerous insane in the lunatic asylum.

That the public wrong of setting at large the dangerous insane shall make the commitment in all such cases by the court of chancery a sufficient answer to the writ of habeas corpus, nor shall any proof of restored reason make that answer insufficient until the said proof shall have shown a soundness of mind, undisturbed by any aberration, for periods graduated with a view to the gravity of the consequences contingently involved to the public by a premature release. In a case of assault, with intent to kill, a period of one year; in a case of manslaughter, a period of three years, and in a case of murder, a period of five years.

J. L. ALCORN.

Executive Office, April 28, 1870.

LEGAL NEWS.

Thirty-six of the graduating class of Princeton College propose to enter upon the study of the law.

The president has nominated John S. Nixon, Esq., judge of the United States district court for New Jersey.

Chief-Justice Cole, of Iowa, favors woman's suffrage, looking upon it as the grand preventive for crime, lawlessness and intemperance.

An eminent lawyer of Pennsylvania, name not published, has given Princeton college $1,000 toward the endowment of the professorship of modern languages.

A colored alderman in Wilmington, N. C., who was called "Anthony" by the counsel in a law case in which he was a witness, refused to reply till he was addressed as Mr. Howe, and the court sustained him.

An Indianapolis lawyer writes to a gentleman in Springfield that the divorce business is improving since the recent decision of the United States supreme court on the legality of Indiana divorces.

Joshua F. Bullitt, a distinguished jurist of Kentucky, who was exiled during the war on account of his connection with the Sons of Liberty, was stricken with palsy at his home in Danville last week.

It is said that Mr. Hoar will soon retire from the attorney-generalship of the United States, and be succeeded by Hon. Edwards Pierrepont, now United States district attorney of the New York district.

The Sheffield (England) *Telegraph* has been sued for libel by the Earl of Sefton, for saying that the Prince of Wales would soon appear as a witness in the divorce case between the earl and his countess.

District Attorney Garvin, of New York, has issued forty executions against the bondsmen of alleged criminals who have failed to appear for trial at the courts of general and special sessions.

The supreme court of Alabama decides that the "statute of limitations" did not run during the war. All notes, bonds, bills, checks, drafts and other written evidences of indebtedness, given since or during 1860, thus become valid again.

A New York dispatch to a Boston paper states that on the conclusion of the McFarland trial, the friends of Mr. Runkle (Mrs. Calhoun's husband), himself a lawyer, will make an attempt to have Charles Spencer expelled from the New York bar.

The grand jury in the criminal court of Washington, D. C., have found two true bills of indictment against the Baltimore and Ohio railroad, for maintaining nuisances in that city, by blocking up, obstructing and impeding certain streets.

In a suit by the Government, against the sureties of an official bond of one of its public officers, the United States supreme court lately decided that the testimony of the sureties themselves was admissible to establish their defense.

An Irish woman at Chittenango recently caused her husband's arrest, on the ground of his whipping her. The justice sentenced him to the penitentiary or a fine of ten dollars, when the wife immediately provided her own money and paid the fine.

The vote of the inmates of the National Soldiers' Home, in Montgomery county, Ohio, was decided to be illegal by Judge McMinney, on the ground that they were not citizens of the state. The republican candidate for a county office was thereby defeated.

Buffalo must be the El Dorado of the legal profession. Just think of it — they have got a ten-dollar lawsuit, in which the costs already are over $1,200; and the contesting litigants are just getting interested in the case.

A lady's will disposing of about $800,000 worth of property is contested in Philadelphia, it being contended that when the will was signed deceased was not in her right mind; as an evidence of which it is stated that she kept pistols in the house, and would daily engage in firing at a mark in the yard.

The attorney-general of California has rendered an opinion that until the law of the state is changed, or congress adopts some legislation in the matter, it is the duty of the county clerks to refuse to register negroes. He urges them to obey the state laws, pending the action of congress.

The *Woman's Advocate*, in combatting objections to female jurors, says that girls whose thoughts have never soared above the ribbon tying their tresses, or dived deeper than the rosette on their gaiters, are not likely to be chosen as arbiters of the fate of a criminal.

The United States supreme court has refused the petition of the Kansas Pacific railway for an injunction restraining the collection of state taxes on its road and property. Chief Justice Chase says, in his opinion, that the constitution contains no authority for the exemption from state taxation.

Welcome Howard has brought suit in the United States district court at Indianapolis, Ind., against thirty-six citizens of Lagrange county, who, he claims, maltreated and tarred and feathered him, Judge Lynch fashion, in December last. He claims ten thousand dollars damage.

The case of *Asher Levy* v. *Baltimore and Ohio Railroad Company*. An action to recover $30,000 damage for injuries sustained by the plaintiff through the breaking of a wheel of one of the company's cars while passing from Grafton, Va., to Cumberland, Md., as also for the loss of a wallet containing $7,700, has resulted in a verdict in favor of the defendants.

An English judge once addressed a criminal who had been sentenced to death for passing a forged bank note, in this wise: "I trust that through the merits of and mediation of our Blessed Redeemer, you may experience that mercy which, in due regard to the credit of the paper currency of the country, forbids you to hope for here."

Some time since the supreme court of this district made an order constituting the United States the plaintiff in the Farragut claims case, instead of Farragut and Porter, as heretofore. Recently the counsel for the government, by direction of the president and attorney-general, entered a motion to vacate the order, on the ground that the government could only become plaintiff in the case by its voluntary action.

The Arkadelphia (Ark.) *Tribune*, in announcing the return of Judge Searle to his home, says: "When such scribbling lepers as represent the Kuklux Democracy of this place, attempt to libel him, personally, and contempt his court, we shall ever be found in his support with the many others of his defenders, against these treasonable politicasters who are pandering to the tastes of their distempered associates."

John T. Nixon, recently appointed United States judge for the district of New Jersey, in place of R. S. Feld, resigned, was a member of the thirty-seventh congress. After graduating at Princeton college, of which institution he is at present a trustee, he entered upon the practice of law in 1845, and has been one of the leading practitioners in the federal courts. He is also well known as the compiler of Nixon's Digest of the laws of New Jersey.

The Hon. A. A. King, who died a few days ago in St. Louis, was sixty-nine years of age. He was born in Sullivan county, Tennessee; studied law, and was admitted to the bar on becoming of age. He removed to Missouri in 1830, and in 1834 was elected to the legislature of that state, and was returned for a second term two years later. In 1839 he was appointed a circuit judge, which position he held until 1848, when he was elected governor of the state, his term of office expiring in 1853. In 1862 he was again placed upon the bench, but was elected during the same year as representative from Missouri to the thirty-eighth congress, serving upon the judiciary committee.

Among the victims of the late disaster at Richmond was P. H. Aylett, Jr., Esq., one of the most eminent lawyers of the Richmond bar. Both as a speaker and writer he excelled, having written much for the Richmond *Examiner* during the existence of that paper, and when controlled by its founder, John M. Daniel, Esq. He was appointed United States attorney for the Eastern district of Virginia, and served during the four years of Mr. Buchanan's administration. During the war he was appointed assistant attorney-general for the Confederate States by Jefferson Davis, a position which he filled up to the surrender of General Lee. Since the war he has edited, with marked ability, the Richmond *Times*, and subsequently the *Enquirer*. He was a great grandson of Patrick Henry, the "forest-born Demosthenes" of revolutionary fame, whose name he bore, and much of whose rare eloquence he seemed to have inherited. In person he was tall and commanding, and in manner genial and affable. He was about forty-seven years of age, and leaves a family.

NEW YORK STATUTES AT LARGE.*

CHAP. 741.

AN ACT to amend the Code of Procedure.

PASSED May 6, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The fourth subdivision of the eleventh section of an act entitled "An act to simplify and abridge the practice, pleadings and proceedings of the courts of this state," passed April twelfth, eighteen hundred and forty-eight, is hereby amended so as to read as follows:

In an order affecting a substantial right, not involving any question of discretion arising upon any interlocutory proceeding, or upon any question of practice in the action, including an order to strike out an answer, or any part of an answer, or any pleading in an action, such appeals, whether now pending or hereafter to be brought, may be heard as a motion, and noticed for hearing for any regular motion day of the court.

§ 2. Subdivision third of section eleven of the said act is hereby amended by striking out the words, "But no appeal to the court of appeals shall be had or heard hereafter from any order or judgment in any proceeding under chapter three hundred and thirty-eight of the laws of one thousand eight hundred and fifty-eight."

§ 3. Subdivision thirteen of section sixty-four of said act is hereby amended so as to read as follows:

If the judgment be docketed with the county clerk, the execution shall be issued by him to the sheriff of the county, and have the same effect and be executed in the same manner as other executions and judgments of the county court, except as provided in section sixty-three.

§ 4. Section sixty-six of the said act is hereby amended so as to read as follows:

The district courts of the city of New York shall have such jurisdiction as is provided by special statutes; and proceedings, under article two of title ten of chapter eight of part three of the revised statutes, may be had before any justice of such courts, without regard to the district in which the premises are situated; and the affidavits used in such proceedings may be taken before any officer authorized by law to take affidavits. And the justices of the district courts of the city of New York are hereby respectively authorized to appoint a stenographer in their several courts, whose duty it shall be to take full stenographic notes of all proceedings in trials had therein; he shall hold his office during the pleasure of the justice of the court, and shall receive a salary of two thousand dollars per annum, out of the city treasury. The clerks of the said district courts shall collect, in all cases in which a trial is had, the sum of one dollar, in addition to the other fees authorized by law, and shall pay the same into the city treasury, in like manner with other fees collected by them.

§ 5. Sections eighty-eight and one hundred and one of said act are hereby severally amended, by striking out the words and figures "4. Or a married woman" from each section.

§ 6. Section one hundred and twenty-one of said act is hereby amended by adding at the end thereof as follows:

Where an intestate, not being an inhabitant of the state, shall die out of this state, not leaving assets therein, and there shall be pending in the supreme court, or in the court of appeals, an appeal brought by such intestate from a judgment against him, the court in which said appeal is pending may order the judgment appealed from affirmed, with costs, unless the attorney for the intestate on said appeal procure said action to be revived, within six months after notice to perfect such appeal, by the substitution of a representative of said intestate in said action.

§ 7. Section one hundred and twenty-eight of said act is hereby amended so as to read as follows:

The summons shall be subscribed by an attorney, and directed to the defendant, and shall require him to answer the complaint, and serve a copy of his answer on the person whose name is subscribed to the summons, at a place within the state, to be therein specified, in which there is a post-office, within twenty days after the service of the summons, exclusive of the day of service.

§ 8. Section one hundred and eighty-six of the said act is hereby amended by adding thereto as follows:

The defendant may give bail whenever arrested, at any hour of the day or night, and shall have reasonable opportunity to procure it, before being committed to prison.

§ 9. Section two hundred and twenty-six of said act is hereby amended so as to read as follows:

The application mentioned in the last section may be opposed by affidavits or other proofs, in addition to those on which the injunction was granted.

§ 10. Section two hundred and sixty-seven of said act is hereby amended so as to read as follows:

Upon the trial of a question of fact by the court, its decision shall be given in writing, and shall contain a statement of the facts found, and the conclusions of law separately; and upon a trial of an issue of law, the decision shall be made in the same manner, stating the conclusions of law. Such decision shall be filed with the clerk, within twenty days after the court, at which the trial took place. Judgment upon the decision shall be entered accordingly four days thereafter. If, upon motion, by either party, to a general or special term of the court, it shall be made to appear that the decision is unreasonably delayed, the court may make an order absolute, for a new trial, or may order a new trial, unless the decision shall be filed by a time to be specified in the order. The costs of the former trial shall abide the event of the new trial.

§ 11. Section two hundred and eighty-eight of said act is hereby amended by adding thereto the following words:

If any defendant be in actual custody under an order of arrest, and the plaintiff shall neglect to enter judgment in the action within one month after it is in his power to do so, or shall neglect to issue execution against the person of such defendant, within three months after the entry of judgment, such defendant may, on his motion, be discharged from custody by the court in which such action shall have been commenced, unless good cause to the contrary be shown: and, after being so discharged, such defendant shall not be arrested upon any execution issued in such action.

§ 12. Section three hundred and nine of the said act is hereby amended by adding thereto as follows:

And in an action for the foreclosure of a mortgage, the court may make a like allowance, not exceeding two and one-half per cent.

§ 13. Section three hundred and fifty of the said act is hereby amended by adding thereto as follows:

And proceedings under an order appealed from may be stayed by an order of the court or a judge thereof, on such terms as may be just.

§ 14. The sixth subdivision of section four hundred and one of the said act is hereby amended so as to read as follows:

No order to stay proceedings, for a longer time than twenty days, shall be granted by a judge out of court, except to stay proceedings under an order or judgment appealed from, or upon previous notice to the adverse party.

§ 15. Section six of this act shall not apply to actions now pending, nor to any right of action already accrued,

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

nor take effect until the first day of June, eighteen hundred and seventy. The other sections of this act shall apply to actions now pending, as well as to such as may be hereafter brought, and shall take effect immediately.

CHAP. 175.

AN ACT regulating the sale of intoxicating liquors.

PASSED April 11, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. There shall be a board of commissioners of excise in each of the cities, incorporated villages and towns of this state. Such boards in cities shall be composed of three members, who shall be appointed as hereinafter provided. In incorporated villages they shall consist of three members of the board of trustees, one of whom shall be president, to be annually designated by such board of trustees; and in towns they shall consist of the supervisors and justices of the peace thereof, for the time being, respectively. Any three members shall be competent to execute the powers vested in any town board, and in case the office of supervisor be vacant, or there be not two justices in the town, then the town clerk shall act in their places respectively.

§ 2. The mayor of each of the cities, except in the cities of New York and Brooklyn, shall appoint the commissioners of excise in their respective cities within ten days after the passage of this act; but in the cities of New York and Brooklyn the mayor shall nominate three good and responsible citizens to the board of aldermen of such cities respectively, who shall confirm or reject such nominations. In case of the rejection of such nominees, or any of them, the mayor shall nominate other persons as aforesaid, and shall continue so to nominate until the nominations shall be confirmed. The present commissioners of excise for the metropolitan district and the commissioners for the counties shall continue to exercise the duties of the office until such appointments, or some one of them, shall be appointed in such cities respectively, as herein provided. Any one or more of the commissioners so appointed shall have the power to act as a board of excise for the city in which he shall be appointed until the others shall be duly appointed. Commissioners of excise in cities shall hold their offices for three years, and until others shall be appointed in their places, and shall receive a salary not to exceed twenty-five hundred dollars a year each, to be fixed by the mayor and common council of their respective cities, and shall be paid as other city officers are paid. On the first Monday of April in every third year hereafter, the mayor and board of aldermen shall proceed to appoint, in the manner above described, persons qualified as aforesaid to be such commissioners of excise in their respective cities for the next three years, commencing on the first day of May in that year, and shall, from time to time, as often as vacancies shall occur, appoint persons qualified as aforesaid to fill the unexpired term of any commissioners who shall die, resign, remove from the city, or be removed from office. Such commissioners of excise in cities shall be removed for any neglect or malfeasance in office, in the same manner as provided by law for the removal of sheriffs.

§ 3. The commissioners of excise shall meet in their respective cities, villages and towns on the first Monday of May in each year, and on such other days as a majority of the commissioners shall appoint, not exceeding once each month in any year in any town or village, for the purpose of granting licenses as provided by law. In cities they shall meet on the first Monday of each month, and as often as they shall deem necessary. All such licenses shall expire at the end of one year from the time they shall be granted.

§ 4. The board of excise in cities, towns and villages shall have power to grant licenses to any person or persons of good moral character, who shall be approved by them, permitting him and them to sell and dispose of, at any one named place within such city, town or village, strong and spirituous liquors, wines, ale and beer, in quantities less than five gallons at a time, upon receiving a license fee, to be fixed in their discretion, and which shall not be less than thirty nor more than one hundred and fifty dollars. Such licenses shall only be granted on written application to the said board, signed by the applicant or applicants, specifying the place for which license is asked, and the name or names of the applicant or applicants, and of every person interested or to be interested in the business, to authorize which the license shall be used. Persons not licensed may keep, and, in quantities not less than five gallons at a time, sell and dispose of, strong and spirituous liquors, wines, ale and beer, provided that no part thereof shall be drunk or used in the building, garden or inclosure communicating with, or in any public street or place contiguous to, the building in which the same be so kept, disposed of or sold.

§ 5. Licenses granted, as in this act provided, shall not authorize any person or persons to expose for sale, or sell, give away or dispose of, any strong or spirituous liquors, wines, ale or beer, on any day, between the hours of one and five o'clock in the morning; and all places, licensed as aforesaid, shall be closed, and kept closed between the hours aforesaid.

§ 6. The act entitled "An act to regulate the sale of intoxicating liquors within the metropolitan police district of the state of New York," passed April fourteenth, eighteen hundred and sixty-six, is hereby repealed, and the provisions of the act passed April sixteenth, eighteen hundred and fifty-seven, except where the same are inconsistent or in conflict with the provisions of this act, shall be taken and construed as a part of this act, and be and remain in full force and effect throughout the whole of this state.

§ 7. In no town or village shall the commissioners of excise, created by this act, appoint a clerk of the board of excise. The pay of commissioners of excise in towns or villages shall be three dollars per diem. The moneys arising from licenses in any town or village shall be deposited with the county treasurer, within thirty days after receiving the same, to be expended under the direction of the board of supervisors at their next annual meeting, for the support of the poor of such town. Moneys arising from licenses in cities shall be paid into the treasuries of such cities respectively. The book of minutes kept by the commissioners of excise in any town or village, except when in use by such commissioners, shall be deposited in the clerk's office of such town or village. The expenses of procuring necessary books for minutes, and necessary blanks, in any town or village, when actually incurred, shall be audited and paid in like manner as other town or village charges.

§ 8. The provisions of this act as to the appointment of commissioners of excise, in each of the cities of this state, their tenure of office, the supplying of vacancies and their removal from office, shall not extend to the territory included in the Niagara frontier police district, until the first day of January, in the year one thousand eight hundred and seventy-two. And at all times hereafter up to the last mentioned day, the board of police commissioners of the said police district shall continue to be the board of commissioners of excise in and for said district, and the territory embraced therein, as now provided by law, subject to the provisions of this act; and up to the time aforesaid all fees for licenses which shall be issued by the said board, and all fines and penalties herein provided for, shall be received by said board of police commissioners of said Niagara frontier police district, and shall be paid into the Niagara police fund, for the use and benefit thereof, as now provided by law.

§ 9. This act shall take effect immediately.

The Albany Law Journal.

Albany, May 21, 1870.

REFORM OF BRITISH JUDICATURES.

Besides the Law Digest Commission, a Judicature Commission was appointed a few years ago in England, to report upon the present mode of administering justice in that country, and also to suggest the necessary forms. The report of the commission was presented to parliament last year, and its leading provisions are now in the shape of a bill, which, with little modifications, is certain to become law this session. The bill is of an innovating and radical nature, and is, so far, very unlike the labors of the law digest commissioners, who propose no change in law or procedure, but merely seek to digest into order the legal miscellany called English law.

We gave, in our impression of the 23d ult., a sketch of Lord Hatherly's speech, in which he described the purport of the Judicature, or "Judges Jurisdiction Bill." At present there is a great variety of judicatures in England, each with a distinct, and, in many cases, an exclusive jurisdiction. A suitor may consult a common-law attorney, who consults a common-law counsel, who advises proceedings in a common-law court. The case goes on to a hearing before a jury, every mere equitable element being carefully eliminated from the pleadings and evidence, and the verdict is, we will assume, for the plaintiff. He then considers that he is at last owner of his hereditary estate, and issues an *habere* to the sheriff to put him in possession of the long contested acres. The defendant, however, goes into a court of equity, and gets an injunction, restraining the plaintiff from acting upon his judgment at law. The common-law attorney now perceives his mistake in not having gone to an equity practitioner at first. In his next case he flies to a chancery lawyer, who advises a bill for relief, discovery, injunction, and what not. But the bill is at last dismissed, the court having no jurisdiction, and a common-law tribunal being the appropriate forum. Were the two professions of attorney and barrister amalgamated in England, errors such as we have cited would less frequently be common there than they have been hitherto. But, the attorney, not having legal knowledge enough to ascertain the diagnosis of his client's complaint, shapes a random case for counsel, who cannot be very certain for some time whether he is not going into the wrong box. The error being, to use a Baconian phrase, in the first digestion, no subsequent process can rectify it. But, even a lord chancellor has sometimes had serious doubts whether his jurisdiction extended to the case before him. To cap the climax, there are two ultimate courts of appeal in England,—the house of lords and the privy council—and causes are often dismissed by the latter tribunal for want of jurisdiction.

The judicature or judges jurisdiction bill proposes to amalgamate the courts of law, equity, admiralty, probate and divorce, etc., and to reduce all to a single denomination, and having one uniform scope. A suitor, therefore, cannot in future err as to the jurisdiction. This "highway for the simple" will have seven wide doors, all leading to a common penetralia, instead of the seven separate and narrow apertures at present leading each to a distinct tribunal. There will still, it seems, be suits in equity and actions at law; and the plaintiff may shape his complaint for either side of the court, as he pleases. But the judge before whom he first appears may transfer the cause to the equity or common law side of the court, as the case may be. This seems to be an odd mode of consolidating jurisdictions. The plaintiff still has the power of subjecting the defendant to the expensive process of chancery, where almost all the evidence is entered as pleadings on the record. It is likely, however, that next session, at latest, a new code of common forms of procedure will be introduced, which alone a suitor will be at liberty to adopt.

British law has been long approaching this fusion of law and equity. The common law procedure acts of 1852 and 1854 conferred upon courts of common law a jurisdiction to compel discovery and to issue injunctions. The Regulation act, 1860, reciprocated the compliment, and gave the court power to determine issues of common law fact. But the judicature bill will consolidate the jural federation and render it one single integer.

There is no provision in the bill for the amalgamation of the two professions. But this, we think, will result, in the course of time, as a corollary to the general tendencies to consolidate. Last year a measure was before the house of commons to consolidate the Irish and English bars. We hope it is not long until every learned profession will have not only an imperial, but even an international significance. All measures of legal consolidation pave the way for this desirable result. The reforming lawyers of England, however, seem at present to have enough on hand besides amendments in the constitution of the bar. The efforts of the law digest commission, and of the judges who are to prepare general orders for the carrying out the provisions of the judges' judicature bill, will probably see another autumn or two before the harvest of their labors (on the old world deliberate plan), will be complete. We have thought an outline of the projected British law reforms would be interesting to the social reformer west of the Atlantic, inasmuch as the British designs contain much that recommends itself to our own adoption.

THE LESSONS OF THE McFARLAND CASE.

It was long since practically settled that if a man surprise his wife in the act of adultery, or in such proximity to the act of adultery that it is apparent that the crime has been committed, he may lawfully slay both or either of the adulterers, provided his passion has not had time to cool. This doctrine has been, in practice, extended to the cases of a brother avenging the seduction of his sister, a father avenging the seduction of his daughter, and a woman avenging her own seduction, or even a breach of promise of marriage without seduction. The uniform tenor of the late American decisions is that the aggrieved person may lawfully kill, even though sufficient time may have elapsed for passion to subside. These cases are mainly based on the actual

discovery of the offense by the avenger, or on the discovery of such circumstances that its commission becomes reasonably and morally certain. The Cole and Hiscock case virtually went a step further, and absolved a husband for killing a supposed seducer upon the wife's confession alone. And now we come to the McFarland and Richardson case, in which it is laid down as the practical rule of action, that if a married woman leaves her residence in New York, and goes to Indiana, and procures a divorce, valid under the laws of that state, for a cause really existing, her husband may lawfully slay any unmarried male friend of the wife who aids and abets in the procurment of the divorce, although there is no proof of any adultery on the part of the wife with that friend. We say this is the practical rule established by this case, because this is the construction put upon it by the great majority of the public and of the newspapers. The idea of the prisoner's insanity is generally scouted. Insanity, the press say, was the pretext for an acquittal according to the forms of law; the prisoner was no more insane than jealous, brutal, drunken husbands usually are when deprived of wives who have always supported them; the trial was a "farce." It is therefore not important for us to consider whether insanity was or was not proved at the trial. We will only remark on this point in passing, that Mrs. McFarland-Richardson in her statement published since the trial, does much more, in our opinion, both to absolve her husband and inculpate herself than all the evidence adduced on the trial. No one can carefully read her statement without coming to the conclusion that *she* at least had always regarded him as suffering at frequent intervals under aberration of intellect. She knew he came of a lunatic stock. He was subject to sudden, violent, and inexplicable fits of anger. She always thought him "born to do a murder." She had warned him that she feared he would kill her in one of these paroxysms, to which he replied that he never would harm a hair of her head if he *knew* her. This goes far to corroborate the evidence of insanity, of which there was a good deal given on trial. On the other hand, there would seem to be considerable pecuniary method in his madness, for if Mr. Pomeroy's uncontradicted testimony is credible, he sought to sell his story of his wrongs to a newspaper editor for publication. On the point of the wife's culpability, she admits that although she had at command abundant proof that her husband had been repeatedly guilty of adultery, yet esteeming this a less grievous offense against her womanhood than the direct personal indignities she had suffered at his hands, she had gone to a state where the latter were a recognized ground of separation, and there procured the divorce, which we understand was without notice to McFarland. This was a fatal mistake on this unhappy wife's part, and goes far to justify the circulation of the scandal relative to her association with Richardson.

We must be permitted also to remark here, that the privilege of irresponsible killing which the laws, as administered, accord to men, under the circumstances mentioned above, is not, so far as we know, extended to the female sex. Adultery is a common and every-day offense on the part of married men, but, we suppose, if a woman should shoot her husband's paramour, she would not escape punishment. Here is room for a seventeenth amendment of the federal constitution.

But what we intend mainly to comment on is the satisfaction with which this verdict is accepted by the public, received as it is upon the assumption that insanity was not proved, and that the wife was guilty. With one or two exceptions, the leading newspapers substantially approve it. The *World* says, with apparent contentment, that we are in a state of nature on the subject of infringements of marital rights. To quote the language of an article on the Cole-Hiscock case, published contemporaneously in the *American Law Register*, and written by the author of this article:

"In other words, that private animosity may usurp the place of public justice, and society in this respect be reduced to elemental chaos; that a private individual may lawfully take the life of his fellow-being where society and the laws would have no right to take life, or even inflict the slightest punishment. Is there not in this idea something radically wrong?

"To countenance the individual in becoming, at his own option, the executor of established public laws, savors of a demoralized state of society; but to applaud the individual when he not only constitutes himself the executioner, but himself makes the law which he executes, is a distinguishing mark of a barbarous and lawless community. And when we add to this, that the community has looked calmly and approvingly on this course for a hundred years of enlightenment and civilization, and still persists in neglecting or refusing to render that legally penal which in effect it has so long farmed out to private revenge, it is truly one of those obstinate anomalies, the existence of which goes to justify the belief among theologians in the doctrine of innate total depravity, and in statesmen the despair of constructing a perfect political system.

"In new and unsettled countries where laws exist, but the executive power is weak, combinations of individuals have sometimes been temporarily tolerated for the purpose of preserving human life and property, but then only with great reluctance and debate, and for the shortest practicable period; and these departures from the ordinary procedure of civilized nations are regarded in the older and more settled communities with an extremely measured approbation, if not with positive disapproval. So great is the fear in conservative minds of possible injustice through hasty measures, excited passions, and the absence of legal forms, that the very name of 'vigilance committee' raises the spirit of condemnation, and the query whether it is not better to 'bear the ills we have, than fly to others that we know not of;' whether it is not better, in the humane language of the law, that ninety-nine guilty should go unpunished than that one innocent should be harmed. And so these summary dealings have been tolerated only because they seemed unavoidable, very much as many arbitrary proceedings were justified during the late war by the plea of 'military necessity.' But in these same old and settled communities — refined, educated, humane, christian communities — here in the state of New York, where we have been accus-

tomed to regard human life as safe as human wisdom can make it, and the execution of laws as certain as human foresight can render it; where the cheapness with which human life has seemed to be held in the Southern states of the Union has been so strongly and persistently reprobated; where legislators have had so many solemn judicial warnings of the effects of neglected duty — it seems yet, if we may judge from the defects of the statute-book, and the actual administration of law, to be the sentiment of the people, as it also seems the voice of the public press, that the individual is justified in deliberately taking the life of his neighbor for that which is in law no crime. With the exception of Massachusetts and Pennsylvania (so far as we know), adultery in the United States is nowhere judicially pronounced a crime, but still is a full excuse for the taking of life by the private hand.

"The omission in this particular is the more singular because we are so hedged and guarded on nearly every side by law. It is really curious to contemplate the number of things artificially unlawful. We have laws against almost every form of sumptuary excess and licentious and indecent conduct. It is against the law to utter a profane oath; to disturb the public quiet on Sunday; to sell intoxicating liquor without conforming to public requirements; to drive fast through the streets; to expose the person in public places; to commit 'the abominable and detestable crime against nature.' We have laws punishing infringements on the proper relations of the sexes. It is against the law to commit rape, or to seduce an unmarried female under promise of marriage, and, in a number of communities, to commit fornication. A man may be criminally punished, under certain circumstances, for saying that his neighbor has seduced a woman; but he cannot be legally punished for seducing that neighbor's wife.

"Again: How tender of human life is the law, at least in theory! Nearly every form of homicide and of violence, or risk of violence, to the person of one's self or of another, is forbidden. It is against the law for a man to commit suicide, and criminal to assist one in taking his own life. It is unlawful for two men to agree to run the risk of killing one another in duel. It is forbidden to give a man a black eye, to maim him, to engage in a prize-fight, to fire a gun off in a crowded place. It is even illegal for Sam Patch to jump over Genesee Falls, or for Blondin to walk a tight-rope across the Niagara. The law even goes so far as to make provision for the protection of the mere germ of human life in the womb, in order to prevent the destruction of that which may possibly become a sentient being, and so we have laws against striking a pregnant woman, against procuring abortions, and even against advising the pregnant woman to take medicines with that purpose. And it is not human life alone of which the law is in theory so tender, but it extends its protection over the brute creation, and forbids cruelty to animals.

"But this same society, so careful of human and brute life; so averse to cruelty in every form; that sickens and grows faint at the sight or mere report of bloodshed; that feels a thrill of horror when the daily newspaper tells them that a thousand miles away some poor man is crushed out of existence by the whirling belt or the rushing railroad train; that shudders at the appointment of a judicial execution in its midst, and deafens the ear of the government with appeals for commutation or respite; this society yet deliberately and willfully places the sword of vengeance in the hand of an infuriated wretch, and bids him work his reckless will on his brother whom he supposes to have injured him; and after private vengeance is glutted, makes him the hero of the hour, and applauds the violation of law and justice.

"In view of these things, we cannot escape the conviction, that christianity and civilization have not yet effectually purged the tiger out of men. There still remains much to be done to obliterate the marks that distinguish barbarous from enlightened communities. There is frequently a feeling in the community that the administration of the laws is not severe enough. There is always a large class of unthinking persons ready to find fault if a criminal is allowed to go at large on bail, or if he receives a milder punishment than uninstructed public opinion would deem it just to inflict. Tribunals are denounced for not doing 'substantial justice,' in disregard of oaths, evidence, and the letter of the law. There is a frightful amount of this mob-spirit even among intelligent and reasonable citizens. But the remedy for the state of things complained of is legislation — not lynching. 'Substantial justice' is certain oppression. The lamp-post and the paving stone are unsafe instruments, and an enraged and howling crowd are unreliable ministers of justice. It is an awful thing to take human life, even in pursuance of judicial decrees, and the act should be surrounded by all the sanctions of law, and conducted with dignity and order. It should be resorted to only in the last extremity, for the safety of aggregated mankind, and as the most fearful example to offenders. How, then, can those christian gentlemen who are opposed to capital punishment, both conscientiously and as matter of governmental policy, look so indifferently, or rather half approvingly, on these irresponsible murders which have so long stained the annals of jurisprudence?

"Now, if there is an offense that, in the opinion of society, substantially justifies summary and deadly punishment at the hand of the injured citizen, why not make that offense a statutory crime, and visit upon both the participants the severe penalties of the law? This would be in accordance with the theory upon which, and the purposes for which, society is instituted, and would take away the excuse for private vengeance. Society cannot be benefited by tolerating murder because of adultery. It would, also, deal out a just measure of punishment for the crime. If adultery is justly punished by death, let the guilty parties die; but if it is not deemed deserving of so grave a penalty, then certainly it should not be affixed, and this, in itself, would be a striking evidence of the gross injustice of the present practice. Again, it would or should punish both the criminals. The woman, sinning against the natural purity of her sex, is the more blameworthy, especially where she does so in spite of every artificial advantage of education and precept. And, finally, it would teach the lesson which men are so loath to learn, that the object of punishment is not revenge, but correction."

LAW AND LAWYERS IN LITERATURE.*

XIX.

SEWELL,

in his tragedy "Sir Walter Raleigh," thus describes Coke and the crown lawyers in the memorable trial of the hero who gave the title to the play:

"I heard the deep-mouth'd Pack, that scented Blood
From their first starting, and pursued their View
With the Law Musick of long-winded Calumny.
Well I remember one among the Tribe,
A reading Cut-throat skill'd in Parallels,
And dark Comparisons of wond'rous Likeness,
Who in a Speech of unchew'd Eloquence,
Muster'd up all the Crimes since Noah's Days,
To put in Ballance with this fancied Plot,
And made e'en Cataline a Saint to Raleigh;
The Sycophant so much o'er-play'd his Part,
I could have hugg'd him, kiss'd the unskillful Lies
Hot from his venal Tongue."

DANIEL,

in his lines on "Lord Keeper Egerton," has the following, which reminds us of a passage in Montaigne:

"Since her interpretations, and our deeds,
Unto a like infinity arise;
As b'ing a science that by nature breeds
Contention, strife, and ambiguities;
For altercation controversy feeds,
And in her agitation multiplies:
The field of cavil lying all like wide,
Yields like advantage unto either side.

"Which made the grave Castilian king devise
A prohibition that no advocate
Should be convey'd to th' Indian colonies;
Lest their new settling, shaken with debate,
Might take but slender root, and so not rise
To any perfect growth of fine estate;
For having not this skill how to contend,
Th' unnourish'd strife would quickly make an end."

BROOKE,

in "Mustapha," thus speaks of law:

"Laws the next pillars be with which we deal,
As sophistries of ev'ry common weal;
Or rather nets, which people do ask leave
That they to catch their freedoms in, may weave;
And still add more unto the sultan's pow'r,
By making their own frames themselves devour.
These Lesbian rules, with show of real grounds,
Giving right, narrow; will, transcendant, bounds."

DEKKER,

in "Match me in London," observes:

"You oft call Parliaments, and there enact
Laws good and wholesome, such as whoso break
Are hung by the purse or neck. But as the weak
And smaller flies i' the spider's web are ta'en,
When great ones tear the web and free remain;
So may that moral tale of you be told
Which once the wolf related: in the fold
The shepherds kill'd a sheep, and eat him there;
The wolf look'd in, and see'ng them at such cheer,
Alas! quoth he, should I touch the least part
Of what you tear, you would pluck out my heart.
Great men make laws, that whosoe'er draws blood
Shall dye; but if they murder flocks, 'tis good.
I'll go eat my lamb at home, sir."

In Tourneur's "Revenger's Tragedy" we find this dialogue:

1. Tell me, what has made thee so melancholy?
2. Why, going to law.
1. Why, will that make a man melancholy?
2. Yes, to look long on ink and black
Buckram. I went to law *in anno*
Quadragesimo secundo; and I
Waded out of it *in anno sexagesimo tertio.*
1. What! three and twenty years in law?
2. I have known those that have been five and fifty,
And all about pullen and pigs.
1. May it be possible such men should breathe,
To vex the terms so much?
2. 'Tis food to some,
My lord. There are old men at the present
That are so poison'd with th' affectation
Of law-words, having had many suits canvass'd,
That their common talk is nothing but barb'rous
Latin; they cannot so much as pray, but
In law, that their sins may be remov'd, with
A writ of error, and their souls fetch'd up
To heaven with a *certiorari.*

DAVENANT,

in his lines on the "Restauration," says:

"Your clemency has taught us to believe
It wise, as well as virtuous, to forgive.
And now the most offended shall proceed
In great forgiving, till no laws we need.
For law's slow progresses would quickly end,
Could we forgive as fast as men offend.
Revenge of past offences is the cause
Why peaceful minds consented to have laws:
Yet plaintiffs and defendants much mistake
Their cure, and their diseases lasting make;
For to be reconciled, and to comply,
Would prove their cheap and shortest remedy.
The length and charge of law vex all that sue;
Laws punish many, reconcile but few."

In "Gondibert" he says:

"Yet since on all war never needful was,
Wise Aribert did keep the people sure
By laws from little dangers; for the laws
Then from themselves, and not from pow'r secure.

"Else conquerors, by making laws, o'ercome
Their own gain'd pow'r, and leave men fury free:
Who growing deaf to pow'r, the laws grow dumb;
Since none can plead, where all may judges be."

MIDDLETON,

in "The Phœnix," has a very amusing character, Tangle, "an old, crafty client, who by the puzzle of suits and shifting of courts has more tricks and starting holes than the dizzy pates of fifteen attorneys; one that has been muzzled in law like a bear, and led by the ring of his spectacles from office to office;" "some say he's as good as a lawyer; marry, I'm sure he's as bad as a knave; if you have any suits in law he's the fittest man for your company; has been so towed and lugged himself, that he is able to afford you more knavish counsel for ten groats than another for ten shillings;" "An old, busy, turbulent fellow; a villainous law-worm that eats holes in poor men's causes."

Then ensues the following scene between Tangle and two suitors, who have come to him for advice:

First Suitor. May it please your worship to give me leave?

Tangle. I give you leave, sir; you have your *veniam.* Now fill me a brown toast, sirrah.

First Suit. Has brought me into the court; marry, my adversary has not declared yet.

Tang. Non declaravit adversarius, sayest thou? what a villain's that! I have a trick to do thee good; I will get thee out a proxy, and make him declare, with a pox to him.

First Suit. That will make him declare, to his sore grief; I thank your good worship; but put case he do declare?

Tang. Si declarasset if he should declare there—

First Suit. I would be loath to stand out to the judgment of that court.

Tang. Non ad judicium, do you fear corruption? then I'll relieve you again; you shall get a *supersedeas non molestandum*, and remove it higher.

First Suit. Very good.

Tang. Now, if it should ever come to a *testificandum*, what be his witnesses.

First Suit. I little fear his witnesses.

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

Tang. Non metus testes? more valiant man than Orestes.

First Suit. Please you, sir, to dissolve this into wine, ale or beer. (*Giving money.*) I come a hundred mile to you, I protest, and leave all other counsel behind me.

Tang. Nay, you shall always find me a sound card; I stood not a' th' pillory for nothing in '88; all the world knows that. Now let me despatch you, sir. I come to you *presenter.*

Second Suit. Faith, the party hath removed both body and cause with a *habeas corpus.*

Tang. Has he that knavery? but has he put in bail above, canst tell?

Second Suit. That I can assure your worship he has not.

Tang. Why, then, thy best course shall be to lay out more money, take out a *procedendo*, and bring down the cause and him with a vengeance.

Second Suit. Then he will come indeed.

Tang. As for the other party, let the *audita querela* alone; take me out a special *supplicavit*, which will cost you enough, and then you pepper him. For the first party after the *procedendo* you'll get costs; the cause being found, you'll have a judgment; *nunc pro tunc*, you'll get a *venire facias* to warn your jury, a *decem tales* to fill up the number, and a *capias utlegatum* for your execution.

Second Suit. I thank you, my learned counsel.

Phœnix then enters, telling Tangle he knew him "in *octavo* of the duke, but still in law:"

Tang. Still in law? I had not breathed else now; tis very marrow, very manna to me to be in law; I'd been dead ere this else. I have found such sweet pleasure in the vexation of others, that I could wish my years over and over again, to see that fellow a beggar, that bawling knave a gentleman, a matter brought e'en to a judgment to-day, as far as e'er 'twas to begin again to-morrow. O raptures! here's a writ of demur, there a *procedendo*, here a *sursurrara*, there a *capiendo*, tricks, delays, money — laws!

Phœ. Is it possible, old lad?

Tang. I have been a term-trotter myself any time these five-and-forty years; a goodly time and a gracious; in which space I ha' been at least sixteen times beggared, and got up again; and in the mire again, that I have stunk again, and yet got up again.

Phœ. And so clean and handsome now?

Tang. You see it apparently; I cannot hide it from you; nay, more, in *felici hora* be it spoken; you see I'm old, yet have I at this present nine-and-twenty suits in law!

Phœ. Deliver us man!

Tang. And all not worth forty shillings.

Phœ. May it be believed?

Tang. The pleasure of a man is all.

Phœ. An old fellow, and such a stinger!

Tang. A stake pulled out of my hedge, there's one; I was well beaten, I remember, that's two; I took one abed with my wife again her will, that's three; I was called cuckold for my labour, that's four; I took another abed again, that's five; then one called me wittol, that's six; he killed my dog for barking, seven; my maid servant was knocked at that time, eight; my wife miscarried with a push, nine; *et sic de cæteris.* I have so vexed and beggared the whole parish with process, subpœnas, and such-like molestations, they are not able to spare so much money from a term as would set up a new weathercock; the church wardens are fain to go to law with the poor's money.

Phœ. Fie, fie!

Tang. And I so fetch up all the men every term time, that 'tis impossible to be at civil cuckoldry within ourselves, unless the whole country rise upon our wives.

Phœ. An excellent stratagem; but of all I most wonder at the continual substance of thy wit, that, having had so many suits in law from time to time, thou hast still money to relieve 'em.

Tang. Why do you so much wonder at that? Why, this is my course; my mare and I come up some five days before a term.

Phœ. A good decorum!

Tang. Here I lodge, as you see, amongst inns and places of most receipt —

Phœ. Very wittily.

Tang. By which advantage I dive into countrymen's causes; furnish 'em with knavish counsel, little to their profit; buzzing into their ears that course, this writ, that office, this *ultimum refugium;* as you know I have words enow for the purpose.

Phœ. Enow a' conscience, i' faith.

Tang. Enow a' law, no matter for conscience. For which busy and laborious sweating courtesy, they choose but feed me with money, by which I maintain mine own suits; hoh, hoh, hoh! Another special trick I have, nobody must know it, which is to prefer most of these men to one attorney, whom I affect best; to answer which kindness of mine he will sweat the better in my cause, and do them the less good; take't of my word, I helped my attorney to more clients last term than he will despatch all his life-time."

Phœnix utters these fine lines:

"Thou angel sent amongst us, sober Law,
Made with meek eyes, persuading action,
No loud immodest tongue,
Voic'd like a virgin, and as chaste from sale,
Save only to be heard, but not to rail;
How has abuse deform'd thee to all eyes,
That where thy virtues sat, thy vices rise!
Yet why so rashly for one villain's fault
Do I arraign whole man? Admired Law,
Thy upper parts must needs be sacred, pure,
And incorruptible; they're grave and wise:
'Tis but the dross beneath 'em, and the clouds
That get between thy glory and their praise,
That make the visible and foul eclipse;
For those that are near to thee are upright,
As noble in their conscience as their birth;
Know that damnation is in every bribe,
And rarely * put it off from 'em: rate the presenters,
And scourge 'em with five years' imprisonment,
For offering but to tempt 'em.
Thus is true justice exercis'd and us'd;
Woe to the giver when the bribe's refused:
'Tis not their will to have law worse than war,
Where still the poor'st die first;
To send a man without a sheet to his grave,
Or bury him in his papers;
'Tis not their mind it should be, nor to have
A suit hang longer than a man in chains,
Let him be ne'er so fasten'd. They least know
That are above, the tedious steps below."

The following is a scene between Falso, who is a justice of the peace, and some suitors:

"*First Suit.* May it please your good worship, master justice —

Fal. Please me and please yourself; that's my word.

First Suit. The party your worship sent for will by no means be brought to appear.

* Finely, nobly.

Fal. He will not? then what would you advise me to do therein?

First Suit. Only to grant your worship's warrant, which is of sufficient force to compel him.

Fal. No, by my faith, you shall not have me in that trap; am I sworn justice of peace, and shall I give my warrant to fetch a man against his will? Why, there the peace is broken. We must do all quietly; if he come he's welcome; and as far as I can see yet, he's a fool to be absent — ay, by this gold is he — which he gave me this morning. (*Aside.*)

First Suit. Why, but may it please your good worship —

Fal. I say again, please me and please yourself; that's my word still.

First Suit. Sir, the world esteems it a common favor, upon the contempt of the party, the justice to grant his warrant.

Fal. Ay, 'tis so common, 'tis the worse again; 'twere the better for me were't otherwise.

First Suit. I protest, sir, and this gentleman can say as much, it lies upon my half-undoing.

Fal. I cannot see yet that it should be so, — I see not a cross yet. (*Aside.*)

First Suit. I beseech your worship, shew me your immediate favour, and accept this small trifle but as a remembrance to my succeeding thankfulness.

Fal. Angels? I'll not meddle with 'em; you give 'em to my wife, not to me.

First Suit. Ay, ay, sir.

Fal. But I pray tell me now, did the party *viva voce* with his own mouth, deliver that contempt, that he would not appear, or did you but jest in't?

First Suit. Jest? no, a' my troth, sir; such was his insolent answer.

Fal. And do you think it stood with my credit to put up such an abuse? Will he not appear, says he? I'll make him appear with a vengeance. Latronello! (*Enter Latronello.*)

Lat. Does your worship call?

Fal. Draw me a strong-limbed warrant for the gentleman speedily; he will be bountiful to thee. Go and thank him within.

First Suit. I shall know your worship hereafter.

Fal. Ay, I pray thee do. (*Exeunt Suitors with Latronello.*) Two angels, one party, four another; and I think it a great spark of wisdom and policy, if a man come to me for justice, first, to know his griefs by his fees, which be light, and which be heavy; he may counterfeit else, and make me do justice for nothing; I like not that; for where I mean to be just, let me be paid well for it; the deed so rare purges the bribe."

A fencing match ensues between Falso and Tangle, introductory to which the latter describes the weapons:

" *Tang.* Your longsword, that's a *writ of delay.*

Fal. Mass, that sword's long enough, indeed; I ha' known it to reach the length of fifteen terms.

Tang. Fifteen terms? that's but a short sword.

Fal. Methinks 'tis long enough; proceed, sir.

Tang. A writ of delay, longsword; *scandala magnatum*, backsword.

Fal. Scandals are backswords, indeed.

Tang. Capias cominus, case of rapiers.

Fal. O desperate!

Tang. A *latitat*, sword and dagger; *a writ of execution*, rapier and dagger.

Fal. Thou art come to our present weapon; but what call you sword and buckler, then?

Tang. O, that's out of use now! Sword and buckler was called *a good conscience*, but that weapon's left long ago; that was too manly a fight, too sound a weapon for these, our days."

Tangle's suits go against him, and he raves, pronouncing "a terrible, terrible curse upon you all, I wish you to my attorney. See where a *præmunire* comes, a *dedimus potestatem*, and that most dreadful execution, *excommunicato capiendo!* There's no bail to be taken; I shall rot in fifteen jails, make dice of my bones and let my counsellor's son play away his money with 'em." Phœnix declares that "who so loves law dies either mad or poor," and pronounces him mad; to which Fidelo excepts, saying, "If he be any way altered from what he was 'tis for the better." Tangle says he will set himself "free with a *deliberandum;*" prays for "an *audita querela* or a *testificandum;*" "an extent, a proclamation, a summons, a recognisance, attachment, and injunction! A writ, a seizure, a writ of 'praisement, an absolution, a *quietus est!*" His distemper is exorcised by Quieto in the following formula:

"The balsam of a temperate brain
I pour into this thirsty vein,
And with this blessed oil of quiet,
Which is so cheap that few men buy it,
Thy stormy temples I allay;
Thou shalt give up the devil, and pray;
Forsake his works, they 're foul and black,
And keep thee bare in purse and back.
No more shalt thou in paper quarrel,
To dress up apes in good apparel.
He throws his stock and all his flock
Into a swallowing gulf,
That sends his goose unto his fox,
His lamb unto his wolf.
Keep thy increase,
And live at peace,
For war 's not equal to this battle;
That eats but men; this men and cattle:
Therefore no more this combat choose,
Where he that wins does always lose;
And those that gain all with this curse receive it,
From fools they get it, to their sons they leave it."

The following deed by the "Captain," who sells his wife just as he is going a voyage, might be a useful precedent to those on whom the obligations of matrimony rest lightly, and save them the expense and annoyance of several weeks' residence in some western state:

"To all good and honest Christian people, to whom this present writing shall come, know you for a certain, that I, captain, for and in the consideration of five hundred crowns, have clearly bargained, sold, given, granted, assigned, and set over, and by these presents do clearly bargain, sell, give, grant, assign, and set over, all the right, estate, title, interest, demand, possession, and term of years to come, which I, the said captain, have, or ought to have, in and to Madonna Castiza, my most virtuous, modest, loving, and obedient wife, together with all and singular those admirable qualities with which her noble breast is furnished; in primis, the beauties of her mind, chastity, temperance, and, above all, patience, excellent in the best of music, in voice delicious, in conference wise and pleasing, of age contentful, neither too young to be apish, nor too old to be sottish, and, which is the best of a wife, a most comfortable sweet companion,

which said Madonna Castiza, lying and yet being in the occupation of the said captain, to have and to hold, use, and to be acquitted of and from all former bargains, former sales, gifts, grants, surrenders, re-entries; and furthermore, I, the said, of and for the consideration of five hundred crowns to set me aboard, before these presents, do utterly disclaim forever any estate, title, right, interest, demand, or possession of, in, or to the said Madonna Castiza, my late virtuous and unfortunate wife, as also neither to touch, attempt, molest, or incumber any part or parts whatsoever, either to be named or not to be named, either hidden or unhidden, either those that boldly look abroad, or those that dare not shew their faces," etc.

BLACKSTONE,

who had a great passion and genius for literature, gave up every thing for the law; but his legal acquirements and talents, although large, were not distinguished enough to have given him immortality, unless they had been joined with that elegant style which makes his Commentaries so delightful. The following is his melodious and playful "Farewell to the Muse," written in 1744:

"As by some tyrant's stern command
A wretch forsakes his native land,
In foreign climes condemned to roam,
An endless exile from his home;
Pensive he treads the destin'd way,
And dreads to go, nor dares to stay;
Till on some neighb'ring mountain's brow
He stops, and turns his eye below;
There, melting at the well-known view
Drops a last tear, and bids adieu;
So I, thus doom'd from thee to part,
Gay queen of Fancy and of Art,
Reluctant move, with doubtful mind,
Oft stop, and often look behind.

"Companion of my tender age.
Serenely gay, and sweetly sage,
How blithesome were we wont to rove.
By verdant hill or shady grove,
Where fervent bees, with humming voice,
Around the honey'd oak rejoice,
And aged elms with aweful bend
In long cathedral walks extend!
Lulled by the lapse of gliding floods,
Cheer'd by the warbling of the woods,
How blest my days, my thoughts how free,
In sweet society with thee!
Then all was joyous, all was young,
And years unheeded roll along:
But now the pleasing dream is o'er,
These scenes must charm me now no more:
Lost to the field, and torn from you—
Farewell!—a long, a last adieu.

"Me wrangling courts and stubborn Law
To smoak, and crowds, and cities draw;
There selfish Faction rules the day,
And Pride and Av'rice throng the way;
Diseases taint the murky air,
And midnight conflagrations glare;
Loose Revelry and Riot bold
In frighted street their orgies hold;
Or when in silence all is drown'd,
Fell murder walks her lonely round;
No room for Peace, no more for you,
Adieu, celestial nymph, adieu!

"Shakespeare no more, thy sylvan son,
Nor all the art of Addison,
Pope's heav'n strung lyre, nor Waller's ease,
Nor Milton's mighty self must please;
Instead of these, a formal band
In furs and coifs around me stand;
With sounds uncouth and accents dry,
That grate the soul of harmony,
Each pedant sage unlocks his store
Of mystic, dark, discordant lore,
And points with tott'ring hand the ways
That lead me to the thorny maze.

"There, in a winding close retreat,
Is Justice doom'd to fix her seat,
There, fenc'd by bulwarks of the Law,
She keeps the wond'ring world in awe,
And there, from vulgar sight retir'd,
Like eastern queens is more admired.

"O let me pierce the secret shade
Where dwells the venerable maid!
There humbly mark, with rev'rent awe,
The guardian of Britannia's Law,
Unfold with joy her sacred page,
(Th' united boast of many an age,
Where mix'd, yet uniform, appears
The wisdom of a thousand years.)
In that pure spring the bottom view,
Clear, deep, and regularly true,
And other doctrines thence imbibe
Than lurk within the sordid scribe;
Observe how parts with parts unite
In one harmonious rule of right;
See countless wheels distinctly tend
By various laws to one great end;
While mighty Alfred's piercing soul
Pervades and regulates the whole.

"Then welcome business, welcome strife,
Welcome the cares, the thorns of life
The visage wan, the pore-blind sight,
The toil by day, the lamp at night,
The tedious forms, the solemn prate,
The pert dispute, the dull debate,
The drowsy bench, the babbling Hall,
For thee, fair Justice, welcome all!

"Thus, though my noon of life be past,
Yet let my setting sun, at last
Find out the still, the rural cell,
Where sage Retirement loves to dwell!
There let me taste the home-felt bliss
Of innocence and inward peace;
Untainted by the guilty bribe;
Unburs'd amid the harpy tribe;
No orphan's cry to wound my ear;
My honour and my conscience clear;
Thus may I calmly meet my end,
Thus to my grave in peace descend."

The same agreeable poet wrote the "Lawyer's Prayer:"

"Ordain'd to tread the thorny ground,
Where very few, I fear, are sound;
Mine be the conscience void of blame;
The upright heart; the spotless name;
The tribute of the widow's pray'r;
The righted orphan's grateful tear!
To Virtue and her friends a friend,
Still may my voice the weak defend!
Ne'er may my prostituted tongue
Protect th' oppressor in his wrong;
Nor wrest the spirit of the laws
To sanctify the villain's cause!
Let others, with unsparing hand,
Scatter their poison through the land
Enflame dissention, kindle strife,
And strew with ills the path of life;
On such her gifts let Fortune shower,
Add wealth to wealth, and power to power;
On me, may favouring Heaven bestow
That peace which good men only know.
The joy of joys by few possess'd,
The eternal sunshine of the breast!
Power, fame and riches I resign—
The praise of honesty be mine;
That friends may weep, the worthy sigh,
And poor men bless me when I die!"

JOHN C. SPENCER.*

III.

Among the early friends of Mr. Spencer, at Canandaigua, was Gen. Peter B. Porter, long and favorably known in the history of the state, as a man of high character and unsullied honor, who quietly, and without parade or ostentation, rendered himself of much importance in public affairs—whose influence, like the powers in the natural world, was mild and noiseless, but penetrating and enduring—an accurate observer of men, yet simple and natural in his manners, uniting habits of economy with the most disinterested and liberal charities. A pioneer of western New York, his energetic and enterprising character materially aided in the development of the resources of that beautiful country.

During the autumn of 1809, Gen. Porter completed

*From advanced sheets of "Bench and Bar."

a very commodious residence in the village, which he leased to Mr. Spencer, and in which he first commenced the duties and responsibilities of housekeeping. In after years he frequently described, in lively language, the first dinner of which he partook in this his "own hired house." "It was eaten off from a common kitchen table. I was seated on a cheap old-fashioned chair, and Mrs. Spencer occupied a common wooden stool. But every thing on the table, though simple, was nicely cooked, and we enjoyed our meal with a relish rarely equaled at the more sumptuous repasts of our prosperous days." Thus, with frugality, economy and self-reliance, the young couple entered life's great contest, and thus they became successful in the struggle.

Within six months after taking possession of this house, as a tenant, Mr. Spencer became the purchaser of it, and for twenty-six years and upward, it was his home.

In 1809 Ontario county contained within its limits all that territory now included in the counties of Yates and Wayne, together with all that part of Monroe and Livingston lying east of the Genesee river. From a very early period its bar has been distinguished for the eloquence and learning of its members. A long line of brilliant names adorn its history, many of whom were rendered, by nature and art, almost perfect legal orators, whose eloquence "led criticism itself captive," and who could touch, "with a strong and certain hand, any chord, from uproarious merriment to the deepest pathos, or the most terrible invective."

That Mr. Spencer was able, while yet in his youth, to attain the highest professional distinction, opposed by such competitors, sufficiently attests his ability.

Nothing, however, is so favorable to the development of real ability, nothing so essentially elicits the intellectual strength of young lawyers, as constant intercourse and collision with advocates of superior legal attainments and skill. The contest may at first be unequal, may often result in discomfiture and mortification, but with every failure strength and confidence will be gained, close study and research resorted to, and at length the nicely graduated scale of professional success easily ascended.

When the great Scottish lawyer, Cockburn, was called to the bar—young, obscure and diffident—he was compelled to struggle with those giants of the Scottish bar, Clerk, Cranstoun, Moncreiff and Fullerton. Though their inferior in age, in legal knowledge and juridical power, yet, bracing himself for the contest, he boldly entered the lists against them. Regarding it no disgrace to be conquered by such antagonists, he continued the struggle until he was able to maintain his ground, and at length to successfully contend with them. His success shed such luster upon his name that he soon reached the bench, where, as has been well said of him, "his reputation and efficiency were unequaled."

When Mr. Spencer first appeared at the Ontario bar, he was the only democratic or anti-federal lawyer who appeared there. Unappalled by the influence, numbers, and strength of the opposition, and scorning the weak advantage of belonging to "the popular side," he boldly declared his principles, then ably and manfully maintained them, and thus he soon became the standard-bearer of his party in western New York. "Much of the litigation of that day was occasioned by party collisions, and he therefore encountered, from the beginning, a combined opposition, which taxed to the uttermost his 'iron will,' rendering it necessary for him to enter court perfectly prepared at all points; and he found it necessary to be constantly on his guard against the attacks of his political, as well as his professional opponents, to whom he was especially distant and repulsive in his manners." This state of things, however, polished and sharpened the weapons he was compelled to wield; it taught him to parry as well as to thrust, and he rapidly advanced in his profession.

Mr. Spencer always loved solitary study; he never delighted in what is called fashionable life. A mind given to research will see in that society—where persons have no other occupation than fashionable amusement—acuteness of intellect, refinement of manners, elegance and good taste in a certain kind of conversation; but he will also see all profundity of thought, all serious reflections discarded, and hence the glossy volubility of a fop in such circles is preferred to the recondite conversation of the really intelligent and learned.

Accustomed from his youth to the detail of politics, the lawyer was soon blended with the politician. Political dissensions ran high, and were characterized by great bitterness; party feuds were not then as soon forgotten as they are at the present. The easy, gliding scale of political conscience, the temporizing, trimming, bartering policy of modern partisans were then unknown; a rigid fealty to party; an honest, though bitter opposition; an implacable, unswerving warfare, guided the politician of that day, often engendering feelings of hostility which tinged the amenities of social life for many years.

When the questions and events which led to the war of 1812 began to agitate the public mind, Mr. Spencer, stimulated by an inherent patriotism, joined his fortunes to the party which favored resistance to British aggression, and when war was finally declared, he became the firm supporter of Madison and Tompkins. There were few men at that time who exerted a wider or more direct influence than John C. Spencer. His vigorous mind, his ready and powerful pen, were devoted to the discussion of the great questions which divided the public mind.

One of the pamphlets published by him, entitled "The probable Results of a War with England," attracted much interest throughout the nation; and in Great Britain it was republished in the papers opposed to the ministry, as an unanswerable argument against the policy of the American war. "Who does not see," said one of the leading opposition journals of the day, "the fatal truths contained in Mr. Spencer's article on the results of this war? If there are those so perverse that they cannot see, its truths will, in time, be brought home to the government, when it is, perhaps, too late. There is not an individual, who has attended at all to the dispute with the United States, who does not see that it has been embittered from the first, and wantonly urged on by those who, for the sake of their own aggrandizement, are willing to plunge

their own country in all the evils portrayed by the American writer."

It was one of the merits of Mr. Spencer that he entered thoroughly into his subject, leaving no part unexplained—fearing less the imputation of undue minuteness or superfluity than the more serious charge of passing superficially over the topics of discussion.

Sometimes in his anonymous writings there was the crisp denunciation and terse sarcasm of Junius; the close and frigid philosophy of Calhoun; and then the polished rebuke of Addison; and thus the public were often left in doubt as to the real paternity of his many productions.

After the declaration of war Mr. Spencer continued to wield his pen and exert his influence in urging the people to a vigorous support of the government; but, at length, he too was attracted to the field. In the autumn of 1813 he accepted the position of judge-advocate on the staff of Major-General McClure, and with that officer moved to the seat of war on the northern frontier. The staff of Gen. McClure was composed of young men who subsequently attained much eminence, professionally and politically, in the state. John C. Spencer was judge-advocate, as we have seen; William B. Rochester, afterward a circuit judge, and a politician, who in 1825 disputed with De Witt Clinton for the gubernatorial chair of the state, with such chances of success that he was defeated by a very small majority, was aid; Daniel Cruger, in after times a leading lawyer in western New York, speaker of the assembly, and representative in congress, was quartermaster; John F. Bacon, subsequently for many years clerk of the senate, was paymaster, and Dr. James Faulkner, afterward member of assembly, judge of Livingston county, and state senator, was surgeon. Dr. Faulkner is the only surviving member of Gen. McClure's military family, and is a resident of Dansville, N. Y.

After continuing in the service six months, Mr. Spencer was appointed United States assessor, and in accepting this office he was compelled to tender his resignation. Returning home, he entered upon the discharge of the new and responsible duties thus imposed upon him. The office of assessor was created under the act of Congress passed March, 1813, which provided for a direct tax to aid in the prosecution of the war. It was exceedingly odious to the opponents of Mr. Madison, and was anathematized by them as the first steps toward the establishment of a despotic government. It required great firmness and legal exactness to carry this law into effect, but it was fearlessly and accurately carried out by Mr. Spencer.

In February, 1815, he was appointed by Mr. Tompkins district attorney for the five western counties of the state. In making this appointment, the governor, while he in some measure rewarded a faithful and influential friend, recognized the great legal ability of that friend. It was, however, a position of great responsibility and labor. It compelled Mr. Spencer to attend the criminal courts of distant counties, and thus to perform long and tedious journeys on horse back, over roads which were but a slight improvement on the old Indian trail which then intersected the country. But he was adventurous, and at that age when ambition has no bounds, and he entered upon the discharge of his duties with great alacrity.

It is related that, soon after his appointment, while on his way to attend a term of the oyer and terminer at Batavia, night overtook him when within ten or twelve miles from that village, and he was compelled to remain all night at a hotel. During the evening, while seated by the fire which blazed on the large old-fashioned hearth, two travelers entered and asked for lodging during the night. Matters were soon arranged between them and the host, and they too found a place by the cheerful fire. In a few moments they fell into conversation, from which Mr. Spencer soon learned that they had been indicted for burning a building; were "out on bail," and now on their way to Batavia, where they were to be tried at the ensuing court.

They made no concealment of their peculiar situation, and continued to converse in a tone which was audible to all in the room. At length one of them, whose name was Benson, remarked that a new district attorney had been appointed. "I can't tell what turn our case will take now; Wisner, the old one, was inclined to give us a chance for our lives. Going to be at court this week, sir?" he asked, turning abruptly to Mr. Spencer. "Yes," was the reply. "Are you acquainted pretty generally with lawyers about this country?" asked Ford, the companion of Benson. "I know some of them," said Spencer. "Do you know the name of this new district attorney?" asked Ford. "Yes; his name is Spencer." "What! not the Spencer that lives at Canandaigua, I hope?" said Benson, his eyes dilating with the interest he felt in the question. "Yes, sir; I think it is the same man." "Good God! is it possible? Why, I had rather fall into the hands of an Algerine than into his." "Why so? Will he do any thing more than his duty, do you think?" asked Spencer. "Do any thing more than his duty? Why, good gracious! from all the accounts I have heard of him, he is a regular Philistine, as sour as vinegar, but as smart as steel. He will go all lengths to send a fellow to state's prison, right or wrong, and then he'll go along with him to see that the key is safely turned on the poor fellow," said Ford. "Well, well, this is tough enough, tough enough, to be tried for arson with John C. Spencer against us. Come, Ford, let us go to bed, though I shan't sleep much; and when I do, I shall dream that this Spencer is after me in full chase," said Benson, as he was leaving the room.

During the afternoon of the next day, while Benson and Ford were seated in the court-room, Mr. Spencer came in and took a chair among the lawyers in the bar. "There," whispered Ford to his companion, "there is the man we talked with last night at the tavern, and he is a lawyer, you see; I thought he was, all the time, and I'll bet he is a good one, too." "So will I," said Benson; "and that tall, spare form and thin face shows that he has got a great, active mass of brains, and that his mind is too strong and active for his body. I wonder who he is." Just then Mr. Spencer arose to discuss some question in a civil matter in which he had been retained after his arrival at Batavia, and, as usual, he made an impression upon all in the room. "There, what did I tell you?" said

Benson to his companion, when the speaker had closed; "he is what you call able and strong, and I am going to have him help our lawyer defend us."

In a short time the business in which Mr. Spencer was engaged being disposed of, he left the bar for the purpose of going to his room below. Benson and his friend followed him into the hall; the former, touching Spencer on the shoulder, said, "We would like to talk with you a little; don't you remember us? we were at the hotel with you last night." "Yes, I remember; what do you wish to say to me?" asked Mr. Spencer. "Why, you know that we are indicted for burning a building, and, as our trial is soon to take place, we thought we would like to have you assist our lawyer in defending us," said Benson. "I do not think you want me to defend you." "Why not," asked one of them. "Because I think you do not like my name." "We don't know nor care what your name is; we like your appearance, and believe you are a dead match for that devilish Spencer that is against us," said Ford. "Well, we will see; my name is John C. Spencer." "Heavens and earth!" exclaimed Ford, recoiling from him in terror, while Benson remained perfectly speechless with fright. "You see, gentlemen, that my name is not exactly pleasing to you, and our business is doubtless at an end," said Mr. Spencer, preparing to leave them. "For heavens sake, Mr. Spencer," said Ford, "excuse us for our plain talk to you, and—and, don't—don't bear any harder upon us for it, for we—we are not guilty, we—" "Enough of this," said Spencer, interrupting him, "I shall do my duty, and nothing more; what you have said will make no difference whatever; one thing, however, I will promise not to do; I will not go with you to the *state's prison, just to see that the key is safely turned upon you.*" With this remark he left them. The next morning their trial commenced, but such was the nature of the evidence that the district attorney himself was convinced that they were not guilty, and consented that a verdict to that effect might be entered, and they were fully discharged.

CURRENT TOPICS.

The jury system, like most other human institutions, has its draw-backs, and one of them is the tendency of jurors, in cases where they differ, to ignore the principle of law requiring unanimity in the verdict. We believe it is not unusual in actions for damages for juries to agree upon a verdict by compromise or lot. This practice is sometimes indulged in in criminal cases. An instance has recently occurred at the Norwich assizes in England. A person was on trial for bribery and corruption, and the Liverpool *Daily Post* says that the verdict of "not guilty" was obtained by the drawing of lots. When it was determined that there was a difference of opinion, one of the jurors produced a quantity of bread and cheese, and announced his determination to exhaust his supplies before he changed his opinion. A "scene" is said to have followed, which was finally brought to a close by an agreement to decide by lots. It is hardly necessary to say that a practice of this sort is entirely subversive of the fundamental principles of trial by jury, and ought to be carefully guarded against by the court.

The court of Alleghany county, Pennsylvania, has promulgated some new rules with regard to admissions to the bar which we shall be glad to see copied by the courts of this and the other states. These rules provide that the applicant should have served a regular clerkship and have studied under the direction of an attorney for three years, such clerkship to date from the time when the attorney with whom he is studying shall have registered with the prothonotary his name, age and residence. But no person is to be registered until he shall have undergone an examination on all the branches of a thorough English education and the elements of the Latin language by the board of examiners. Proper deductions from the time required are made for those having attended a law school. Notice of intention to apply for admission is to be published for four weeks in the Pittsburgh *Legal Journal*. To entitle an applicant to admission he must undergo an examination by a board of examiners on the principles and practice of law and equity and is to produce and file with the prothonotary a certificate signed by all the examiners who were present at the examination, that he is sufficiently qualified, etc., for admission. Persons admitted to practice in other courts of the state, or in the courts of other states, are required, in order to secure admission to appear before the board of examiners, and to produce a certificate signed by all the examiners present, of character and qualifications.

A movement toward the establishment of an organized system of legal education in England is beginning to assume practical form in the shape of an association or law university, of which it is understood that Sir Roundell Palmer will act as president. The professed objects of the association are stated to be: 1st. The establishment of a law university for the education of students intended for the profession of the law. 2d. The placing of the admission to both branches of the profession on the basis of a combined test of collegiate education and examination by a public board of examiners. This movement is indirectly the result of the report of the inns of court of inquiry commission, which was appointed in 1854 to investigate the facilities for legal education as afforded by the inns of court. That commission, which was composed of some of the most eminent jurists of England, reported in favor of uniting the inns in a university, the functions of which were to be to institute and regulate examinations, the passing of which should be requisite for the call to the bar; to confer degrees in law, and to provide lectures having reference to the course of study requisite for passing the examination and obtaining the degrees. This report was never passed upon, and was well-nigh forgotten, when in 1868 the law societies of solicitors throughout England took up the matter in an earnest manner, and appointed delegates to meet and draw up a plan for a university of law. This new scheme is based upon the plan of the commission of 1854, with the important addition that both branches of the legal profession are comprised; and it also contemplates that the proposed university shall embrace not only the inns of court and the members of the bench and

bar, but also the various incorporated or organized societies of solicitors. It is said that this new scheme bids fair to command the harmonious support of a large proportion of the legal profession in both branches.

If the testimony of the medical witnesses in the McFarland case is to be believed, we must coincide with the remark, slightly changed, of Lord Macaulay, that the population of this country consists of about forty millions — mostly insane. "Moral insanity," "homicidal tendency," "insane impulse," "delusion," "dementia," "mania," "melancholia," and "frenzy" — dance through their evidence in a manner that would have utterly confounded the M. D.s of Hale's time. If the science of medicine is to continue the "march of improvement" which has characterized it during the past fifty years, our descendants a half century hence will be relieved from the necessity of maintaining jails and prisons, for all crime will be shown by a cloud of medical experts to be the result of some one of the multitudinous forms of insanity. The present tendency of the medical profession is to the opinion, that all passion is a kind of insanity, and that no insane person ought to be punished. The danger of such views has been recently illustrated in several striking instances. We have never doubted the correctness of Lord Hale's rule of law, that some kinds of insanity furnish no excuse for crime. The law does not say that every one who knows right from wrong is free from mental disease, but it does say that when such a person does the wrong it is expedient to punish him, whether he has mental disease or not. This rule is an eminently practical one, and commands the approbation of a large majority of mankind. If human judges were to attempt to weigh accurately the amount of moral guilt involved in each offense, and to apportion the punishment accordingly, the primary object of punishment — the prevention of crime — would be lost sight of.

The mischief that may be done, and is done, by admitting the plea of "uncontrolable impulse," "insane impulse," "melancholia," and the like, is, that it is likely to prevent others really capable of controlling their malicious impulses from doing so; and, assuming that the object of punishment is prevention, and that abstract justice is unattainable and impracticable, we say that less harm is done by punishing a few persons whose impulses may really have been uncontrollable, than by admitting the plea as an excuse for crime. We do not advocate the punishment of men so far insane as not to know right from wrong; but in those cases where the insanity is the result of passion or impulse, and only evinced by the crime committed, we would have the full penalty of the law meted out.

Judge Emmons, of the United States circuit court at Cincinnati, has delivered an opinion sustaining the demurrer filed in behalf of the government to the action brought by distillers to restrain the collection of the tax on whisky, assessed in obedience to what is termed the fourth-hour rule.

OBITER DICTA.

Common counts — those from Germany.

Laches to be avoided—where the door is thereby opened to fraud.

In a trial for breaking open a tailor's shop and stealing a coat and pair of trowsers, it was ruled as the prisoner had no right to *open*, he should'nt have the *clothes*.

Two lawyers were rival practitioners, but neither was over and above proficient in his profession. One boasted he knew the more law; the other admitted it, but swore it was of a poorer quality.

A well-known western express company have on their bills of receipt that they will not hold themselves responsible for injuries resulting from "acts of God, or Indians, or other enemies of the United States government."

"What is your answer in that libel for divorce?" asked a member of the bar the other day of a brother on his way to the clerk's office; "a general denial, or a *Tu quoque?*" For "recrimination," isn't "*Tu quoque*" rather felicitous?

We heard a young attorney one day undertaking to argue down the court upon a ruling that had been foreshadowed, if not actually made. "Pray, what do I understand that your honor claims?" "I don't *claim* any thing," was the reply, which made our young friend appear a little ridiculous.

In Colby's (Mass.) Practice, the author begins the subject of "tender" in a vein of quiet humor: "There are few subjects upon which young practitioners are liable to commit greater errors than this. Nothing would seem to be more easy than for one man to offer money to another (except perhaps to take it); but it will be seen from the cases that it is a matter requiring more than common coolness and carefulness."

A young man who had spent a little of his time and a great deal of his father's money in fitting himself for the bar, was asked, after his examination, how he got on. "Very well," said he. "I answered one question right." "Ah! indeed," said his father. "And, pray, what was that?" "They asked me what a *qui tam* action was, and I told them that I did not know," was the response of the youthful aspirant for legal honors.

In a breach of promise case, in Liverpool, the presiding judge delivered himself of two aphorisms worthy of preservation. The defendant's counsel, having argued that the lady had a lucky escape from one who had proved so inconstant, the judge remarked that "what the woman loses is the man as he ought to be." Afterward, when there was a debate as to the advisability of a marriage between a man of forty-nine and a girl of twenty, his lordship remarked that "a man is as old as he feels; a woman as old as she looks."

In one of those outbreaks which are regularly engendered in drinking saloons, a certain William Brown took occasion to polish off Mr. Luke Spinney, the proprietor of the establishment, with a heavy bottle, which he borrowed from Spinney's counter for the purpose. In *Brown v. Spinney*, the verdict, so to speak, was for the plaintiff, and the dispenser of cheap liquor received what is popularly known as an "awful punishment." Spinney came into court with a frontispiece battered and bruised in a style that would delight the heart of a prosecuting officer, and that approximated that picture of ruin required to be set forth in a common-law indictment for assault and battery. Brown hadn't much to say for himself. His plea

of guilty was given with the proper tone of penitence; and his counsel's efforts were bent to secure a light sentence. It was urged that the prisoner was under the influence of liquor at the time, and poor liquor at that. "But, sir, consider the aggravation," said his honor, "an attack of this dangerous nature. Your client admits that he assaulted this man with a bottle." "Yes, your honor," was the ready reply, "but I beg you to remember that this man *assaulted my client first with its contents.*" The point was neatly taken. Luckily for Brown, this presentation of the affair induced the court to inflict a comparatively mild sentence; and the rule is likely to be followed until Spinney sells a better quality of whisky.

COURT OF APPEALS ABSTRACT.

Henry Hart, Adm'r, etc. v. *The Erie Railway Company.*

A traveler on a public thoroughfare, crossing a railroad, has a right, on approaching the crossing, to expect that the usual warning by bell, whistle or flagman will be given of the approach of a train. He is not bound to assume that the railroad company may violate the law by omitting such precaution. He has a perfect right to act upon the assumption that they will obey the law, in determining the degree of caution which he should exercise in approaching the crossing. In determining the question whether one injured at a road crossing, by a train of cars, was guilty of carelessness in not discovering the approach of the train, all the circumstances which surround the transaction must be considered. An act or omission which under one state of facts would be clearly negligent, under other circumstances would be excusable; hence, no rule of universal application can be prescribed, as every case must mainly depend upon its own circumstances, and be determined accordingly.

When the evidence is conflicting, or questions of credibility are involved, the case must be very clear indeed in favor of the defendant to justify the court in granting a nonsuit. Opinion by INGALLS, J.

Samuel Guillaume et al. v. *The Hamburg and American Packet Company.*

When goods were delivered by the plaintiff to the defendants as common carriers for transportation across the ocean, and a bill of lading given to the plaintiff containing, among other things, the following exceptions: "The act of God, enemies, pirates, thieves, robbers, restraint of princes, rulers, and police, etc., or from any act, neglect, or default whatsoever of the pilot, master, or mariners being excepted, and the owners being in no way liable for any consequences above excepted." When the vessel on which the goods were shipped reached New York, the mate, while engaged in discharging the freight, gave the goods in question to a carman who claimed to be authorized to remove them by the plaintiff, but who, in fact, had had no such authority. The goods were lost. *Held*, that the exceptions contained in the bill of lading did not excuse or embrace the act of the mate in so delivering the goods without authority from plaintiff. A fair construction of such bill is, that the parties did not intend to except acts of gross carelessness, but only the hazards which attend the transportation of the goods. Opinion by INGALLS, J.

Hugh Conaughty v. *Lemuel Nichols and another.*

This was an action by the plaintiff against the defendants to recover the proceeds of goods consigned to the defendants to sell as factors. The plaintiff alleged and proved the consignment to defendants, the sale of the goods by them, the amount realized therefor, the amount due him, after deducting expenses, etc., and the refusal of the defendants to pay the same. The complaint contained the following allegation, "*and have converted the same to their own use*, to the damage of the said plaintiff, in the said sum of six hundred and eighteen dollars and forty-three cents, for which said last mentioned sum the said plaintiff demands judgment," etc. At the trial the defendant moved for a nonsuit, on the ground, substantially, that the plaintiff had failed to establish the cause of action alleged in the complaint; that the action was in *tort* and not in *contract*, and that there was a total failure of proof within the provisions of section 171 of the Code. The plaintiff asked leave to strike out the words "that the defendants converted the money to their own use," etc., which was denied. *Held*, that the plaintiff, having alleged facts constituting a cause of action, and having sustained them by proof upon the trial, should not have been nonsuited, because the pleading contained an unnecessary allegation adapted to a complaint in an action *ex delicto*. Although facts are stated in a pleading which are unnecessary to be proved to constitute a cause of action or defense, they may be disregarded upon the trial or stricken out on motion before trial.

The case of *Walter* v. *Bennett* (16 N. Y. R. 250) does not conflict with these views. All that that case decides is, that a party shall not be allowed to recover for a cause of action which is not alleged and proved.

If the complaint in question had merely stated facts sufficient to authorize a recovery for a wrongful detention, the plaintiff would not have been entitled at the trial to amend by inserting facts appropriate to an action on contract; but when a cause of action on contract is fully set forth, words appropriate to an action *ex delicto* may be treated as surplusage. Opinion by INGALLS, J.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF NEW YORK.*

CONSIGNEES.

1. *Liability for detention of boat.* — Consignees of a cargo of grain, who are not themselves the owners thereof, are only liable to the owner of the vessel for an improper detention thereof at the place of delivery, arising from their own misconduct or neglect. *Huntley* v. *Dows et al.*

2. It is their duty to provide, at the earliest moment practicable, a place of storage; and they have no right to detain the owner and his boat while endeavoring to effect a sale of the cargo. They are liable for the damages occasioned by such detention. *Ib.*

3. *Claim for demurrage.* — If the carrier, after the cargo is discharged, settles with the consignees, and gives his receipt "in full for freight and charges," such receipt is not evidence that the claim for demurrage was settled. *Ib.*

EXCISE LAW.

1. *License: to whom a protection.* — A license to sell liquors to be drank on the premises, issued under the excise act of 1857, is not only to the licensee to sell, etc., but is also a license to sell at a particular place. A license so issued will protect the agent or clerk of the licensee; but an individual selling as the agent or clerk of a person, or at a place, not licensed, cannot obtain immunity by claiming that he acted for another party. *The Com'rs of Excise of Orange County* v. *Dougherty.*

2. A husband, guilty of a violation of the statute, cannot relieve himself from liability by setting up the defense that his wife owned the tavern where the liquor was sold, and that he sold as her agent, where there is no proof that the wife had any license. *Ib.*

WITNESSES.

1. *Parties.* — Under the section of the code declaring that a party shall not be allowed to be examined as a witness in his own behalf "in respect to any transaction or communication had personally by said party with a deceased person, against parties who are executors or administra-

*From Hon. O. L. Barbour; to appear in the 55th volume of his Reports.

tors of such deceased person," a plaintiff in an action against an executrix cannot be allowed to testify as to notes made by the deceased to the order of, and indorsed by, the plaintiff, and which were transactions had personally between them. *Strong* v. *Deane, Executrix, etc.*

2. In such a case the test of the admissibility of the testimony is, does it tend to prove what the transaction was? *Ib.*

RELEASE.

1. *What is such.* — A paper by which the person executing the same, for and in consideration of a mortgage given to him by another to secure the payment of $600, exonerates the latter from all notes or papers that he holds against him, operates as a *release*, according to its terms, and extinguishes the debt due upon a note of the releasee for $600, held by the releasor at the time. *Strong* v. *Deane, Ex'x, etc.*

2. *Explaining: burden of proof.* — The burden is upon the person executing such an instrument, to overcome the effect of it as a release, which cannot be done by parol. *Ib.*

3. And proof that there were other notes, amounting in the aggregate to the sum of $600, which were intended to be, and were, released, does not tend to explain such release, or to exclude from its operation the $600 note. *Ib.*

INTEREST.

Proof of payment. — If, at the time a release of all notes or papers is executed, a note held by the releasor is past due, the indorsement by him, upon the note, of the receipt of interest, after the date of the release, and when the note was in his hands, is not proof of any such payment of interest by the maker. *Strong* v. *Deane, Ex'x, etc.*

EXECUTION.

1. *How far a protection to officer.* — A ministerial officer is protected in the execution of process fair on its face, issued by a court or magistrate having jurisdiction of the subject matter to which it relates. *Shaw* v. *Davis.*

2. To justify a seizure of property under execution, a constable is not required to prove the validity of the judgment on which it was issued; or, indeed, that any judgment in fact was rendered. *Ib.*

3. The process, formal in all respects, issued by a competent tribunal or officer, authorized to act in that regard, is sufficient to protect a ministerial officer who acts under it according to law. *Ib.*

EXEMPTION LAW.

1. *Vegetables for family use.* — Where it was proved that the plaintiff was a householder, and had a family for which he provided; that he had about thirty bushels of potatoes, four or five bushels of apples, and some sixty or seventy heads of cabbage, which comprised his stock of vegetables, and were levied on about the middle of February; and evidence was given as to the number of his family, and as to the fact whether these vegetables were actually provided for family use; *held*, that a case was made for the jury, who had a right to find that the vegetables were all necessary, and actually provided for family use. *Shaw* v. *Davis.*

2. The fact that a man is taking his vegetables to market to exchange them for articles of prime necessity in his family, or even to obtain the means to pay his taxes, will not deprive him of the right to insist that such vegetables were, in fact, actually provided for family use, and exempt from seizure and sale on execution against him. *Ib.*

JUDGMENT.

Reversing in part and affirming in part. — Where a judgment rendered in a justice's court is for different claims, or is for distinct items or articles of property, separable in their nature, and capable of being separated on the record, both as to identity and value, the county court, on appeal, may reverse in part and affirm as to the residue. *Shaw* v. *Davis.*

INTERPLEADER.

1. If, in an action of interpleader, the property in dispute is definite and certain in character, this is sufficient. Its exact value is wholly immaterial. *Cady et al* v. *Potter et al.*

2. Thus, where the interpleader was to determine the rights of the defendants in fixed and definite property, to wit, twenty shares of the capital stock of a bank, to which twenty shares of stock neither the bank nor its officers made any claim whatever: *held*, that there was no force in the objection that the subject of the controversy was not definite and fixed in amount. *Ib.*

AGREEMENT.

1. *Reforming in equity.* — Although it is the well-settled rule that a court of equity may reform a written contract, upon parol evidence of a mistake; yet this can be done only in an action between the parties to the contract, or their privies. *Cady et al.* v. *Potter et al.*

2. A contract cannot be reformed in a collateral action by persons not parties to such contract, nor claiming under a party thereto in privity. *Ib.*

3. Where the demand for a reformation of a contract comes from neither of the parties to the instrument, or any one claiming under them, in privity, but from the personal representatives of a third party claiming under an alleged prior transfer, parol evidence to show what the contract was, and that an important part was omitted from the written instrument, is inadmissible. *Ib.*

BANK STOCK.

Rights of assignee. — A *bona fide* assignee of bank stock, with the first valid transfer thereof on the books of the bank, who takes his assignment without notice of a previous assignment not entered on the transfer book, has a prior and better right to such stock than the previous assignee. And a cancellation of the transfer to him, by the officers of the bank, made without his knowledge or consent, is unauthorized and of no effect. *Cady et al.* v. *Potter et al.*

EVIDENCE.

1. *Statements and dying declarations.* — Although, in an action to recover damages for injuries inflicted on the plaintiff's wife, by the defendant, which caused her death, a statement made by the wife to the plaintiff, respecting the assault, immediately after it occurred, might be admissible in evidence, as part of the *res gestæ*, to show who the person was that committed the assault, yet a conversation had with the plaintiff, by the wife, the next day, cannot be received. *Spatz* v. *Lyons.*

2. Nor is such a statement admissible as the dying declarations of the deceased; such declarations being admissible only in cases of trial for the homicide of the person making them, and then only where the person was acting under a full conviction that the wound was mortal, and that death would speedily ensue. *Ib.*

3. *Hearsay.* — It is not sufficient ground for admitting hearsay evidence, for such a purpose, that it is a matter of necessity, because no other proof can be procured. Hence, it cannot be received on the ground of necessity, to prove an assault committed, even though the party assaulted has since died. *Ib.*

PRACTICE.

1. *Retaining cause.* — In an action brought for equitable relief, and tried before a judge, if there appears to be no ground for granting such relief, the court should retain the cause, and grant such legal relief as may be just. *Cuff* v. *Dorland.*

2. Hence, although a judge refuses to decree a specific performance of a contract of sale, at the suit of the purchaser, yet he should retain the case for the purpose of

awarding to the plaintiff the damages he is entitled to for the non-performance. *Ib.*

3. *Right of jury to take papers with them.* — If a jury take a paper which is given in evidence, with the concurrence of the judge, it is not error; that proceeding resting entirely in the exercise of a sound discretion by him. *Schaffner* v. *The Second Avenue Railroad Co.*

2. If the jury take a paper with the concurrence of the judge, though without the knowledge of the parties, and although it may not have been put in evidence, it is not error, if it appear either that it was not read or used by him; or that, being immaterial in its character, it can be seen, from an examination of the whole case, that it could not have had any bearing upon the issues or the result. *Ib.*

LIMITATIONS, STATUTE OF.

1 *Absence from the state.* — Notes were made and dated, and fell due, in 1854, the maker being then a resident of the state of New York. He left this state in 1851 and moved his family to New Jersey, where he resided and kept house from that time till 1861; during which period his business was in New York, and on week days he was in the city daily, returning to his home at evening. In an action brought upon the notes, in 1866, *it was held* that the statute of limitations did not run while the defendant resided in New Jersey; and that the writ was not barred. *Bassett* v. *Bassett.*

VENDOR AND PURCHASER.

1. *False representations: intent to deceive.* — If a vendor has knowledge of the character and condition of the property he is selling, and makes a representation respecting it which turns out to be false, the motive with which the representation was made is all important, where he is sought to be made responsible on the ground of fraud; and the fact whether he really believed, or had any justifiable reason for believing, that what he said was true, is a most legitimate subject of investigation; and in that, as in all those cases of imputed fraud where the motive is the subject of inquiry, the party charged with the fraudulent intent is permitted to be heard. *Weed et al.* v. *Case.*

2. In order to sustain an action for deceit by means of false representations, it is always necessary to aver and prove an intent to deceive; and whenever a party actually believes what he asserts to be true, he is not liable, although it turns out that what he affirmed was false, in fact. *Ib.*

3. Thus, where in an action by the purchasers against the vendor to recover damages for deceit in the sale of a canal boat, the judge refused to instruct the jury that if they found that the defendant really believed that the representations made by him, in regard to the boat, were true, their verdict should be for the defendant; it was *held*, that the judge erred in refusing the instructions asked for. *Ib.*

NEW YORK (CITY OF.)

1. *Lease on sale for assessments.* — A lease executed by the corporation of New York, upon a sale of land for assessments, is conclusive evidence that the sale was regularly made according to the provisions of the statute. This includes the *demand* of the owner, or upon the premises, and other matters to be done to authorize the sale. *Masterson* v. *Hoyt et al.*

2. *Relief in equity.* — And this being so, a court of equity has jurisdiction to relieve the owner, whenever defects exist rendering the assessment illegal. *Ib.*

3. He may, therefore, maintain an action to set aside the assessment, to cancel the lease, and for an injunction, on the ground that the assessment was illegal; that no demand was made of him, or upon the premises; that no warrant was issued for the collection of the assessment; and that the recitals in the lease are untrue. *Ib.*

BOOK NOTICES.

Reports of cases argued and determined in the Supreme Court of the State of Wisconsin: with tables of the cases and principal matters. By O. M. Conover, official reporter. Vol. 23 containing the cases decided at the June and October terms 1868, and part of those decided at the January term 1869. Chicago: Callaghan & Cockcroft. 1870.

Wisconsin is fortunate in having a good reporter of the decisions of its supreme court. We do not remember when we have turned over the pages of a report that gave us more satisfaction than the one before us. With very few exceptions we find that Mr. Conover has done his work skillfully and well. There are four particulars in which a reporter's skill is put to the test and on which the value of a report mainly depends. 1st, the statement of the case; 2d, the argument of counsel; 3d, the head note or syllabus; 4th, the index. In each of these particulars this volume contains little to censure. The statements of facts are full, yet concise, and there is a noticeable absence of that repetition of the facts in the statements and opinions which cumber so many of our reports. The arguments, though brief, present the main points urged and the authorities relied upon. The "eloquence of the advocate" has been judiciously omitted. Perhaps no part of a reporter's duty requires so much legal knowledge, talent, skill and industry as does that of preparing the abstracts or head notes. No lawyer can pretend to peruse or digest the multitude of reports constantly pouring in upon him; but every one is compelled to rely mainly upon the head notes for a knowledge of what lies beyond; that these should be concise, accurate and reliable is a matter of vast importance. If they are too long and crowded with unnecessary facts and particulars, they cease to be abstracts and give the lawyer infinite labor and perplexity; if they are deficient or inaccurate, they are false guides and mislead and confuse; if they give mere suggestions and *obiter dicta* as matters decided, they are a sort of fraudulent sample and almost worse than useless. This part of his task has been most admirably done by the reporter of the cases before us. As an illustration of the terse style of these head notes we select a few of the briefest:

"A parol contract of marine insurance is valid." *Northwestern Iron Company* v. *The Ætna Insurance Company*, 160.

"An agreement that defendant was to buy a vessel, pay the purchase money and take the title in his own name, and was then to sell the plaintiff one-quarter of the vessel, *held* to be void under the statute of frauds." *Brown* v. *Slauson*, 244.

"Personal judgment against mortgagor for deficiency after foreclosure sale cannot be rendered before the deficiency becomes due according to the contract. *Danforth* v. *Coleman*, 528."

In the fourth essential to a good report—the index—we find nothing to except to in the present report. The subjects are well distributed, the titles are sufficiently numerous, and the cross references carefully noted. The more important cases contained in the volume have been heretofore abstracted in THE LAW JOURNAL.

TERMS OF THE SUPREME COURT FOR MAY.

4th Monday, Circuit and Oyer and Terminer, Sullivan, Peckham.
4th Monday, Circuit and Oyer and Terminer, Onondaga.
4th Monday, Circuit and Oyer and Terminer, Genesee, Daniels.
4th Monday, Circuit and Oyer and Terminer, Niagara, Marvin.
4th Tuesday, Circuit and Oyer and Terminer, Plattsburgh, Bockes.
Last Monday, Circuit and Oyer and Terminer, Otsego, Parker.
Last Monday, Special Term, Corning, Johnson.
Last Tuesday, Special Term, Albany, Miller.

Maine judges refuse naturalization papers to aliens who are engaged in the sale of liquor.

NEW YORK LAW INSTITUTE—ELECTION OF OFFICERS.

The annual election of the New York Law Institute took place on the 9th inst., with the following result:

President, Charles O'Connor; first vice-president, Charles Tracy; second vice-president, Henry A. Cram; third vice-president, Samuel Blatchford; treasurer, Edward H. Owen; recording secretary, Joseph S. Bosworth; corresponding secretary, Benjamin D. Silliman; librarian and assistant treasurer, Aaron J. Vanderpoel.

Library Committee—Edmund Terry, Lewis S. Thomas, Hooper C. Van Vorst, Stephen P. Nash, Edward Paterson, James C. Carter, William Watson, Thomas M. North.

Committee on Jurisprudence—Wm. M. Evarts, Benjamin V. Abbott, Edwin W. Stoughton, David Dudley Field, Enoch L. Fancher, Chas. F. Stone, Edmund Wetmore.

Committee on Censorship—Charles F. Southmayd, John McKeon, Benjamin F. Kissam, John W. Edmonds, Henry D. Sedwick, Everett P. Wheeler, James C. Carter, Lewis B. Woodruff.

LEGAL NEWS.

Governor Bullock, of Georgia, has sued the Atlanta *Constitutionalist* for libel.

Hon. John O. Cole, of Albany, has resigned the office of police justice, after holding it for forty years.

Ex-Governor Wells has been appointed United States district attorney of the district of Virginia.

Gen. Jubal Early is about to settle permanently in Lynchburg, Va., for the practice of the law.

Judge David C. Humphreys, of Alabama, has been confirmed as an associate justice of the supreme court of the District of Columbia.

A Boston juryman signed a petition for the pardon of a convict, because, as he said, he was afraid if he did not the man would kill him.

Ill-treatment of the mother-in-law by the husband is one of the grounds upon which a divorce is asked by a lady in Richmond, Va.

At the late term of the United States supreme court at Washington about 225 cases were disposed of, leaving on the docket about 250.

Judge Woods, of the United States court in Louisiana, has dismissed a number of confiscation cases, in accordance with instructions from the attorney-general.

The king of Italy pardoned last year two hundred and twenty-five criminals; the emperor of Austria, one hundred and ten; and the king of Prussia, forty-five.

A jury at Lewiston, Me., recently convicted liquor sellers enough at one sitting (without returning to consult) to pay fines amounting to $3,200, besides sending some to jail.

Joseph B. Keyes, assistant United States marshal for the Boston district, died at his residence in Lowell, a few days ago, of disease of the kidneys. He was a lawyer by profession, talented and successful.

The Mississippi Senate has confirmed Governor Alcorn's appointments to the supreme bench of that state. The appointees are Judges Simrall, Peyton, and Tarbell.

Lieutenant-Governor Dunn, of Louisiana, and the members of the board of the New Orleans police commissioners, have been committed to prison for five days and fined $95 each, by Judge Cooley, of the sixth district court of that city, for contempt.

The United States attorney-general has partially prepared an opinion on the question submitted to him by the treasury department as to whether officials can legally receive rewards or moieties in cases of fines or seizures for violations of the revenue laws. Judge Hoar was compelled to suspend work on this opinion on account of more pressing business, but is expected to complete it this month.

Suit has been commenced in the superior court of Baltimore, by the state of Maryland, against the Baltimore and Ohio Railroad Company, to recover the value of gold over currency in which the state has been paid its 6 per cent interest on dividends guaranteed by the company on the preferred stock owned by the state, which now amounts to nearly $2,000,000. The claim is based on the recent legal-tender decision of the United States supreme court.

Rochester, Minn., has been the scene of a queer lawsuit between a merchant and a discharged servant girl, which terminated in the discomfiture of the merchant. The girl sued the merchant for her pay, and he brought in a bill against her to offset it, charging her fifty cents per night for kerosene when her "cousin" called to see her, and one dollar per night each night she worked for herself after the housework was done.

The following names were recently taken from a jury list in Sussex county, England, which was compiled about the year 1658: Faint-not Hewitt, Seek-wisdom Wood, Redeemed Compton, Accepted Trevor, God-reward Smart, Make-peace Heaton, Be-courteous Cole, Repentance Airs, Return Spellman, Kill-sin Simple, Fly-debate Roberts, Be-faithful Sinner, Hope-for Rending, Weep-not Billings, Elected Mitchell, Fight-the-good-fight-of-faith White, Stand-fast-on-high Stringer, Search-the-Scriptures Moreton, The-peace-of-God Knight.

In New York, the judges of the superior court have recently leaned to the practice that orders of civil arrest are within the discretion of the judge to whom the application is made; and, if the circumstances do not otherwise demand it, an order will not be granted on mere technical compliance with the statute. This has long been the practice of the court of common pleas. In the supreme court, as a rule, it has been regarded as sufficient to present facts bringing the case within the terms of the statute, so that the issuing of the order has come to be regarded as an absolute right, if the requirements of the statute be complied with.

One of the oddest defenses on record has just been made at Hamburg by a man who murdered his wife from motives of jealousy. According to his own account he had not murdered her, but "had killed her in a fair and honorable duel, as he had placed a pistol in her hand and told her to shoot at him." The court, however, did not quite regard it as an affair of honor, and condemned him to twenty-five years' penal servitude, expressly stating that they had not sentenced him to death on account of respect for the opinions of the majority of the population of the North German Bund.

The English judges appear to be in earnest about putting down bribery at elections. Mr. Justice Blackburn, who passed sentence upon Robert Hardiment on his conviction for bribery at the last Norwich municipal election, has declined to make an order placing him in the first class of misdemeanants. The prisoner has consequently been obliged to wear the prison dress, and is treated as an ordinary misdemeanant. As he is a man who has been accustomed to the comforts of life, having been a tradesman in a fair way of business, Hardiment has been much mortified by his new position, and his friends propose to obtain, if possible, a mitigation of his sentence.

Attorney-General Hoar has decided the question of the application of the owners of the Visitacion ranch to recall the order directing the institution of the suit in chancery to cancel the patent. This ranch is reputed to be worth several million dollars, and is located about two miles south of San Francisco. It was the subject of the recently well-known financial enterprise which was checked by the attorney-general, creating distrust in Mexican titles based on patents of the United States. That feeling is now quieted by an order of the attorney-general of the state, allowing the applicant to recall his order, and allowing the patent to stand. The decision gives great satisfaction to California land owners now in Washington.

NEW YORK STATUTES AT LARGE.*

CHAP. 47.

AN ACT to amend chapter fifty-seven of the Laws of eighteen hundred and sixty, entitled "An act conferring additional powers and duties on Courts of Special Sessions in the county of Monroe," passed March third, eighteen hundred and sixty.

PASSED March 8, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The first section of chapter fifty-seven of the laws of eighteen hundred and sixty, entitled "An act conferring additional powers and duties on Courts of Special Sessions in the county of Monroe," passed March third, eighteen hundred and sixty, is hereby amended so as to read as follows:

§ 1. Courts of special sessions in the county of Monroe, in addition to the powers vested in said courts by the first and second sections of chapter seven hundred and sixty-nine of the laws of eighteen hundred and fifty-seven, shall have exclusive jurisdiction to hear, try and determine charges for crimes and offenses in the cases in this section mentioned, arising within said county, provided, however, that the accused in such cases shall have the right to demand a trial in said court as provided by law.

1. All cases of petit larceny not charged as a second offense.

2. Cases of assault and battery not charged to have been committed riotously or upon any public officer.

3. Cases of intoxication arising under the seventeenth section of an act entitled "An act to suppress intemperance and to regulate the sale of intoxicating liquors," passed April sixteen, eighteen hundred and fifty-seven. But nothing in this act shall affect the jurisdiction of courts of sessions or oyer and terminer in said county, in cases where charges of petit larceny or assault and battery are properly joined or included in any indictment for felony according to law.

§ 2. This act shall take effect immediately.

CHAP. 170.

AN ACT to amend an act entitled "An act to extend the jurisdiction of surrogates' courts," passed April twenty-three, eighteen hundred and sixty-seven.

PASSED April 11, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section two of the act entitled "An act to extend the jurisdiction of surrogates' courts," passed April twenty-three, eighteen hundred and sixty-seven, is hereby amended so as to read as follows:

§ 2. The surrogate, to whom such surplus moneys shall be paid, shall, upon the application of any person entitled thereto, or to any part or share thereof, by petition duly verified by the oath of the applicant, and by such other proof as shall be required by the surrogate, stating the name or names and residence of the party or parties entitled thereto, or to any part or share thereof, and also describing the premises so sold, make distribution of the said surplus moneys to the party or parties entitled thereto, in the same manner, by like proceedings and with like effect as moneys derived from the sale of real estate made by order of the surrogate, under and by virtue of existing provisions of law, are required to be distributed.

§ 2. On such distribution, the claimant or claimants of the said surplus moneys, or any part or share thereof, shall make proof of his, her or their right or title thereto, by evidence satisfactory to said surrogate.

§ 3. It shall be competent, on such distribution, for any party claiming such surplus moneys, or any part or share thereof, to controvert by proofs before said surrogate the claim or claims of any adverse claimant of said surplus moneys, or of any part or share thereof.

§ 4. In case any of the parties claiming said surplus moneys, or any share or part thereof, are minors, having no general guardian appearing to protect the rights and take care of the interests of such minors, the surrogate shall appoint some proper and competent person special guardian to protect the rights and take care of the interests of such minors on such distribution. The written consent of such special guardian to serve as such shall be signed by the person so appointed, and shall be filed in the office of said surrogate. And it is hereby made the duty of such special guardian to attend the proceedings before said surrogate on such distribution, and protect the rights and take care of the interests of such minors.

§ 5. The party making such application shall serve or cause to be served upon all persons upon whom a notice of said sale was served, or who were parties defendant in such foreclosure and sale, and upon all persons named in said petition, a copy of said notice of distribution. Such notice shall be served, and the service thereof proved, in the same manner as is provided for in part second, title fifth of the code of procedure, entitled "Of the manner of commencing civil actions," for the service of a summons, and the proof of such service.

§ 6. This act shall take effect immediately.

CHAP. 203.

AN ACT relating to the Court of Appeals and the Commission of Appeals.

PASSED April 14, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The court of appeals, instituted by the sixth article of the constitution, shall possess all the powers and jurisdiction heretofore possessed by the existing court of appeals, and all laws authorizing and regulating appeals to the last mentioned court, and other laws relating thereto, the judges thereof, their powers and duties, and not inconsistent with the constitution or with this act, shall be deemed in force and applicable to the court in this section first mentioned, and to the judges thereof; provided, however, that no existing law which relates to the rehearing of causes in such court shall be in force, and provided further, that the court may prescribe the times and places of holding its terms, except as provided in the next section.

§ 2. The said court of appeals shall hold a term for the hearing of causes and matters before it in the senate chamber of the capitol, in the city of Albany, commencing on the first Tuesday in July next. The clerk of the existing court of appeals shall act as clerk of such newly instituted court until a clerk thereof shall be appointed, pursuant to the constitution, and he shall prepare and make up a calendar for the term so to be held, to be composed of the causes and matters which shall be upon the then existing calendar of the court of appeals, which were not pending in said court on the first day of January, eighteen hundred and sixty-nine. Such causes and matters on the existing calendar shall be deemed regularly noticed and ready for hearing at such term, according to the usual course and practice. Causes not upon the said existing calendar, and brought into the court of appeals since the first day of January, eighteen hundred and sixty-nine, may be noticed for hearing at the said term, and placed upon the calendar so to be prepared. The rules and practice of the existing court of appeals shall continue to be the rules and practice of the court of appeals until the same shall be altered by order of the court.

§ 3. The commission of appeals provided for in the said

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

sixth article of the constitution shall commence on the first Monday of July next, at which time the commissioners shall meet at the capitol, in the city of Albany, and shall take the oath of office, and organize by appointing a chief commissioner. The clerk of the present court of appeals shall be the clerk of the said commission until the expiration of his term of office, when the commissioners shall appoint a successor for the residue of the period of the commission, and his compensation shall be the same as that of the clerk of the court of appeals.

§ 4. The said commission shall hold a term or sitting for the hearing of the causes committed to it at the capitol, in the city of Albany, commencing on the first Tuesday of July next, and shall proceed to hear and determine causes which were pending in the present court of appeals on the first day of January, eighteen hundred and sixty-nine. For that purpose the calendar of such causes, prepared for the year eighteen hundred and seventy, shall be deemed the calendar of the term so to be held, and of subsequent terms, or sittings, without further notice of hearing, and any such cause not on the calendar may be noticed and placed thereon at any term or sitting. The commissioners shall have power to hear and determine motions to dismiss appeals, and other motions arising in the causes committed to them. All existing laws relating to officers and attendants of the existing court of appeals, and all rules of procedure therein, shall be deemed in force in respect to said commission, so far as applicable to its jurisdiction and powers.

§ 5. The clerk of the commissioners shall keep minutes of their proceedings, orders and decisions, and whenever they shall make a final decision of any cause, or an order dismissing an appeal, the same shall be certified by the clerk to the court of appeals, and, on being recorded in the minutes thereof, shall be of the same force and effect as if the decision or order had been duly made by said court. A motion for a rehearing of any cause decided by the said commissioners shall be made before them.

§ 6. All remittiturs in causes determined by the said commissioners shall, after the decisions have been certified as required in the last preceding section, be sent down from the court of appeals. All minutes kept by the clerk of the commissioners of their proceedings, decisions and orders, shall be deposited, and remain of record, in the office of the clerk of the court of appeals.

§ 7. Prior to the first Monday of July next, the present court of appeals shall finally dispose of all causes and matters which shall have been argued before it or submitted for decision, either by determining such causes and matters, or by directing a re-argument of the same.

§ 8. From and after the first Monday of July next the salary of the chief judge of the court of appeals shall be seven thousand five hundred dollars, and the salary of the associate judges of said court and of the commissioners of appeals shall be seven thousand dollars, and in addition to such salaries the said chief judge and associate judges shall be paid their reasonable expenses when absent from their homes in the performance of official duty.

§ 9. All laws relating to the clerk of the court of appeals, his powers and duties, shall be applicable to the clerk appointed under the constitution, except so far as they may be inconsistent with the sixth article of the constitution or this act.

§ 10. This act shall take effect immediately.

CHAP. 208.

AN ACT in relation to the acknowledgment or proof of the execution of instruments in writing by persons in the Dominion of Canada.

PASSED April 14, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The acknowledgment or proof of any deed or other written instrument required to be proved or acknowledged in order to entitle the same to be recorded or read in evidence in this state, by any person being in the Dominion of Canada, may be made (in addition to the persons already authorized by law) before the judge of any court of record, or the mayor of any city, within the said Dominion of Canada; but no such acknowledgment or proof shall be valid unless the officer taking the same knows or has satisfactory evidence that the person making it is the individual described in and who executed the instrument. And there must be subjoined or attached to the certificate of proof or acknowledgment, if taken before a judge of a court of record, a certificate under the name and official seal of the clerk of the court, that there is such a court; that the judge before whom the proof or acknowledgment is taken is a judge thereof; that such court has a seal; that he is the clerk thereof; that he is well acquainted with the handwriting of such judge, and verily believes his signature genuine. If the proof or acknowledgment be taken before the mayor of any city, it shall be certified by him under his seal of office. And such proof or acknowledgment taken pursuant to the foregoing provisions shall be as valid and effectual as if taken before a justice of the supreme court of this state.

§ 2. This act shall take effect immediately.

CHAP. 222.

AN ACT to amend section twenty-three of article second, title nine, chapter nine of part first of the Revised Statutes, in relation to the canals.

PASSED April 15, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section twenty-three of article second, title nine, chapter nine of part first of the revised statutes is hereby amended by adding thereto the following:

"And whenever the navigation of any of the canals shall be interrupted or endangered, any commissioner or superintendent may, if, in his judgment, it is necessary or proper so to do, cut up, destroy or remove any canal boat, vessel or other thing in or partly in the canal, and the damages in consequence thereof shall be assessed in the manner provided by chapter two hundred and eighty-seven of the laws of eighteen hundred and thirty-six."

§ 2. This act shall take effect immediately.

CHAP. 299.

AN ACT declaring and providing for the punishment of certain offenses committed upon the lakes, canals, and navigable waters of this state.

PASSED April 20, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. If any person or persons shall willfully or corruptly cast away, burn, sink, scuttle or otherwise destroy any vessel, canal boat, or other craft upon any of the lakes or other navigable inland waters of this state, or upon any canal of this state, with intent to injure or defraud any owner of such vessel, canal boat or other craft, or with intent to injure or defraud the owner or owners of any property shipped or laden on board the same for transportation, or with intent to injure or defraud any insurer of such vessel, canal boat, or other craft, or of any property so shipped or laden thereon, or of any part thereof, the person or persons so offending shall, upon conviction thereof, be deemed and adjudged guilty of a felony, and shall be punished by imprisonment in a state prison for a term not less than two years.

§ 2. Any owner or owners of any vessel, canal boat, or other craft, or any other person who shall, upon any of the lakes or other inland navigable waters of this state, or upon any canal of this state, willfully or corruptly cast away, burn, sink, scuttle, or otherwise destroy or injure any such vessel, canal boat, or other craft, or in any man-

ner direct, procure, or cause the same to be done, with intent to injure or defraud any owner or owners of any property shipped or laden on board the same, or any insurer of such property, or of any part thereof, shall, upon conviction thereof, be deemed and adjudged guilty of felony, and shall be punished by imprisonment in a state prison for a term not less than two years.

§ 3. Any person or persons who shall willfully or corruptly attempt to cast away, burn, sink, scuttle, or otherwise destroy any vessel, canal boat, or other craft upon any of the lakes or other navigable inland waters of this state, or upon any canal of this state, with intent or design to injure or defraud the owner or owners of such vessel, canal boat, or other craft, or the owner or owners of any property shipped or laden on board the same, or any insurer of any such vessel, canal boat, or other craft, or property, or any part thereof, shall, upon conviction thereof, be adjudged guilty of a felony, and shall be punished by imprisonment in a state prison for a term not less than one year.

§ 4. This act shall take effect immediately.

CHAP. 300.

AN ACT to provide for the payment of bonds of towns, villages, and other municipal corporations.

PASSED April 20, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In all cases where bonds of any town, village, or other municipal corporation may have been or shall hereafter be issued according to law, and in all cases where the payment of the principal or interest of such bonds shall not have been otherwise paid or provided for, the same shall be a charge upon the real and personal property of such town, village or municipal corporation, and shall be assessed, levied, collected, and paid in like manner as other debts, obligations, and charges against such town, village, or municipal corporation, except that in villages the same shall be assessed, levied, and collected by the trustees thereof in the following manner: The commissioners of said village, if any there be, who are or have been duly authorized by law to issue said bonds; or if there shall be no commissioners, then the said trustees, or a majority of them, shall, on or before the first day of January of each year, prepare and file with the clerk of the said village corporation a detailed statement of the amount of bonds which may have been issued by said village, or which may be a charge upon the same, with the amount of principal and interest which may have become due, or which shall become due during the succeeding year, and such amount of principal and interest which shall be already due, or which shall become due during such succeeding year, shall be by the trustees of said village assessed and levied upon the taxable property of said village, and collected with the other taxes which shall be collected from time to time for village purposes; and whenever, through inadvertence, neglect, or other cause, any portion of the principal or interest due as aforesaid upon such bonds by such municipal corporation shall not have been paid, the same shall be assessed and collected at the first assessment and collection of taxes by such municipal corporation after such failure or omission to pay the same.

§ 2. Any commissioner, officer or officers whose duty it shall be to make reports as provided for in the first section of this act, or to make provision for the payment of the principal or interest of such bonds as aforesaid, and who shall fail or refuse to make such report, or to provide for such payment, shall be liable to a penalty not exceeding one thousand dollars, nor less than two hundred and fifty dollars, to be sued for and recovered by the holder of any of the aforesaid bonds or obligations.

§ 3. This act shall take effect immediately.

CHAP. 280.

AN ACT to amend an act passed April thirteenth, eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes."

PASSED April 18, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. A mortgagee whose mortgage is duly recorded, or the assignee of any mortgage whose assignment is duly recorded, and the personal representatives of such mortgagee or assignee, who shall have filed with the comptroller, as required by law, a notice and description of his mortgage, may at any time after the sale of all or any part of the mortgaged premises for unpaid taxes, and before the expiration of six months from the giving of the notice required by section seventy-seven of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, entitled "An act in relation to the collection of taxes on lands of non-residents, and to provide for the sale of such lands for unpaid taxes," may redeem the said premises so sold or any part thereof from the said sale. If the said sale shall have been made by the comptroller, such redemption shall be made by paying to the state treasurer, upon the certificate of the comptroller, for the use of the purchaser, his heirs or assigns, the sum mentioned in his certificate, with interest, at the rate allowed by law in the case of redemption by occupants from the date of such certificate; and if the said sale shall have been made by a county treasurer or other county officer, the redemption shall be made by paying to the county treasurer the amount for which said lands were sold, with interest at the same rate, from the day of sale. The mortgagee or assignee of a mortgage, or other person redeeming lands sold for unpaid taxes as authorized by this section, shall have a lien on the premises so redeemed for the amount paid, with interest thereon from the time of such payment, at and after the rate of seven per centum per annum, in like manner as if the same had been included in the mortgage. Section one of chapter two hundred and eighty-five of the laws of eighteen hundred and sixty-two, entitled "An act to amend chapter four hundred and twenty-seven, of the laws of eighteen hundred and fifty-five," passed April seventeen, eighteen hundred and sixty-two, is hereby repealed.

§ 2. Section seventy-seven of chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, mentioned in the first section of this act, is hereby amended by adding thereto these words: "Such notice may be given at any time after the expiration of two years from the last day of such sale."

§ 3. Section eighty-one of said chapter four hundred and twenty-seven of the laws of eighteen hundred and fifty-five, is hereby amended by adding thereto the following paragraph:

"A copy of such notice served, together with the affidavit of some person who shall be certified as credible by the officer before whom such affidavit shall be taken, that such notice was duly served, specifying the mode of service, shall be filed in the office of the comptroller within one month after such service."

CHAP. 311.

AN ACT to provide for repairing and keeping in order highways, streets and roads between cities, towns and villages.

PASSED April 21, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever a highway, street or road shall be on the line between a city, town, or village, or between either of them, the officers authorized and required to

repair and keep in order the highways, streets and roads in such city, town and village, shall meet together at the mayor's office in such city, if said highway, street or road be on the line between a city and town or a city and village, or at the office of the town clerk of such town, if the same be on the line between a town and village, on the first Monday of May in each year, at twelve o'clock M., and divide such highway, street or road, and allot one part thereof to such city and the other to such town or village, or one part thereof to such town and the other to such village, as the case may be, in such manner that the labor and expense of working and keeping in repair such highway, street or road may be equal as near as may be.

§ 2. Upon the neglect or failure to attend on the part of the officers of any city, town or village, at the time or places designated in the first section of this act, for the purposes therein mentioned, the officers of the city, town or village present may perform the said duty, and when done, the divisions thus made shall be of the same force and effect as if made by the joint action of such city and town, or such city and village, or such town and village.

§ 3. The statement of the division made pursuant to the provisions of the first or second section of this act shall be reduced to writing and properly authenticated by the officers making the same, and shall be filed within ten days after such division is made in the offices of the city clerk of the city, of the town clerk of the town, and of the clerk of the village, between whom such division has been made.

§ 4. This act shall take effect immediately.

CHAP. 321.

AN ACT to provide for the appraisal of canal claims against the state.

PASSED April 21, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Jurisdiction is hereby granted to and conferred upon the canal appraisers to hear and determine all claims against the state of any and all persons and corporations for damages alleged to have been sustained by them from the canals of the state, or from their use and management, or resulting or arising from the negligence or conduct of any officer of the state having charge thereof, or resulting or arising from any accident or other matter or thing connected with the canals; but no award shall be made unless the facts proved shall make out a case which would create a legal liability against the state were the same established in evidence in a court of justice against an individual or corporation; and in case such legal liability shall be satisfactorily established, then the appraisers shall award to the claimants such sum as shall be just and equitable, subject, however, to the right of appeal to the canal board in all cases, in the manner now provided by law; provided, that the provisions of this act shall not extend to claims arising from damages resulting from the navigation of the canals.

§ 2. The claimants shall file their claims in the office of the canal appraisers within two years from the time said damages shall have accrued, but claims for damages which shall have accrued more than one year prior to the passage of this act shall be filed within one year from the date hereof. The canal appraisers are hereby authorized and required to employ counsel on behalf of the state, on the hearing of such claims, as may be necessary to protect the interests of the state. All acts or parts of acts inconsistent with this act are hereby repealed.

§ 3. The said board of canal appraisers shall prescribe rules as to the form and manner in which claimants shall make out and verify their statement of claims; and they shall provide a general rule for the taking of evidence when the witness shall not be examined orally before said board, and for reducing to writing and preserving said evidence when taken. The said board is hereby authorized to issue subpœnas for the attendance of witnesses, and shall have power to compel their attendance by attachment, and to punish them for contempt, in the same manner as is now provided by law in relation to courts of record; and the said board shall also have power to administer oaths to witnesses and to issue commissions for the examination of witnesses residing out of the State.

§ 4. This act shall take effect immediately.

CHAP. 385.

AN ACT to regulate the hours of labor of mechanics, workingmen and laborers in the employ of the state, or otherwise engaged on public works.

PASSED April 26, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. On and after the passage of this act, eight hours shall constitute a legal day's work for all classes of mechanics, workingmen and laborers, excepting those engaged in farm and domestic labor; but overwork for an extra compensation, by agreement between employer and employee, is hereby permitted.

§ 2. This act shall apply to all mechanics, workingmen and laborers now or hereafter employed by the state, or any municipal corporation therein, through its agents or officers, or in the employ of persons contracting with the state, or such corporation, for performance of public works.

§ 3. Any officer or officers, or agents of this state, or of such corporation, who shall openly violate or otherwise evade the provisions of this act, shall be deemed guilty of malfeasance in office, and be liable to suspension or removal accordingly by the governor or head of the department to which such officer is attached.

§ 4. Any party or parties contracting with the state, or any such corporation, who shall fail to comply with, or secretly evade the provisions hereof, by exacting and requiring more hours of labor, for the compensation agreed to be paid per day, than is herein fixed, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine, not less than one hundred nor exceeding five hundred dollars, and, in addition thereto, shall forfeit such contract, at the option of the state.

§ 5. Chapter eight hundred and fifty-six of the laws of eighteen hundred and sixty-seven, entitled "An act to limit the hours of labor constituting a day's work to eight hours," passed May ninth, eighteen hundred and sixty-seven, is hereby repealed.

§ 6. This act shall take effect immediately.

CHAP. 388.

AN ACT to amend the laws relating to elections.

PASSED April 27, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All laws and parts of laws which direct or require the registers or inspectors of elections, or other officers of elections, to tender to or require of a colored man offering to vote, whether when challenged or not challenged, any oath other than or different from the oath which they are directed or required to tender to or require of a white man in like cases, are hereby repealed; and all laws or parts of laws which direct or require the registers or inspectors of election to interrogate a colored man offering to vote, or when offered as a witness as to the qualifications of other voters, whether

when challenged or not challenged, by putting to him questions or requiring answers other than those prescribed to be put to or required from a white man, under like circumstances, are hereby repealed, and it shall not be lawful for the registers or inspectors of elections to tender to or to administer to a colored man any oath, or to put any questions or require any answers other than such as, under like circumstances, it is lawful to tender, administer, put to or require from a white man.

§ 2. It shall not be lawful for the registers, inspectors, canvassers, or other officers of election, to reject the name from the registry, or the vote of any colored man, except for like causes as would make it their duty to reject the name or the vote of a white man.

§ 3. Any register, inspector or other officer of elections offending against the provisions of this act, shall, upon conviction, be adjudged guilty of a misdemeanor, punishable by a fine of five hundred dollars and imprisonment for six months.

§ 4. This act shall take effect immediately.

CHAP. 467.

AN ACT in relation to county courts.

PASSED April 28, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The county courts, in addition to the powers they now possess, shall have jurisdiction in civil actions where the relief demanded is the recovery of a sum of money not exceeding one thousand dollars, or the recovery of personal property not exceeding in value one thousand dollars, and in which all the defendants are residents of the county in which the action is brought at the time of its commencement, subject to the right of the supreme court, upon special motion, for good cause shown, to remove any such action into the supreme court before trial, and also, on such removal being made, to change the venue or place of trial. They shall have such appellate jurisdiction as is now provided by law.

§ 2. Costs in the county courts in actions authorized to be brought therein by the preceding section shall be the same, and shall be recovered in the same cases only, as in the like actions in the supreme court.

§ 3. Power of local legislation is hereby conferred on the several boards of supervisors to establish, by local law applicable to their several counties, the salary of the county judge, and of the surrogate when elected as separate officer, such salaries to be payable out of the county treasury; provided that the salary of no county judge or surrogate shall, when once so established, be diminished during his term of office.

§ 4. It shall be lawful for the boards of supervisors of the several counties to authorize the surrogate therein to employ the necessary clerks, and the said boards shall fix the compensation to be paid such clerks.

§ 5. This act shall take effect immediately.

CHAP. 503.

AN ACT respecting elections other than for militia and town officers.

PASSED April 28, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All laws and parts of laws which provide or prescribe that the electors of this state shall cause their names to be registered or enrolled with registers of election or other election officers, at any day prior to the day on which an election is to be held, are hereby repealed, except so far as the same apply to the city and county of New York.

§ 2. Nothing in this act contained shall be construed to apply to the city and county of New York, nor to repeal, alter, or amend any of the provisions of an act entitled "An act in relation to elections in the city and county of New York," passed April fifth, eighteen hundred and seventy.

§ 3. This act shall take effect immediately.

CHAP 521.

AN ACT releasing the interest of the people of the state of New York in certain real estate to Nelson Dufort.

PASSED April 29, 1870, by a two-thirds vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All the estate, right, title and interest of the people of the state of New York, acquired by escheat, by reason of the allenage of Joseph Woods, deceased, of, in and to that piece or parcel of land situate in the town of Clayton, county of Jefferson, state of New York, of which the said Joseph Woods died possessed, and conveyed to him by D. D. Calvin, by deed dated November thirty, eighteen hundred and sixty-six, and recorded in the clerk's office of Jefferson county, December thirteen, eighteen hundred and sixty-six, in book one hundred and sixty-eight of deeds, page three hundred and eighty-seven, etc., is hereby released to Nelson Dufort, of the town of Clayton, in said county of Jefferson.

§ 2. Nothing herein contained shall be construed to impair, release or discharge any right, claim or interest of any creditor or purchaser, heir at law or devisee, in the said real estate.

JUDICIARY ELECTION.

The election for court of appeals judges, held on Tuesday last, resulted in the success of the entire Democratic ticket. The vote polled was very light, especially in the rural districts, which fact may fairly be construed into an admission on the part of the people that judges ought not to be elected by popular vote. Since the adoption of the constitution of 1846, the decisions of the court of appeals have not been received, at least outside of our own state, with that respect and acquiescence which, prior to that time, had always been accorded to the decisions of our court of last resort. This was from no fault or failing in our judges, but from the radical defects of our judicial system. But hereafter, with a sounder system, and judges of acknowledged ability, learning and industry, the lost prestige of the court will be regained, and we may safely say that no other court, except perhaps the supreme court of the United States, will have so great an influence upon the laws and jurisprudence of the other states.

The following, being the nominees on the Democratic ticket, will constitute five of the seven judges of the court of appeals for the next fourteen years:

Chief Justice.—Sanford E. Church.
Associate Justices.—William F. Allen, Rufus W. Peckham, Charles A. Rapallo, Martin Grover.

Two of the four Republican candidates are also elected, but which two will not probably be known for a week hence. The *Tribune* inclines to the opinion that Charles J. Folger and Charles Andrews will be the men.

The Albany Law Journal.

Albany, May 28, 1870.

COURTS AND DECISIONS.

The method which a court pursues in arriving at its decisions, on causes submitted to it, has an important influence upon the weight of its opinions, considered as expositions of the law. The disregard of sound principles in this respect is the cause of some confusion in our judicial oracles, and the results which accumulate, in course of time, under wrong methods of deliberation, seriously affect the profession and the character of our jurisprudence.

The reason why the final determination of questions of law is left to a court constituted, for the purpose, of several judges, rather than to several independent courts of one judge each, is that we may gain something more than the individual opinions of several minds qualified and opposed by each other; it is to get the opinion of *a court;* a composite opinion which shall evolve the doctrines of the law in conference, and promulgate them, so far as union of judgment gives certainty and precision, and no further.

If a court, after hearing an argument, should confer together, under the settled policy of arriving, by discussion if necessary, at a common result, uniting, so far as practicable, in a view in which all or a clear majority were agreed, and going no further than this, the judgments of that court would, if the members were men of even respectable professional attainment, be cautious, harmonious, clear and weighty. By reason of such conference and the consequent limitations of opinion, the members of the court would always know what the court had decided, and in subsequent cases raising the same question, instead of laboring to ascertain what was the significance of previous judgments, they would have simply to consider how to apply the rule which they had previously united in adopting.

If such a court, desiring to assign its reasons in each case, were to direct one of its members to draw up a statement of the result of such conference as a report of their judgment, the reader would then have the *opinion of a court.* Such an opinion always addresses itself to the profession with a superior sanction to that possessed by individual utterances. It possesses the qualities peculiar to *judicial wisdom.* The reports of such courts as these always win the respect and confidence of the profession. They can contain nothing of the peculiar and eccentric opinion of one man; all traces of those professional idiosyncracies which the best of judges sometimes carry with them to the bench, are sifted out. The judgments reported are the concurrence, and not the dissensions, of the court; and they have the weight of the united expression of a united opinion.

Let us suppose, on the other hand, that under the pressure of business, or in haste to adjourn, a court, after hearing the arguments in a large number of cases, allot to the several members the duty of preparing an opinion in each, without first determining the result. Let us suppose that, to secure a thorough discussion, they designate Judge A as *primus* and Judge B as *secundus*, to examine No. 1 on the calendar, and prepare each his opinion; Judge C and Judge D to do the same with No. 2. Upon the same method, in cases of great importance, a greater number of judges will be charged with the duty of investigating the case and preparing opinions. Each judge deliberates only upon the cases assigned to him, and then prepares a brief on each of them, which he calls an opinion. He desires that his opinion shall be such as the court will adopt. He fortifies it with various bulwarks. He says, after laying down the law as he understands it, "but if my brethren should not agree in this view of the law, we must reach the same result by another view," and then invokes different and even inconsistent principles to sustain his conclusion, just as counsel frame their points to take the court with them on one ground or another.

When all the opinions have been prepared, the court come together for consultation. The opinion of Judge A is read, then that of Judge B, and the court vote which result they will adopt.

This method gives us, not the *opinion of the court*, but, at best, the opinion of Judge A, indorsed by a majority; or, as will often be the case, it gives us the result arrived at by Judge A, with expressions of doubt as to the reasons assigned by him.

What deference can we expect will be paid, outside the jurisdiction of our own state, to the judgments of a court which habitually refrains from forming any opinions of its own as a court, and contents itself with issuing the individual paper of each member in turn, *indorsed without recourse*, as one may say, by a bare majority of the other members?

This method is, perhaps, more agreeable to the judges than the other, if the court be constituted of persons uncongenial to each other. It also is said to dispose of any one calendar more expeditiously.

But its disastrous effects upon the reputation of the court, and on the authority of its expositions of the law, are sadly illustrated in the recent history of some of the courts of our state.

The court which adopts such a method does not know what it has decided. The profession do not know whether the court has decided any thing. They get the opinion of Judge A, assigning *his* reasons why the judgment should be so and so, and the opinion of Judge B, assigning very different reasons for the same conclusion, and the vote of a majority in favor of the conclusion; but when the reasons assigned in the opinions are invoked to govern another case, we are told that the court did not adopt the reasons. In some cases we have inconsistent opinions based on hostile doctrines, leading under peculiar circumstances to the same judgment, with no clue to the *opinion of the court*, nor even any indication that *the court* had any opinion. We have had, even, in a recent instance, one judge declaring, by an extra-judicial statement, that the court's opinion was contrary to the reasons assigned in the written opinion, which led to the judgment, and which was officially reported as such.

The reporters have been, in some instances, reproved for publishing such opinions; but the reporters cannot be justly blamed, *on the verbal authority of one judge*, for publishing the *written opinion of another*

judge on his authority, as representing the decision of the court. Who shall decide when the judges disagree as to what the court has decided?

A highly esteemed author (Bishop) has recently impugned the authority of the New York decisions, on the ground of the alleged influence of political considerations. We believe that no greater mistake could be made on this point. The courts of our state are, with very few and local exceptions, marked by the same high degree of personal ability, wisdom and integrity that they have ever maintained.

But no court, however high its position, however great the learning of its members, can sustain its authority, beyond its own local jurisdiction, unless it form an opinion of its own, *as a court*, upon the questions of law which come before it, and take care that its members shall not assume, much less be required to frame, by anticipation before final decision, their statements of its judgment.

If our courts will take advantage of the changes in our judiciary system about to take place, to inaugurate the policy of deciding each cause by the conference of the court, before any member is committed by his authorship of an opinion, and of announcing the opinion of the court, not that of the individual member who delivers it, they will find the sure means of regaining the pristine respect and weight accorded at home and abroad to the judgments of the tribunals of this state.

STOLEN SAVINGS-BANK BOOKS.

Savings banks have increased so steadily in a considerable portion of the country, that to-day there is scarcely a village of two thousand inhabitants to be found without one. Their object confessedly is to encourage prudence and economy in persons of small means. They offer a safe and profitable investment, that imposes no greater burden upon those who would avail themselves of it, than making their deposits and taking good care of the deposit book. A large proportion of those who contribute savings to these institutions are ignorant of principles of finance, and unable to employ their surplus earnings to advantage, even if the amount were worthy the name of "capital." It is important that the rules of the bank should be simple and easy to be followed by its depositors. If complicated, they would be, to a large extent, unintelligible; and, if too strict, would repel that very class whom it is especially desirable to attract and to retain. The beneficial effect upon the community at large of a well-conducted institution for savings is everywhere recognized. The trustees generally act without compensation, and it is of the last consequence that confidence should exist between the corporation and its depositors.

Fortunately, but few difficulties, as appears from the reports, have arisen between these banks and those who enjoy its privileges which have required the intervention of the courts. They seem to be confined to a determination of the rights and duties of the respective parties, in the event of a loss of the bank-book by theft, or otherwise; or, to speak a little more generally, to cases of payment to a wrong party.

The by-laws and regulations of these institutions are, we presume, very nearly the same in all parts of the country. Persons about to become depositors are required to sign their names in a book containing the by-laws, and by signing, they, in effect, agree to conform to those laws. The obligation assumed by the bank to return the amount of the deposit and its earnings, rests upon the condition that these regulations are complied with. In many instances, the depositor is further required to write his full name, age, place of birth, residence, and occupation; or, if unable to write, these facts are obtained from him, with such additional data as will prove useful in future, when it may become necessary to make inquiries of a doubtful applicant (who says he cannot sign his name), in order to test his knowledge of what the genuine depositor has made a matter of record. In some cases, an additional precaution is adopted; a credible person known to the bank must identify the party claiming to be a depositor.

Almost always these by-laws are inserted, in an abbreviated form, in the book given to the depositor, one of which provides that money shall not be withdrawn without producing the book; sometimes an express regulation makes the book an order for the money; while other banks say that the book is "evidence of the deposit, and as valid as a note of hand." All the banks agree in requiring immediate notice of the loss of the book. As a matter of fact, those depositors who are too ignorant to comprehend what a savings bank-book means; who, unable to read a word of its contents, rely wholly on their memory for the amount of their deposits, and have no conception of any agreement between themselves and the bank when they make their marks in the large book kept upon the counter; such depositors, we say, are seldom careless of their deposit book, but evince a superstitious regard for it, preserving it with as much anxiety and watchfulness as if it were the money itself.

Suppose a bank has notified its depositors that the book is the order for the money (equivalent to a note payable to bearer), and it is fairly understood that this is the condition upon which the deposit is made, are its officers justified in paying the money over to any one who may present the book, when they have good reason to believe that the book has been stolen? Is a bank bound to exercise a reasonable care and diligence, in order that the genuine owner of a deposit may receive his own, notwithstanding he has been robbed of his book, and has not discovered the loss in season to give notice to the bank officers?

We have been able to discover but one case where this point was material, and that is a recent decision of the supreme court of Maine. In *Eaves* v. *People's Savings Bank* (1858), 27 Conn. 229, the payment was upon a forged order, and the bank was held liable. A dictum of the court is to the effect that, had the book contained a notice that the presentation of the book should be taken to be full authority for paying the money, it might have been held to be a condition of receiving the deposit, and defendants would not have been liable.

In *Sullivan* v. *Lewiston Institution of Savings*, (1869), 56 Me., 507 (the case to which we allude), one of the rules of the bank was as follows:

"As the officers of the institution may be unable to identify every person transacting business at the

office, the institution will not be responsible for loss sustained when a depositor has not given notice of his book being stolen or lost, if such book be paid in whole or in part on presentment."

Plaintiff's book was stolen and money drawn by two different persons, at two different times, personating the plaintiff. Plaintiff notified the bank immediately on learning the loss of his book, but after the money was drawn out. No officer of the bank personally knew the plaintiff, or the persons drawing the money. The plaintiff *made his mark.*

The court, after alluding to the inconvenience of strict proof of identity among numerous depositors, says that the depositor undertakes to preserve his book, to give notice if lost, "or, failing to do so, to claim, as against the institution, nothing which shall have been paid in good faith and in the exercise of reasonable care, to any one presenting it."

The court further says: "A payment to the wrong person upon presentment of the book, even before notice of the loss, if it were presented under such circumstances, or in such a manner, as would tend to excite suspicion, or put a man of ordinary prudence upon inquiry, would not exonerate the institution. Its officers are to be held to the exercise of reasonable care and diligence."

We think the rule of law, as laid down in this opinion, a sound one, namely: That the bank officers are bound to reasonable care and diligence. This is not because the deposit is a bailment. There is no obligation assumed to return the specific property deposited. It is a simple loan, with certain conditions as to repayment. Identification of the person who claims the right to receive it is indispensable. If not incorporated into the by-laws, it is so universal a custom that the condition may be fairly considered to have been engrafted upon the original contract by implication, that the bank shall be entitled to reasonable proof of identity, and shall be held to call for it under suspicious circumstances. The condition is as reasonable, and as well known, as that of banks of circulation and deposit, which pay checks only to identified parties. In savings banks the burden is slight upon the depositor, compelling but little delay, while payment to wrong persons would entail serious losses upon the bank. Many depositors are poor and ignorant, living in localities where it is difficult to keep deposit books in safety; obliged sometimes to place their books in the hands of parties who prove unworthy of the trust; and frequently are drawn from a floating population who do not stay long in any one place. Fairness to each side could ask no less than that each should be ready, the one to demand and the other to furnish means of identification.

In the Lewiston case we are at a loss to apprehend why the court should say there was "no evidence even of want of ordinary care, unless the failure to require the party presenting the book to produce other evidence of his identity besides the possession of it is to be so deemed," and then conclude that such failure was not neglectful. The genuine depositor could not sign his name, and was not known at the bank. It does not appear that any memorandum was made at the time they received his deposit upon which future inquiry could be based, or that any person witnessed his signature who could be called in to identify him, or that any active steps whatever were taken to satisfy the bank officers that the application was genuine. Is not the fact that a man cannot write his name, coupled with the fact that nobody knows him, enough to put a bank officer on his inquiry? In this case two successive individuals personated the unfortunate owner of the deposit, so as to impose upon the disbursing officer. Yet it was considered that he was reasonably vigilant. Had the officer been deceived on inquiry, had the person called in to indentify the applicant lied to the officer, or had the applicant himself answered correctly a list of questions which it is fair to presume the true depositor only knew,—the officer would have performed his duty and the bank been discharged. But, with all deference to so weighty authority as that of the Maine bench, we believe that a rule founded on facts like these will work most unfavorably both to banks and their depositors. We think, on the facts as presented in the report of the case, the bank officer failed to exercise reasonable care; and if our conclusion is a wrong one, it would be well for banks to be required by their charter to obtain personal identification wherever there is reason to suspect fraud in the withdrawal of deposits.

LAW AND LAWYERS IN LITERATURE.*

XX.

DICKENS.

Presuming that this author's writings are familiar to every lawyer, if not to every one else, I had not purposed to make any quotations from them or criticisms upon them. But a re-perusal of "Bleak House" has induced me to devote a few moments to some reflections upon this writer. It is commonly urged against Dickens that he is a caricaturist. This cannot be denied. The scenes of life, as he draws them, are colored by his strong imagination and his deep sympathies. His intellectual eyes seem to be what Sam Weller calls "a pair of patent double million magnifying gas microscopes of hextra power." His pictures of the theory and administration of law are doubtless exaggerations, but they are useful ones. In his preface to *Les Plaideurs*, Racine observes: "For my own part, I think Aristophanes was right in carrying his ideas beyond the bounds of probability. The judges of the Areopagus perhaps would not easily have discovered that he had satirized their natural avidity for gain, the clever tricks of their clerks, and the tediousness of their advocates. It was proper to exaggerate these personages a little, to enable them to recognize themselves." And so it was proper for Dickens, in the famous trial of *Bardell* v. *Pickwick*, to exaggerate the intellectual narrowness of the judge, the skill of advocates in making mountains out of mole-hills, the badgering of witnesses, the garrulity of women, and the stupidity of jurors. But in that superb romance, "Bleak House," I find little exaggeration. It would, indeed, be difficult even for Dickens to exaggerate the wrongs growing out of the chancery system — that monstrous monument of legal

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

ingenuity, perversion and oppression. When I reflect upon it, I can think of but one grain of mitigation that our profession can urge for themselves; it is a system invented by the clergy and thrust upon us. We have the same excuse for tolerating it that the present generation of slaveholders had for practicing the crime of slavery. Selden discovered the radical fault of the chancery system two centuries ago. "Equity in law," he says, "is the same that the spirit is in Religion, what every one pleases to make it. Sometimes they go according to Conscience, sometimes according to Law, sometimes according to the Rule of Court. Equity is a Roguish thing: for Law we have a measure, know what to trust to; Equity is according to the Conscience of him that is Chancellor, and as that is larger or narrower, so is Equity. 'Tis all one as if they should make the standard for the measure we call a foot, a Chancellor's foot; what an uncertain measure would this be? One Chancellor has a long Foot, another a short Foot, a third an indifferent Foot. 'Tis the same thing in the Chancellor's Conscience." He might have added, whatever else it is, the chancellor's foot is always heavy. The proposition substantially made to our present legislature, to return to the distinction between law and equity in this state, strikes me as would a proposal to congress to return to the system of involuntary servitude.

"Bleak House" is generally considered one of the author's failures. To me it is his greatest success. The story is too gloomy, perhaps, to appeal to the ordinary novel-reading taste, but for lawyers it possesses a terrible interest. Believing that our profession are not so familiar with it as they ought to be, let me make some quotations. Is there much exaggeration in his picture of the court of chancery and a chancery suit?

"On such an afternoon, if ever, the lord high chancellor ought to be sitting here, — as here he is — with a foggy glory round his head, softly faced in with crimson cloth and curtains, addressed by a large advocate with large whiskers, a little voice, and an interminable brief, and outwardly directing his contemplation to the lantern in the roof, where he can see nothing but fog. On such an afternoon, some score of members of the high court of chancery bar ought to be — as here they are — mistily engaged in one of the ten thousand stages of an endless cause, tripping one another up on slippery precedents, groping knee-deep in technicalities, running their goat-hair and their horsehair warded heads against walls of words, and making a pretense of equity with serious faces, as players might. On such an afternoon the various solicitors in the cause, some two or three of whom inherited it from their fathers, who made a fortune by it, ought to be — as are they not? — ranged in a line, in a long matted well (but you might look in vain for truth at the bottom of it) between the registrar's red table and the silk gowns, with bills, cross-bills, answers, rejoinders, injunctions, affidavits, issues, references to masters, masters' reports, mountains of costly nonsense, piled before them. Well may the court be dim, with wasting candles here and there; well may the fog hang heavy in it, as if it would never get out; well may the stained-glass windows lose their color, and admit no light of day into the place; well may the uninitiated from the streets, who peep in through the glass panes in the door, be deterred from entrance by its owlish aspect, and by the drawl languidly echoing to the roof from the padded dais where the lord high chancellor looks into the lantern that has no light in it; and where the attendant wigs are all stuck in a fog-bank! This is the court of chancery; which has its decaying houses and blighted lands in every shire; which has its worn-out lunatic in every mad-house, and its dead in every churchyard; which has its ruined suitor, with his slipshod heels and threadbare dress, borrowing and begging through the round of every man's acquaintance; which gives to moneyed might abundantly the means of wearying out the right; which so exhausts finances, patience, courage, hope; so overthrows the brain and breaks the heart; that there is not an honorable man among its practitioners who would not give — who does not often give — the warning, 'Suffer any wrong that can be done you rather than come here!'

"Who happened to be in the lord chancellor's court this murky afternoon besides the lord chancellor, the counsel in the cause, two or three counsel who are never in any cause, and the well of solicitors before mentioned? There is the registrar below the judge, in wig and gown; and there are two or three maces, or petty-bags, or privy-purses, or whatever they may be, in legal court suits. They are all yawning, for no crumb of amusement ever falls from JARNDYCE AND JARNDYCE (the cause in hand) which was squeezed dry years and years ago. The shorthand writers, the reporters of the court, and the reporters of the newspapers, invariably decamp with the rest of the regulars when Jarndyce and Jarndyce comes on. Their places are a blank. Standing on a seat at the side of the hall, the better to peer into the curtained sanctuary, is a little mad old woman in a squeezed bonnet, who is always in court, from its sitting to its rising, and always expecting some incomprehensible judgment to be given in her favor. Some say she really is, or was, a party to a suit; but no one knows for certain, because no one cares. She carries some small litter in a reticule, which she calls her documents, principally consisting of paper matches and dry lavender. A sallow prisoner has come up, in custody, for the half-dozenth time, to make a personal application 'to purge himself of his contempt;' which, being a solitary surviving executor who has fallen into a state of conglomeration about accounts of which it is not pretended that he ever had any knowledge, he is not at all likely ever to do. In the mean time his prospects in life are ended. Another ruined suitor, who periodically appears from Shropshire, and breaks out into efforts to address the chancellor at the close of the day's business, and who can by no means be made to understand that the chancellor is ignorant of his existence, after making it desolate for a quarter of a century, plants himself in a good place and keeps an eye on the judge, ready to call out 'My lord!' in a voice of sonorous complaint, on the instant of his rising. A few lawyers' clerks and others, who know the suitor by sight, linger, on the chance of his furnishing some fun, and enlivening the dismal weather a little.

"Jarndyce and Jarndyce drones on. This scare-crow

of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two chancery lawyers can talk about it for five minutes, without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have been married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth, perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee house in Chancery lane; but Jarndyce and Jarndyce still drags its weary length before the court, perennially hopeless.

"Jarndyce and Jarndyce has passed into a joke. That is the only good that has ever come of it. It has been death to many, but is a joke in the profession. Every master in chancery has had a reference out of it. Every chancellor was 'in it,' for somebody or other, when he was counsel at the bar. Good things have been said about it by blue-nosed, bulbous-shoed old benchers, in select port-wine committee after dinner in hall. Articled clerks have been in the habit of fleshing their legal wit upon it. The last lord chancellor handled it neatly, when, correcting Mr. Blowers, the eminent silk gown, who said that such a thing might happen when the sky rained potatoes, observed, 'or when we get through Jarndyce and Jarndyce, Mr. Blowers;'—a pleasantry that particularly tickled the maces, bags, and purses.

"How many people out of the suit Jarndyce and Jarndyce has stretched forth its unwholesome hand to spoil and corrupt, would be a very wide question. From the master upon whose impaling files reams of dusty warrants in Jarndyce and Jarndyce have grimly writhed into many shapes; down to the copying clerk in the Six Clerks' Office, who has copied his tens of thousands of chancery folio pages under that eternal heading; no man's nature has been made better by it. In trickery, evasion, procrastination, spoliation, botheration, under pretenses of all sorts, there are influences that can never come to good.

"Thus, in the midst of the mud, and at the heart of the fog, sits the lord high chancellor in his high court of chancery.

"When we came to the court, there was the lord chancellor, the same whom I had seen in his private room in Lincoln's Inn, sitting in great state and gravity on the bench; with the mace and seals on a red table below him, and an immense flat nosegay, like a little garden, which scented the whole court. Below the table, again, was a long row of solicitors, with bundles of papers on the matting at their feet; and then there were the gentlemen of the bar in wigs and gowns—some awake and some asleep, and one talking, and nobody paying much attention to what he said. The lord chancellor leaned back in his very easy chair, with his elbow on the cushioned arm, and his forehead resting on his hand; some of those who were present dozed; some read the newspapers; some walked about, or whispered in groups; all seemed perfectly at their ease, by no means in a hurry, very unconcerned, and extremely comfortable.

"To see every thing going on so smoothly, and to think of the roughness of the suitors' lives and deaths; to see all that full dress and ceremony, and to think of the waste, and want, and beggared misery it represented; to consider that, while the sickness of hope deferred was raging in so many hearts, this polite show went calmly on from day to day, and year to year, in such good order and composure; to behold the lord chancellor, and the whole array of practitioners under him, looking at one another, and at the spectators, as if nobody had ever heard that all over England the name in which they were assembled was a bitter jest, was held in universal horror, contempt, and indignation; was known for something so flagrant and bad that little short of a miracle could bring any good out of it to any one; this was so curious and self-contradictory to me, who had no experience of it, that it was at first incredible, and I could not comprehend it.

"When we had been there half an hour or so, the case in progress—if I may use a phrase so ridiculous in such a connection—seemed to die out of its own vapidity, without coming, or being by anybody expected to come, to any result. The lord chancellor then threw a bundle of papers from his desk to the gentleman below him, and somebody said 'JARNDYCE AND JARNDYCE.' Upon this there was a buzz and a laugh, and a general withdrawal of bystanders, and a bringing in of great heaps, and piles, and bags, and bagsful of papers.

"I think it came on 'for further directions,'—about some bill for costs, to the best of my understanding, which was confused enough. But I counted twenty-three gentlemen in wigs, who said they were 'in it;' and none of them appeared to understand it much better than I. They chatted about it with the lord chancellor, and contradicted and explained among themselves, and some of them said it was this way, and some of them said it was that way, and some of them jocosely proposed to read huge volumes of affidavits, and there was more buzzing and laughing, and everybody concerned was in a state of idle entertainment, and nothing could be made of it by any body. After an hour or so of this, and a good many speeches being begun and cut short, it was 'referred back for the present,' and the papers were bundled up again, before the clerks had finished bringing them in."

There does not seem to be much exaggeration in this to any one who has charge of a suit a quarter of a century old, as I have. Mine has outlasted one constitution of our state, and the constitutions of half a dozen attorneys. As there are a large number of defendants who are continually dying off, most of my efforts, since I came into the suit six years ago, have been devoted to dragging it out of the grave. The action is to enforce a legacy. My client himself, who

is only the administrator of the original plaintiff, has outlived the Almighty's statute of limitations. My own connection with the suit serves forcibly to remind me of the frail tenure of human life, and the emptiness of its pursuits. Now, in all this, there ought not to be any thing to excite derision, but a notice of trial, on my part, is the signal for an immense amount of skeptical merriment on the part of the defendants' attorneys. Some of them even go so far as to assume an air of injury; as if I were doing something unbecoming in pressing for a decision. All of them regard the litigation as a huge joke. This, too, under our system, which makes no distinction between law and equity. The inquiry arises in horribly gigantic proportions: What would become of my clients' rights in chancery?

Elsewhere, in the same book, Dickens says: "The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly and consistently maintained through all its narrow turnings. Viewed by this light, it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself, at their expense, and surely they will cease to grumble."

The argument that the abolition of the system would entail disaster on the class of solicitors is thus set forth and answered by our author: "The respectability of Mr. Vholes has even been cited with crushing effect before parliamentary committees, as in the following blue minutes of a distinguished attorney's evidence: '*Question* (number five hundred and seventeen thousand eight hundred and sixty-nine). If I understand you these forms of practice indisputably occasion delay? *Answer.* Yes, some delay. *Q.* And great expense? *A.* Most assuredly they cannot be gone through for nothing. *Q.* And unspeakable vexation? *A.* I am not prepared to say that. They have never given me any vexation; quite the contrary. *Q.* But you think that their abolition would damage a class of practitioners? *A.* I have no doubt of it. *Q.* Can you instance any type of that class? *A.* Yes; I would unhesitatingly mention Mr. Vholes. He would be ruined. *Q.* Mr. Vholes is considered, in the profession, a respectable man? *A.* — which proved fatal to the inquiry for ten years — Mr. Vholes is considered, in the profession, a *most* respectable man.' So in familiar conversation, private authorities, no less disinterested, will remark that they don't know what this age is coming to; that we are plunging down precipices; that now here is something else gone; that these changes are death to people like Vholes — a man of undoubted respectability, with a father in the Vale of Taunton, and three daughters at home. Take a few steps more in this direction, say they, and what is to become of Vholes' father? Is he to perish? And of Vholes' daughters? Are they to be shirt-makers or governesses? As though Mr. Vholes and his relations being minor cannibal chiefs, and it being proposed to abolish cannibalism, indignant champions were to put the case thus: Make man-eating unlawful, and you starve the Vholeses!"

To my mind there is no exaggeration in poor Miss Flite, the crazy chancery suitor, who caged canary birds and called them the wards in chancery, naming them Hope, Joy, Youth, Peace, Rest, Life, Dust, Ashes, Waste, Want, Ruin, Despair, Madness, Death, Cunning, Folly, Words, Wigs, Rags, Sheepskin, Plunder, Precedent, Jargon, Gammon and Spinach. To my mind there is no exaggeration in the story of the two wards in Jarndyce, whose hapless destinies were united by marriage, and whose earthy union was sundered by a broken heart on the day when the legal lamp in the case of Jarndyce and Jarndyce went out for want of pecuniary oil. To my mind there is no exaggeration in the scene in which our author depicts the merriment and derision with which the bar received the intelligence that Jarndyce and Jarndyce was "over for good," and saw the papers carried out — "bundles in bags, bundles too large to be got into any bags, immense masses of papers of all shapes and no shapes, which the bearers staggered under, and threw down for the time being, any how, on the hall pavement, while they went back to bring out more." And so great is the power of education, of precedent, and of habit, that to my mind there is no exaggeration in the absurd pride with which Mr. Kenge refers to Jarndyce and Jarndyce as "a monument of chancery practice," and boasts "that on the numerous difficulties, contingencies, masterly fictions and forms of procedure in this great cause, there has been expended study, ability, eloquence, knowledge, intellect," and that "the matured autumnal fruits of the woolsack have been lavished upon Jarndyce and Jarndyce." It is not unnatural for lawyers to feel in this way, who are brought up under a system in which their incomes depend in a great measure upon the number of words they can employ to express an idea, and in which success is very essentially dependent on their skill and adroitness in misleading their adversaries. Still less does this work deserve the charge of exaggeration, when we read in the author's preface, that "at the present moment," 1853, "there is a suit before the court which was commenced nearly twenty years ago, in which from thirty to forty counsel have been known to appear at one time; in which costs have been incurred to the amount of seventy thousand pounds; which is a *friendly suit*, and which is (I am assured) no nearer to its termination now than when it was begun. There is another well-known suit in chancery, not yet decided, which was commenced before the close of the last century, and in which more than double the amount of seventy thousand pounds has been swallowed up in costs." And we may be sure Mr. Dickens does not exaggerate when he assures us, in the preface, that, "every thing set forth in these pages, concerning the court of chancery, is substantially true, and within the truth."

While, then, the trial scene in Pickwick Papers is a piece of ingenious pleasantry, the prison scene in the same work, and the whole of Bleak House and of Little Dorritt, are something better and more useful. They are full of that broad and earnest humanity which is the key-note and theme of all Mr. Dickens' works, and which renders him the most engaging and influential writer of English fiction since Shakespeare.

But truth is better as well as stranger than fiction, and the most potently useful words written upon law

in this century were those of the New York Code of Procedure of 1848: "It is expedient that the present forms of actions and pleadings in cases at common law shall be abolished, that the distinction between legal and equitable remedies should no longer continue, and that an uniform course of proceeding in all cases should be established."

PETRONIUS ARBITER.

The *Troy Whig* newspaper says: "Two thousand years ago the following was said of the lawyers:

'Quisquis habet nummos secura naviget aura
Fortunamque suo temperet arbitrio.
Uxorem ducat Danaen, ipsumque licebit
Acrisium jubeat credere, quod Danaen.
Carmina componat, declamet, concrepet, omnes
Et peragat causas, sitque Catone prior.
Juris consultus *paret*, *non paret*, habeto,
Atque esto, quidquid Servius et Labeo.
Multa loquor: quidvis nummis præsentibus opta;
Et veniet: clausum possidet arca Jovem.'

"We will thank our friend Irving Browne to copy the above, with the translation, into his next chapter on Lawyers in Literature."

It seems to me that this passage refers less to lawyers than to that class of whom Christ said that it was easier for a camel to go through the eye of a needle than for one of them to enter the kingdom of heaven. As a rule, despite the popular belief, law and lucre do not go together. But here is the most I can make of my friend's author:

He who has wealth may sail with fav'ring wind,
And temper Fortune's laws to suit his mind;
In Danäe's lap may pour the golden shower,
And satisfy Acrisius with the dower;
Make laws, declaim, his fingers snap, dispatch
All suits, and Cato's dignity o'ermatch.
Let lawyers say, *I see*, or *I don't see*,
And be, like Servius, his who pays most fee.
Ask what you please; 'twill come for ready pelf;
The money box incloses Jove himself.

SERVING PROCESS.

We extract the following from "The Law: What I have Seen, What I have Heard, and What I have known," by Cyrus Jay, an immethodical and garrulous but rather amusing book, which is dedicated "To the Lawyers *and* Gentlemen with whom I have dined for more than half a century at the old Cheshire-Cheese Tavern, Wine Office court, Fleet street:"

"The writ-server, who in the sister island is styled a process-server, is a singular character in the law. Many men of this class have been attorney's clerks, who through drunkenness were discharged; but, notwithstanding which, their employers sometimes took compassion on them, and gave them writs to serve. Some of this fraternity are very knowing, and make not a bad income. I remember an attorney who informed me that he was, after using every exertion, unable to serve a clergyman with a copy of a writ, the service of which was of the greatest importance. I said, 'I will introduce you to a man who is very clever in these matters; but you will have to give him a good fee.' 'O,' said he, 'I do not care about the money; send him to me.' As I was leaving the gentleman's office I met the writ-server just outside, and I returned with him. After the attorney had described to him the defendant's person and calling, that he lived near Kennington common, and had formly resided at Cambridge, it was amusing to hear the writ-server ask about the antecedents of the clergyman. 'Why,' said the attorney, 'when he was at Cambridge he was a very great cricketer.' 'That's enough,' was the reply; and, after depositing the writ and copy in his pocket-book, he departed. This conversation took place the day before Good Friday. Much to my astonishment, my friend informed me on the Saturday that the writ had been served. 'And how do you think it was done?' said he. 'It appears that the writ-server was a married man, and had a large family; he went on the common, erected a wicket, and played cricket with his children for several hours. Whilst the children were enjoying the game, a gentleman, who came out from one of the houses opposite the common, went up to him and said, 'Sir, I am delighted to see you enjoy with your family this noble game.' 'Thank you, sir. Here is a copy of a writ for you.' The wicket was immediately struck, and the writ-server and his children went home to dinner. He was acute enough to know that the gentleman was the defendant, and lawyer enough to know that he could be served on a Good Friday."

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"An attorney employed a man, known familiarly by the nickname of Boss, to serve a copy of a writ on a master carpenter, a Mr. H——, who, as Boss shortly afterward discovered, lodged at a house at Highgate hill. The defendant was a remarkably good-looking man, dressed well, and had the appearance of a gentleman. Boss having knocked at the carpenter's door, it was opened by a little girl, who, in reply to his question whether Mr. H—— was at home, said he had just left the house to go up the hill. Boss thereupon journeyed up the hill with stick in hand, puffing at each step, for he was not a quick walker. Defendant, hearing the tramping of footsteps behind him, and espying the man whom he had seen knocking at the door of his lodgings, quickened his pace; and coming up to a large gate he slammed it back as if he were the owner of the premises; and, the gate having settled, he walked leisurely up an extensive lawn in front of the mansion of a gentleman of fortune, with his hands behind him, avoiding turning his face to the road. Boss, who had heard the gate slam, came up to it as soon as it was settled, put his arms on it, and said to himself, 'this man surely cannot be the owner of the mansion, for the shrubs do not seem to know him — the laurustinuses certainly do not; so I will give him the Westminster halloo;' and thereupon he shouted out at the top of his voice, 'hulloo! I want to speak to you.' The defendant looked round, whereupon Boss went suddenly up to him; and he then, full of trepidation, said, 'What do you want with me?' 'Here is a copy of a writ,' was the reply, which was immediately served on him. The carpenter and writ-server then adjourned to a public house, the former treating the latter with a steak and plenty of gin, and also giving him a sovereign, on condition that he would say he could not meet with him."

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"A cunning writ-server, among his other exploits, signalised himself by serving a gentleman living at

Hackney with a copy of a writ — a feat which no one else of his fraternity had been able to accomplish. The gentleman had, for very potent reasons, never allowed any one to see him at his house; but he was constantly in his garden, in one part of which he kept many fowls. At the back of this garden there was a wall, in which there was a small door, which was always kept fastened. The process-server, finding that nothing could be done at the front of the house, discovered the back of it through tramping over some fields; and, observing that there was a small opening in the garden door, and that he could see the whole length of the garden through it, he procured an egg, and, after carefully cutting it in two, inclosed therein a copy of the writ; which done, he with much skill fastened the two parts together with cement; and, the eggshell with its contents being very light, he threw it over the wall on the grass-plat, where it safely alighted without breaking. It was not long before the process-server espied, through the opening in the gate, the gentleman walking on the grass-plat, who, on observing the egg upon it, took it up and said, 'why, one of my hens has laid me an egg for breakfast on the grass-plat!' No sooner had he uttered these words than the egg separated in his hands, and the copy of the writ then became visible. At the same time he saw a large pole above the wall, with the parchment writ stuck at the end of it, and heard the process-server shouting out at the top of his voice, 'here's the original writ.' But the most amusing part of the whole affair was the attempt of the gentleman, while the proceedings were going on, to set aside the service by a summons before a judge at chambers, on the ground that he had never been served with process; but the judge, on reading the affidavits, amidst roars of laughter, decided that it was a good service; and among process-servers it is known to this day as 'the eggshell case.'"

To the above we might add the instance of a cunning New York attorney who had a summons to serve, in an action for divorce, on a woman who kept herself concealed, but whose whereabouts were known. He at length effected his purpose, after many rebuffs, by disguising his clerk in the likeness of an express messenger, who conveyed the writ to her in a parcel purporting to be jewelry. The vanity of the sex succumbed to the same means which Mephistopheles used to overcome Margaret.

CURRENT TOPICS.

A San Francisco lawyer, named Hastings, has filed a petition in the house of representatives, which has been referred to the judiciary committee, charging Justice FIELD, of the supreme court of the United States, with misbehavior and gross misconduct in office. He sets forth that FIELD is guilty of rendering decisions for corrupt purposes; that he has been interested in litigations where he has given decisions as a judge, and that he is generally corrupt. Judge FIELD's friends say that Hastings is a disreputable lawyer of San Francisco, who was disbarred by Judge FIELD while acting as United States circuit judge for California, and that he takes this method of revenging himself. Hastings will be allowed to make a statement to the judiciary committee as to the proof he has to sustain the charges, but it is not supposed any thing will come of it.

That to the lawyers of a state should chiefly be left the duty of selecting nominees for judicial positions, is a proposition which very few intelligent men ought to question. No class of men are so well qualified as they to judge of the legal attainments, judicial ability, and personal integrity of aspirants for the bench. We have frequently urged the association of lawyers, believing that one of the most important results that would flow therefrom would be a salutary influence over judicial nominations and elections. The lawyers of Chicago, appreciating the importance of exerting their influence, and, as they declare in their call, "believing that political conventions cannot make a man fit to be a judge, who otherwise is not, and that no party convention should be called, under existing circumstances, to nominate men for a purely judicial position," have called a meeting of the bar for the purpose of putting in nomination men known to them to be every way qualified. Such course is eminently proper, and we commend it to their brethren elsewhere.

Many of our readers will recollect that somewhat over a year ago Judge FISHER, of Washington, struck the name of Joseph H. Bradley from the roll of attorneys for violent and disorderly conduct during the trial of a cause, followed by a personal assault upon the judge after the adjournment of the court. Bradley has now demonstrated the propriety of Judge FISHER'S action by making a most brutal and cowardly assault upon the latter. It seems that he had long meditated the assault whenever FISHER should leave the bench for the attorney-generalship, an office to which the latter had been recently appointed. On the afternoon of the 18th inst., as FISHER was passing toward his office, he was met by Bradley, who dealt him a heavy blow with his walking stick. They then attempted to clinch, when the judge tripped Bradley, who fell heavily to the ground, Judge FISHER going down with him, and the two rolling over each other on the pavement. The spectators interfered at this juncture, and the combatants were separated, with slight injuries.

That the fair sex are aggressive and determined in their assault upon the legal citadel, is evident. It is said that no less than one hundred women are now studying law in different parts of this country. This fact appears to soothe the ruffled feelings of the *Tribune*, and leads it to "hope that certain members of the bar may yet be civilized by the admission to legal practice of women, gentle, lovely, and good-mannered." Who can doubt that every member of the bar will be civilized by such gentle, lovely, and good-mannered influences? But we look forward to still stronger civilizing agencies. When charming ladies shall lounge and shake their curls within the bar; when judicial opinions shall be rendered in verse and set to music; when women shall hold the jury-box, and "babies be criers in court;" when the tedium of trial shall be relieved by the heavenly strains of an

orchestra of fair ones, then, if not till then, the most barbarous and boorish of barristers will be reduced to a most perfect state of civilization and refinement. Then even Graham will become as gentle as a lamb, and as soft as a cooing dove. Hail to the time!

The Illinois Constitutional Convention, which has been in session for a long time, has completed its labors. The constitution which they have prepared is, in many respects, a very able scheme of government, and is much better adapted to the needs of a progressive, enterprising state than was the old one. Several improvements have been made in the judicial department. The judicial powers are to be vested in one supreme court, circuit courts, county courts and inferior courts, as justices of the peace, etc. The supreme court is to consist of seven judges, which is an increase of four over the present number, and is to have original jurisdiction in cases relating to the revenue, in *mandamus* and *habeas corpus* and appellate jurisdiction in all other cases. The existing supreme court has, for some years, labored under the disadvantage of not having judges enough to properly dispose of the great amount of business that came before it; its calendar has become burdened with unadjudicated cases, and justice has been delayed to the prejudice of litigants and the public. The addition of four new judges will probably remedy this evil. The judges of this court are to be elected in separate districts, and at times when no general election is held, to avoid a partizan court; and they are to hold for nine years, at an annual salary of four thousand dollars.

Inferior appellate courts are to be organized after the year 1874, should the general assembly deem them necessary, which are to be held by the circuit judges, and are to be in scope and character similar to the general terms of the supreme court of the state of New York. The circuit court system is continued substantially as it now exists — having one judge for each circuit of not less than one hundred thousand inhabitants; but provision is made empowering the general assembly to create in lieu of existing circuits, larger circuits having severally not to exceed four judges. This last provision is modeled on the plan of judicial districts in this state, and is eminently sensible and practicable. The system of large circuits or districts has worked well in this state, and, we believe, will be found a decided improvement over the smaller circuits. To remove the inconvenience of frequent changes of time of holding courts provision is made that such time shall not be changed during the term of the judges. State attorneys are to be elected in each county in lieu of the present circuit attorneys, and are to hold for a term of four years. The jurisdiction of county courts is extended, and county judges, if desirable, hereafter may be elected in districts composed of two or more counties, and probate courts may be established in counties having a population of over fifty thousand. The organization, jurisdiction, powers, proceedings and practice of all courts of the same class, so far as regulated by law, and the force and effect of process, judgments and decrees of such courts are to be uniform. It is made the duty of the judges of all courts of record to furnish the general assembly with a statement of all defects which they may discover in the laws. Such are the main provisions of the judiciary article. The constitution is soon to be submitted to the people, and we sincerely hope will receive their approval.

OBITER DICTA.

The real central criminal court — conscience.

Almost any young lady has public spirit enough to be willing to have her father's house used for a court-house.

People of Wyoming don't know whether to call their female judge a justicess of the peace or a justice of the peacess.

Lawyer Tuttle, of Paterson, N. J., recently played the rough on Lawyer Evans, by writing the following in the official records of the Passaic circuit court: "I acknowledge due service of the above, but the devil can't read it. S. Tuttle, attorney for plaintiff."

At the opening of a breach of promise suit, in Kentucky, recently, the court asked the counsel for the plaintiff how long the trial would probably last. "I can't say exactly," replied he, "but will mention as one item that I have 384 love letters to read."

"Don't leave the court-room, Thomas," said a Shiawassee lawyer to a not very bright witness in a case which he was conducting, "as I may want to question you farther." "Question my father?" said Thomas, "why, he's been dead four years, so heow you going to question him?"

A western coroner's jury returned a verdict that the deceased came to his death from exposure. "What do you mean by that?" asked a relative of the dead man, "there are two bullet holes in his skull." The coroner replied, with a wave of his hand: "Just so; he died of exposure to bullets."

Judge Roosvelt, of the Sportsmen's club, is a rare wag. A gentleman leaving the company at a recent dinner, somebody who sat next the judge asked who he was. "I cannot exactly tell you, sir," he replied with a meaning look, "and I should not care to speak ill of any person whom I do not know deserves it, but I am afraid he is an attorney."

A Detroit prisoner, on his way to the penitentiary for larceny, was asked what he thought of his trial. He said, "When that lawyer that defended me made his speech I thought sure that I was going to take my old hat and walk right out of that court-room; but when the other lawyer got up and commenced talking I knew I was the biggest rascal on top of the earth."

Daniel Webster once had a very difficult case to conduct, which was finally decided against him. After the adjournment of court, one of the principal witnesses for his client came to him and said: "Mr. Webster, if I had thought that we were likely to be beaten in this suit I should have testified to a great deal more than I did." "It's of no consequence," replied Mr. Webster, "for what you did say was not believed by the jury."

Parks, a good-natured member of the bar, and not lacking in ability, entered the profession late in life, and at first was not very successful. One Saturday, at the close of a term in which he had been particularly unsuccessful, he had taken up his file of papers, and in a fret had

written on the back: "All gone *to* h—ll." Judge W.'s attention was called thereto by a member of the profession, who pleasantly remarked: "It's always a handsome sight to see Parks well laid out."

A man with four wives was brought before Hans Swarlhart, a Mohawk justice, for commitment on charge of bigamy. "Four vives!" exclaimed the astonished Hans, "four wives, that was a most hinocious crime. Discharch him at vanst." "Why," protested the prosecutor, "discharge him, when the proof is positive? Will the court explain?" "Yes, I exshplains, iff he lifs mit four vives he got bunishment enough. I lif mit von and I got too much bunishment already."

A man who called at the surrogate's office in New York one day last week, to file a petition for the probate of a will in which he was named as executor, was asked, as usual, to give the date of the testator's death. "An' shure," was the reply, "he ain't dead yet, but he is very sick, and we expect him to die to-night." The petitioner was advised to call again after the man was really dead and buried, and as he has not since made his appearance it is to be presumed that the maker of the will has disappointed him in his anticipations.

A very pretty Oakland girl, not over 18 years of age, brought a suit for breach of promise against a young merchant, who had changed his mind and taken a richer bride. The trial came on; and the girl's mother, a fat, red-faced old dame, was present in the bar, to give moral effect to the recital of her daughter's wrongs. The counsel for the plaintiff, in summing up, discanted at length and with moving pathos upon the enormity of the defendant's guilt in creeping into the bosom of this family (here the old lady pinned her shawl closer), "and deceiving and disappointing this young girl." Here the venerable mother could contain herself no longer, but, with gushing tears, exclaimed: "He deceived us all, gentlemen! Me and all the rest—me and all the rest!" The effect was magical, but not just what the old lady expected.

COURT OF APPEALS ABSTRACT.

MARCH TERM, 1870.

Epapheres J. Sherman v. *Sarah M. Bartholomew, ex'x, etc.*

Where the defendant executed and delivered to the plaintiff a paper declaring that he had deposited a certain sum of money with a third party to be paid to the plaintiff, if, through professional advice and information given by the latter to the defendant, he should recover and collect within ninety days of a certain debtor a large amount of money due defendant. The information was given, and the money collected. In an action against defendant for the sum stipulated, the jury found for the plaintiff. *Held*, that both law and equity united in support of the verdict. That, however defective the papers containing the alleged contract might have been, had the question been raised by demurrer, these defects have been cured by the verdict. Opinion by INGALLS, J.

William D. Robinson v. *The International Life Assurance Society, of London.*

In an action upon an insurance policy issued by the defendants to the plaintiff's assignor, then a resident of Richmond, Va., the defense was set up that the premiums after June 8, 1861, had not been paid. It appeared that the defendants, a foreign corporation, had an agent in Richmond, who had effected the insurance, and to whom the premiums had been paid. Prior to, and until the 8th of June, 1861, the agent at Richmond forwarded the plaintiff's assignor's premium to the general agent in New York, and gave the plaintiff's assignor receipts signed by such general agent, which had been forwarded for the purpose. After the 8th of said June, the war having interrupted communication, the premiums paid the agent subsequently were not forwarded to New York, and were also paid and accepted by the Richmond agent in confederate currency. The plaintiff's assignor died in 1862. The authority of the Richmond agent was in no manner revoked until in the year 1865. *Held*, that the defendants being a foreign corporation, and belonging to a neutral country, the principle of law which would avoid or suspend such contracts between the citizens of states at war with each other, was inapplicable. The *status* of the defendant was simply, that of a neutral contracting or continuing a contract with a citizen of a belligerent country. Such contracts are valid by the laws of all countries. *Held*, also, that the company not having revoked the authority of the Richmond agent, the plaintiff's assignor was justified in paying the premiums to him; and that, under the circumstances then existing, the agent was at liberty to receive, and the plaintiff's assignor to pay, the currency of the confederate states in payment of such premiums. Opinion by HUNT, J.

John Underwood v. *John Green.*

The defendant, acting under the direction of the city inspector of New York, removed a number of dead hogs belonging to plaintiff from the cars of the Hudson River Railroad, at the depot in New York. The hogs had died of suffocation on the way from Albany down, and had been dead but a few hours. Defendant removed them immediately on their arrival, without requesting or giving the plaintiff time to remove them, and in opposition to the requests of his agent, who was present. It was shown that the dead hogs were valuable for a lawful purpose. The defendant claimed to act in pursuance of the 7th section of the ordinance of 1859, which authorizes the city inspector to cause "all dead animals, and every putrid, offensive, unsound or unwholesome substance found in any street or other place in the city, to be forthwith removed," etc. *Held*, that the defendant could not justify his act under such ordinance; that the dead hogs were not *per se* a nuisance or necessarily dangerous to the public health; that the term "dead animals," used in the ordinance, related to such only as were detrimental to the public health; that the owner of the hogs was entitled to a reasonable time to remove such hogs after their arrival. *Held*, also, that while the inspector, in the discharge of his duties, under such ordinance, is clothed with a judicial discretion, yet he is an officer of a limited and special jurisdiction, and when, in any case, his power is challenged, he must prove some facts invoking, or tending to invoke, the exercise of his discretion. Opinions by EARL, C. J., and INGALLS, J.

Robert A. Smith et al. v. *John Orser, Sheriff.*

When a judge at circuit charge that a sheriff, under attachment against two members of a firm, consisting of three members, had no right to take and hold possession of the partnership property: *Held*, that such charge was in conflict with well settled law in this state. *Phillips* v. *Cook*, 24 Wend. 389, approved. Opinion of E. DARWIN SMITH, J.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF RHODE ISLAND.*

ACTION. See *Guardian and Ward.*

ADMINISTRATORS, APPEALS BY. See *Equity Pleadings and Practice*, 2 *and* 4.

APPEAL. See *Appeal Bonds.*

APPEAL BONDS.

The bond required to be given by chapters 191 and 192 of the revised statutes, as a condition of taking an appeal from the court of common pleas to the supreme court, or

* From Hon. John F. Toby, Reporter, to appear in the Ninth Volume of Rhode Island Reports.

of filing a bill of exceptions in the latter court to the rulings of the former, must be signed by the party appealing, and where the bond has been signed by a stranger to the suit, the appeal, or exception, must be dismissed, because the statute has not been complied with. *Townsend* v. *Hazard and others.*

ARBITRATION AND AWARD. See *Award.*

ATTACHMENT.

The provisions of chapter 525 of the statutes are to be construed as provisions in addition to, and not by way of substitution for, those of the statutes previously existing upon the subject of attachments. *Hence*, an attachment of personal estate is void, where the officer charged with the service of the writ left a copy with the defendant as directed by said chapter 525, but did not leave an attested copy of the writ with a copy of his doings thereon, at the defendant's usual place of abode, as directed by chapter 181, § 5, of the revised statutes. *Whitaker* v. *Jenckes.*

APPEALS IN EQUITY. See *Equity Pleadings and Practice*, 3 *and* 5.

APPEALS FROM ORDERS OF TOWN COUNCILS REMOVING POOR PERSONS.

An appeal by the overseer of the poor of a town, from the order of the town council of another town, removing to the one in which he is such overseer a poor person, is properly taken, if taken to the supreme court next to be holden after twenty days from the delivery of said poor person, and the leaving with him of an attested copy of such order, and need not necessarily be claimed within forty days after the making of the order, the provisions of chapter 346 of the statutes not being repealed by those of chapter 681. *Paine* v. *Town Council of North Providence.*

AUDITORS.

1. Under the statute referring cases to auditors (statutes, chapter 660), exceptions to their reports regarding matters of fact are more properly corrected by an appeal to a jury than by a recommitment of the report. *Hunt, Tillinghast & Co.* v. *Reynolds.*

2. Exceptions from an auditor's report regarding matters of fact not disclosed by the record cannot be sustained unless supported by affidavit. *Ib.*

AWARD.

The award of a referee, under a rule of court, is conclusive as to matters of law as well as to matters of fact, and cannot be set aside unless for a cause which affects the fairness of his decision, or which shows that the party objecting did not have a fair and impartial trial. *Cutler* v. *Wall.*

BANK DIRECTORS.

1. Where no qualification is required, and there is no usage to control, a person who is elected a bank director is presumed to accept the office unless he declines it. This presumption may be rebutted. Whether simple non-action as a director for five months would be ordinarily sufficient to rebut it — *query.* But where the stockholders of a bank, in an instrument authorizing its conversion from a state to a national bank, named all the directors who had been elected at the last annual election as those "who are now the directors of said bank," the court cannot hold that two of those so named were not directors at the time of such conversion, because they had never acted in that capacity since their election five months previously. *Lockwood and others, trustees,* v. *American National Bank.*

2. By the provisions of section 44 of the National Currency act of 1864 (chapter 106, 1st session, 38th congress), upon the conversion of a state to a national bank, all the directors of the former become those of the latter, until an election or appointment by the national bank. *Semble*, that no oath is required from these *ad interim* directors, the oath prescribed by section nine of the aforesaid act being designed for those regularly elected by the national bank; but, assuming its necessity, a majority of those who were the directors of the state bank before its conversion is necessary to make a quorum of the board of the national bank. *Ib.*

3. In all cases where an act is to be done by a corporate body or a part of a corporate body, and the number is definite, a majority of the whole number is necessary to constitute a legal meeting, although at a legal meeting, where a quorum is present, a majority of those present may act. *Ib.*

4. Hence, a by-law adopted at a meeting of six *ad interim* directors of a national bank, which had twelve directors before its conversion, is invalid, because not adopted by a majority or quorum of the board. *Ib.*

BY-LAW — ADOPTION OF. See *Bank Directors*, 4.

CONTEMPT. See *Habeas Corpus.*

CONTRACTS.

When two parties enter into a contract, and one of them makes a memorandum of its terms, reads it over to the other party who assents to its correctness, and then retains it in his own possession for his individual use, the contract will be construed to be a verbal and not a written one. Nor does it become a contract in writing because the party making the memorandum affixes his initials thereto. *Hunt, Tillinghast & Co.* v. *Reynolds.*

CRIMINAL PROCEEDINGS.

The provision in section 9 of chapter 221 of the revised statutes, that penalties or forfeitures, the whole or any part whereof is given to any town by any penal statute, may be sued for by the town council in the name of the town, or by the proper prosecuting officer in the name of the city entitled to the benefit thereof, does not apply to fines of upwards of twenty dollars, which are recoverable by indictment under the provisions of section one of the same chapter. *State* v. *Slocum.*

See *Evidence*, 2; *Jurisdiction, New Trials*, 1.

DIVORCE.

1. When one E. C. T. petitioned for a decree declaring the marriage of his son, O. M. T., a minor, with one A. J., null and void, and divorcing him from the bond of marriage with said A. J., it was *held* that the court, being satisfied by the evidence that the said O. M. T. was not of sound mind at the time of his marriage with the respondent, would not grant her application to postpone pronouncing its decree in order to allow the said O. M. T. to be produced before them, her application being based on the claim of his being of sound mind at the time of the marriage, and not of any subsequent recovery, and a physician's affidavit having been presented which stated that he could not be produced in court without suffering injury. *Thayer* v. *Thayer.*

2. A lunatic or a person *non compos* is duly represented in a petition for divorce by the person who, being authorized by the statute (statutes, chapter 706), petitions in his behalf. Personal notice to him of the pendency of the petition, although expedient in some cases, is not expedient when he is a minor without means of his own, and the petition is preferred by his father. *Ib.*

See *Evidence*, 3.

EQUITY PLEADINGS AND PRACTICE.

1. Where an equity cause is heard and decided by a single judge, under the provisions of chapter 692 of the statutes, it is no prejudice to the rights of the parties to enter decrees of dates after the time when the decision was rendered, inasmuch as the right of appeal to the full court runs from the date when the decree is actually entered. *Daboll and others, administrators,* v. *Field.*

2 Administrators represent their intestate's estate so far as regards the allowance of any accounts or claims

against it, and are proper parties to appeal from a decree allowing any such claims. *Ib.*

3. An appeal properly taken from a decree made by a single judge, directing the distribution by administrators of their intestate's estate, draws after it necessarily the reconsideration of so much of another decree made by him in the same cause as also directs a distribution. *Ib.*

4. The supreme court has the power to proceed to the final settlement and distribution of estates of deceased persons when the fund and the parties are before it—its decree will bind all parties who have been properly notified, either by personal or substituted service—and the court will exonerate executors and administrators for payments made according to its decree. *Semble*, that parties who have not had actual notice of a distribution may (using due diligence), by filing a bill for relief, obtain a decree directing the parties who have received an undue share thereof to refund them their proper proportions. *Ib.*

5. Under the provisions of the statute regulating proceedings in cases in equity (statutes, chapter 692), an appeal does not lie from the order of a single judge of the supreme court, directing that certain witnesses in a suit in equity pending before him be produced for oral examination at the trial of said cause. *Anthony* v. *Hutchins.*

See *Injunction.*

ESTATE TAIL. See *Wills*, 1.

EVIDENCE.

1. The defendant, L. R., a manufacturer of woolen goods, consigned them for sale to the plaintiffs, H. T. & Co., commission merchants. In an action by the latter against the former for balance of account, it was *held*, that a contract made between H. T. & Co. and J. T., respecting the sale to him of certain goods consigned them by the defendant, was admissible for the purpose of showing that the charges in the plaintiffs' account against the defendant, relating to the goods which were the subject of that contract, were properly made. *Hunt, Tillinghast & Co.* v. *Reynolds.*

2. In a criminal proceeding, a witness who had testified against the defendant was asked certain questions, apparently with a view to show that he had endeavored to obtain money from the defendant for absenting himself as a witness. A promissory note, signed by the defendant, was then offered and admitted in evidence, and the witness was allowed to testify that it was received by him as a consideration for so absenting himself, from a man he did not know and had not since seen. *Held*, that the note was improperly admitted in evidence, no evidence having been produced to connect the defendant with it, or to show that he signed it. *State* v. *Briggs.*

3. *Held, further*, upon motion for new trial after conviction, that the note having been improperly admitted in evidence, a new trial must be granted notwithstanding the jury were charged that there was no proof that the defendant wrote the note, and that the government had failed to connect it with the defendant. *Ib.*

4. Where a party is alleged to be incapable of contracting a marriage by reason of insanity, the court will form their opinion as to his mental condition from the testimony of witnesses who have been long acquainted with him, and that of medical experts, in preference to personal examination. *Thayer* v. *Thayer.*

See *Husband and Wife*, 1; *Fire Insurance*, 1 and 3; *Life Insurance*, 1, 2, 3 and 4; *Recoupment*, 3.

GOOD WILL.

A good will is, as defined by Lord Eldon, the probability that the old customers will continue to come to the old place. But it is ordinarily the good will of the business as the vendor used it, and is only co-extensive with the business carried on. No decided case can be found where a person selling a good will is prevented from leasing other property he may own in the neighborhood to another person who may carry on the same business, provided there is no collusion, and the lessor has no interest in the business. *Bradford* v. *Peckham and others.*

GUARDIAN AND WARD.

An action against a guardian and his ward jointly will not lie to recover a debt created by the act of the ward before the appointment of his guardian. *Allen* v. *Hoppen, guardian, and another.*

HABEAS CORPUS.

Where the town council commits one summoned to testify in a matter pending before them, for contempt of court in refusing to testify, the supreme court will order him to be discharged when before them on a writ of habeas corpus, if no definite term of punishment is named in the warrant of commitment. *In the matter of Hamel.*

HUSBAND AND WIFE.

1. The testimony of a husband which may tend to criminate his wife, or the testimony of a wife which may tend to criminate her husband, is admissible in a collateral proceeding, provided that no use can afterward accrue therefrom in any direct proceeding against either of them. *State* v. *Briggs.*

2. But a husband or wife objecting to give such testimony will be entitled to the protection of the court. *Ib.*

INDICTMENT. See *Jurisdiction.*

INJUNCTION.

1. An order of injunction until a certain day, or until further order of the court, does not expire on that day, unless some further order is made, but continues in force under the rules of court, until an order is made dissolving it. *Bradford* v. *Peckham and others.*

2. Where a complainant in a bill in equity excepted to the answer, and contended that his exception should be decided, and that he was entitled to a full answer, before a hearing on the motion to dissolve an injunction: *Held*, that ordinarily, on the coming in of the answer denying the equities of law, an injunction is to be dissolved, but not necessarily or of course. *Ib.*

3. On a hearing of a motion to dissolve an injunction, the answer is considered as an affidavit, and the complainant may use counter affidavits, or his exceptions, in argument as to the insufficiency of the answer. *Ib.*

4. The apparent conflict of practice as to dissolving injunctions arises from not distinguishing between the English *common* injunction, which was granted as of course, on certain defaults of the respondent, and a *special* injunction (like the present) granted on special application and oath. *Ib.*

INSANITY. See *Divorce.*

INSURABLE INTEREST. See *Fire Insurance*, 2.

INSURANCE.

Fire Insurance.

1. In an action on a policy of fire insurance, *held*, that the plaintiff was properly allowed to state that he was the owner of the estate insured, that he bought it with his own money, and that it was transferred to one D., who paid nothing for it, to hold for him, for the purpose of showing that in equity he had a right to the premises against the holder of the title at law. *Tuckerman* v. *Home Insurance Co.*

2. An equitable interest in property is an insurable interest, and a person who has gone into possession of certain premises as owner under a parol agreement for the purchase, and has paid part of the purchase money, has such an interest in the premises. *Ib.*

3. In an action on a policy of fire insurance, the answer of a witness who is not an expert, to the question, what it would cost to put up such a building as was burnt, that

"it cost $4,000 to put up such a building forty years ago," is admissible, although the question is inadmissible, the witness having stated a fact and given no opinion. *Ib.*

Life Insurance.

1. In an action on a policy of life insurance, a letter from the president of the defendant company to one S. having been admitted for the purpose of showing him to be a general agent of said company, *it was held*, that certain instructions from said president to S., sent him as advice and information for his private use, but not as any limitation on his authority, were properly excluded from the case. *Mowry* v. *Home Insurance Company.*

2. *Held, further*, that testimony of the plaintiff that said S. told him that if no poison was found in the body of the insured, the defendants would pay the amount of the policy, was properly admitted, the judge having instructed the jury, that if said S. was agent of the company his statement would have the same effect as if made by the defendants, and that if made by the defendants it would not bind them, but must be left to the jury, in connection with the other facts in the case. *Ib.*

3. *Held, further*, that testimony to show that the plaintiff had recently procured additional insurance on the same life, was properly excluded, it being sufficient for this trial to show that he had an insurable interest in the life of the deceased, the defendants not having provided against additional insurance. *Ib.*

4. *Held, further*, that the burden of proof was on the defendant company to show that the statements made by the plaintiff, in his application for insurance, were untrue; that the value to the plaintiff of the life of the party insured was a matter of estimate or opinion, and that the jury should determine whether he could fairly estimate his interest therein at the sum stated in his application. *Ib.*

5. *Held, further*, that interest on the part of the plaintiff in the life of the party insured need not exist at time of suit, such interest existing at the commencement of the policy being sufficient to sustain the action. *Ib.*

6. An insurance by A on the life of B, where A's claim on B is simply the pretext for the insurance; where A has no interest in the life of B he would reasonably desire to have protected by insurance; or where A's interest is small, and the insurance vastly disproportionate, is a gaming contract, and therefore cannot be sustained. *Ib.*

7. A premium on a policy of life insurance being due on a certain day, a receipt signed by the agent of the insurance company, and dated on that day, is presumptive evidence of payment thereof on that day. *Ib.*

8. A regular appointed agent, in this state, of a foreign insurance company, must be presumed, in the absence of evidence to the contrary, to have full authority to act for said company. Any limitation of his authority must be brought home to the knowledge of the plaintiff, to be binding upon him. *Ib.*

9. Where a premium on a policy of a life insurance is not paid until subsequently to the day upon which it is due, the parties suing upon the policy must satisfy the jury that the insured was in good health at time of payment of said premium, in order to keep the policy in force. *Ib.*

JURISDICTION.

Since the passage of the statute conferring upon the court of common pleas for the county of Providence exclusive jurisdiction within that county to find all indictments, and to try all found for crimes not punishable by imprisonment for life (statutes, chap. 659), an indictment for a violation of the provisions of the act of the general assembly, entitled "an act concerning the erection of wooden buildings in the city of Providence," passed October session, 1843, may be found and tried in the court of common pleas, notwithstanding the direction contained in the last named act that the fine imposed for a violation of its provisions shall be recovered "by indictment before, or information in, the supreme court. *State* v. *Slocum.*

LEGACY DUTIES.

Legatees under a will must severally pay the duties required in respect to their respective legacies, even if the legacies are bequests of specific property, unless they are expressly exempt from such payment by the terms of the will, and this whether the duties are claimed under the U. S. act of 1862 (chap. 119), of 1864 (chap. 173), or the amendatory act of 1866 (chap. 184). *Goddard* v. *Goddard.*

MARRIAGE AND DIVORCE. See *Divorce.*

MASTER AND SERVANT.

Whether the owner of a hack, who is personally without fault, can be held to answer for a non-observance of an ordinance directing him to have two lighted lamps to his carriage when driving it in the night time, *query*. He certainly cannot be so held when the hack is being used by some person not then acting in his service, and without his knowledge or consent, as, when the driver, being in his employ as *day* driver, uses the hack for his own purposes, in the night time, unauthorized by the defendant, without his knowledge, and without any personal negligence on his part. *Campbell* v. *City of Providence.*

NEW TRIALS.

1. The supreme court has power, under chapter 193, section 8, of the revised statutes, to grant a new trial in the case of a criminal prosecution in the municipal or police court of the city of Providence. *Campbell* v. *City of Providence.*

2. Subject to the rules of evidence and certain general principles, the whole conduct of a trial, the order of introducing evidence, and the allowing a party to introduce evidence at any particular time, is subject to the discretion of the presiding judge, and it is no ground for a new trial, that where the plaintiff, in an action on a policy of life insurance upon another's life, closed his testimony without offering any evidence showing that he had an insurable interest in the life of the party insured, the presiding judge, having at first decided to sustain a motion for a nonsuit on the part of the defendant, afterward allowed the plaintiff to offer evidence of his insurable interest. *Mowry* v. *Home Insurance Company.*

NULLITY OF MARRIAGE. See *Divorce.*

OVERSEERS OF THE POOR — APPEALS BY. See *Appeals from Decrees of Town Councils.*

PLEADINGS AND PRACTICE AT LAW.

1. To a special plea in bar of an action on a policy of insurance, alleging that by a provision of the policy no action was sustainable thereon, unless commenced within twelve months next after the loss, within which time this action was not commenced, the plaintiff replied, *precludi non*, because "after said cause of action had occurred, and within the twelve months next after the occurrence of the loss and damage aforesaid, the said defendant corporation waived the said condition and proviso in their policy mentioned." *Held*, on demurrer to this replication, that it was lacking in precision, and did not show, with the degree of certainty required by the rules of pleading, what it was which the plaintiff expected to prove in rebuttal of the special plea, and that the plaintiff must set out fully in his replication what it was that he claimed had been done by the parties, which amounted to such a waiver. *Oakman* v. *City Insurance Company.*

2. The waiving of a jury trial in a special court case, and submission of the case under the statute, in law and fact, to the judge holding the court, deprives the party aggrieved by his decision of the right to review the same in matters of fact before the supreme court; and where

the party aggrieved contends that the judge erred in determining the legal effect of certain facts given in evidence, all the facts adduced in evidence before him must be laid before the supreme court, by agreed statement of facts or otherwise, before they can review his decision. *Mitchell* v. *Wilson.*

POWERS. See *Wills*, 2; *Trusts and Trustees.*

PROMISSORY NOTES AND BILLS OF EXCHANGE. See *Recoupment*, 2, 3.

QUO WARRANTO. See *Trial Justices.*

RECOUPMENT.

1. The doctrine of recoupment rests on the equitable principle that the defendant shall be allowed to diminish or defeat the plaintiff's claim by a claim of his own, where both grow out of the same contract or transaction. *Hill* v. *Southwick.*

2. A promissory note, and an agreement which is the consideration for the note, are not such independent contracts that the breach of the one cannot be set up by way of recoupment to the other. *Ib.*

3. In an action upon a promissory note, the consideration of which was an agreement signed by the plaintiff, to convey to the defendant, on or before January 1, 1866, twenty-five hundred dollars of the capital stock of the King Gold Mining Company, at subscription price, it was *held*, that the defendant might defend against the action by showing that no transfer or tender of the said stock was made to him until after August, 1866, and might recoup his damages arising from the plaintiff's failure to perform his agreement. *Ib.*

REFEREES. See *Award.*

STATUTES CITED, EXPOUNDED, ETC.

Statutes of the United States.

1862, C. 119; 1864, C. 173; 1866, C. 184; Legacy Duties; 1864, C. 106; Bank Directors, 2.

Statutes of the State.

Act in relation to the laying out, enlarging, straightening, or otherwise altering streets in the city of Providence. *Waiver*, 2.

Revised Statutes.

Chap. 159, Wills, 6; chap. 181, Attachment; chaps. 191, 192, Appeal Bonds; chap. 193, New Trials, 1; chap. 225, Criminal Proceedings; chap. 316, Appeals from orders of Town Councils.

General Statutes.

Chap. 525, Attachment; chaps. 656 and 659, Trial Justices, 1; chap. 659, Jurisdiction; chap. 660, Auditors; chap. 692, Equity Pleadings and Practice, 5; chap. 706, Divorce.

TOWN COUNCILS — APPEALS FROM ORDERS REMOVING POOR PERSONS. See *Appeals from Decrees of Town Councils.*

TOWN COUNCIL — POWER OF, TO COMMIT FOR CONTEMPT. See *Habeas Corpus.*

TRIAL JUSTICES.

1. Under the provisions of chapters 656 and 697 of the statutes, the town council of a town which is divided into voting districts may, at their first meeting after any annual election of town officers, either (*first*) establish one justice court for the town, or (*second*) elect a trial justice for each voting district, or (*third*) elect one trial justice for all said districts. The election of one trial justice by a town in one of whose voting districts a court of magistrates has already been established, is an election of said one justice for all the remaining districts. *State* v. *Stiness.*

2. A town which has once elected a trial justice to serve in two or more voting districts, cannot afterward change the constitution of the court so created, by electing separate trial justices for each of said districts. Such an election is void, and will not displace the officer first elected, inasmuch as, by the statutes, he holds office until his successor is qualified to act. *Ib.*

TRUSTS AND TRUSTEES.

Who will be the heirs at law of A, at the time of the death of B, cannot be known until B's decease. Hence, where a trustee holds property under a deed of trust which provides that, upon a contingency which has happened, he should hold it for the use of C. G., during her life, and, after her decease, should convey and pay over all said trust estate to P. G., if then living, or if she then have deceased, to those who would then be entitled thereto, as her heirs at law, in such proportion as they would be so entitled had she then deceased intestate, seized and possessed of the same in her own right; it was *held*, that the court could not, upon the application of said C. G., P. G., and of all the parties who would, at the time of the application, be entitled to any interest under said deed as heirs at law of the said P. G. in the event of her decease, direct said trustee to convey the trust property to the said P. G., discharged of said trust, for the reason that the persons equitably entitled to the estate at the decease of the said C. G., the assent of all of whom would be necessary to accelerate the trust, could not be ascertained previous to her decease. *Greene and others* v. *Aborn, trustees.*

WAIVER.

1. It is a fixed rule of courts of equity, as well as of courts of law, that where an irregularity has been committed, and a party who consents to a proceeding which he might have prevented by resisting it on that account, waives thereby all exceptions to such irregularity. *Tingley and others* v. *City of Providence.*

2. Where a street has been improved or extended under the act of the general assembly, "in relation to the laying out, enlarging, straightening or otherwise altering streets in the city of Providence," passed January session, 1854, a party who has filed his objections to the report of the commissioners made thereon, and claimed a jury trial under the provisions of the act, cannot, after the rendition of the verdict, avail himself of any defect or informality in the notice given him of the commissioners' report. *Ib.*

WILLS.

1. A devise of lands in the following words: "I give, devise and bequeath to my nephew, A. W., all my farm, known as the William Brown farm, if he leaves any lawful issue, to his heirs and assigns forever, and if he has no lawful issue after him, to my three children, viz.: M., H. and J., their heirs and assigns forever, share and share alike," vests an estate tail in A. W., the nephew. *Whitford* v. *Armstrong.*

2. The word *relations*, in its widest extent, embraces persons of every degree of consanguinity, and extends to all persons who are descended from the same common ancestors. *Hence*, where R. G. H. devised his estate as follows: "I give, devise and bequeath unto my wife, M. H., all and singular my property and estate, both real and personal, for and during the term of her natural life, with full power to devise and bequeath the same, or any part thereof, to my relations of the Huling family as she shall in her discretion select. And his wife, the said M. H., who was his cousin-german, by her will devised the estate in question to her niece, A. E. T., for life, said A. E. T. being a granddaughter of a sister of the father of R. G. H., and niece of his said wife; it was *held*, that the devise was a valid execution of the power conferred upon M. H. by the will of R. G. H. *Whitney and others* v. *Fenner.*

3. A will executed according to law operates as a revocation of a former will, even if it contains no clause of revocation, where it purports to dispose of all the property of the testator in a manner different from, and inconsistent with, the disposition of it in the former will. *Reese and Wife* v. *Court of Probate of Portsmouth.*

4. An instrument purporting to be a will, but executed in the presence of two witnesses only, and containing no clause of revocation, will not so operate, although it purports to dispose of all the property of the party signing it, in a manner different from, and inconsistent with, the disposition in the first, nor would it so operate if it contained a clause of revocation. As it fails to stand as a will the clause of revocation fails with it. *Ib.*

5. E. F., by her last will and testament, directed her executors to sell at public auction and convert into cash, all the real estate of which she should die seized and possessed, and bequeathed the residue of her estate to five nephews and nieces, R., A., M., W. and N., "equally between them share and share alike, and to their respective heirs, executors, administrators and assigns, provided they all survive me; if not, to such of them, the said R., A., M., W. and N., as shall survive me, equally between them, share and share alike, and to their respective heirs, executors, administrators and assigns." None of these nephews and nieces survived her, but all of them except one left lineal descendants. *Held*, that the said E. F. must be deemed to have died intestate as to the said residue of her estates, the general rule that lineal descendants of devisees who die before their testator shall inherit their devises, as established by chapter 154, § 12, of the revised statutes, being governed by her manifest intention that only such of her nephews and nieces as survived her should take any share in it. *Daboll and others, Administrators*, v. *Field.*

6. *Held*, further, reaffirming *Smith* v *Smith*, 4 R. I., 1, that one S. F., the only child of a brother or sister of said E. F., living at her decease, being thereby her nearest of kin, did not thereby take the residuary estate to the exclusion of the descendants of the other brothers and sisters, but that, under the statute of descents in Rhode Island (Rev. Stat., chap. 159), one-fourth part of all said residuary estate must be divided, *per stirpes*, among the descendants of each of her four brothers and sisters to the remotest degree, and the issue of any descendants of said brothers and sisters who died in the life-time of the said E. F., the issue of any deceased descendant in every degree taking, collectively, the shares of the parent. *Ib.*

BOOK NOTICES.

A Treatise on Facts as subjects of Inquiry by a Jury. By James Ram, of the Inner Temple, M. A., Cambridge, Barrister-at-Law; first American edition, by John Townshend, Counselor-at-law, author of Law of Libel and Slander, etc., etc., with an appendix containing David Paul Brown's "Golden Rules for the Examination of Witnesses," Cox's "Practical Advice for Conducting the Examination of Witnesses," Whewell on Theory and Fact. New York: Baker, Voorhis & Company, 1870.

The rules for eliciting evidence and weighing facts are so pleasingly and clearly laid down in the work in question, from sources so diverse and yet so apt, that after perusing it the reader who does not reflect upon the labor necessarily expended upon its compilation will be likely to exclaim, "Well, really, I don't see any thing very extraordinary about this," and so quite likely would a jury to whom he might read one of its pages to establish a proposition; but where else could counsel have found it? Would he have been able to have said it so well and so effectually without the volume? If he think so let him try the experiment a few times and we are certain it will ever after be a constant companion. The notes of Mr. Townhnsend add materially to the value of the work. Indeed, every thing he does is well done. He has given us, in addition, David Paul Brown's Golden Rules for the Examination of Witnesses, Cox's Practical Advice for Conducting their Examination, Whewell on Theory and Fact, and a model index, the best part of any work. The publishers, however, as usual, have bound their catalogue with the volume. How long are the profession to endure such a nuisance? We once heard an excellent lawyer remark that he would never knowingly buy a book so disfigured. If the index is worth consulting, it should be the last thing in the volume, so that every time it is examined we are not *compelled* to turn over fifteen or twenty pages of worthless stuff. Let publishers send, if they please, their catalogues with, but they should *never* be bound in, their books. This can be easily remedied, and we hope will be in the next impression. The publishers are, however, entitled to much credit for the admirable manner in which they have gotten out the work. It is well printed and well bound.

COLUMBIA COLLEGE LAW SCHOOL.

The eleventh annual commencement of the law school of Columbia College took place on the evening of the 18th inst., in the Academy of Music. The audience was large, and the exercises passed off to the evident gratification of all. Grafulla's Band was in attendance. President Barnard presided, and with him on the stage were Profs. Peck, Vanamringe and Short, Judge Blatchford, ex-Judge Mitchel, David Dudley Field, G. M. Ogden, Bernard Roelker, Judge Van Vorst, Mr. Van Winkle, and other members of the bar.

The Rev. Dr. Duffy, chaplain of the college, opened the exercises with prayer, after which Prof. Theodore W. Dwight addressed the graduating class. He said that in the eleven years that have passed since the commencement of the school, six hundred young men have graduated and passed into the activity of the profession with high hopes as those graduating now. Many of those he was gratified to see adorn the profession in riper manhood. He reviewed at length the course of study through which the graduating class had passed, beginning with the origin of the common law, and coming down to the present wide statutory provisions adapted to the necessities of forty millions of people. They should follow their profession not as a trade for money making, but as a high, lofty and honorable cause. The profession is now practically regarded by the public as a tolerated nuisance. He would not, however, inquire into the reason or justice of this feeling, but would counsel them the course they ought to pursue. They should carefully study their relations to the parties to the litigation, to witnesses, to the demands of justice, and not contemplate their duties of the profession as a mere stage scene. He quoted the memorable opening of Lord Brougham's speech in defense of Queen Caroline, and condemned its sentiments in strong language. He warned them against the practice of improvident injunctions, which, without notice, takes property from the possession of its owner and turns it over to the tender mercies of a receiver. To Judge Lewis A. Woodruff he paid a high compliment for judicial probity and wealth of learning; to the recent change in the organization of the court of appeals he gave his warmest approbation, and gave the credit of the result to Judge Comstock. The Bar Association was a step which did honor to the bar, and would tend to build up alike the honor and efficiency of the legal profession. He urged upon them that, after their own professional life was brought to a close, they would see to it that younger men would be trained up to supply their place, and concluded by bidding them an affectionate farewell.

The alumni address was delivered by Adolph L. Sanger, his subject being "The Legal Status of Women."

The report of the committee on prizes and diplomas was then read, complimenting in high terms the general proficiency of the graduating class, and giving the following result of their examination for the preferment of prizes and diplomas:

The first prize, of $250, in the department of municipal law, was awarded to Charles Kinsey Cannon; the second, of $150, to John McLean Nash, and the third, of $100, to Gilbert Holmes Crawford. The prize of $200 in the department of political science was also awarded to Gilbert Holmes Crawford. The judges of prizes in municipal law were Theron R. Strong, John E. Parsons and George W. Wright; in political science, William E. Curtis, Bernard Roelker, and Edmund Wetmore.

The degree of Bachelor of Laws was conferred upon the following members of the graduating class:

George Agustus Adee, Edward Knapp Anderton, Lemuel Hastings Arnold, Jr., Theodore Aub, George Augustus Baker, Jr., Henry Beadel, Jr., Edward Wells Bell, James Michael Brady, Alfred Douglas Brush, Peter Vincent Burtsell, Charles Kinsey Cannon, Samuel Cardwell, Jr., John Henry Clayton, Timothy Pitkin Chapman, Henry Abel Chittenden, Jr., John Chorlton, Edgar Bradford Clark, Stacy B. Collins, Jr., Le Baron Bradford Colt, John Christopher Conner, Jr., William Edgar Conover, Gilbert Holmes Crawford, Charles Edward Crowell, Albert Delafield, Leo Charles Dessar, Francis Charles Devlin, George Gillespie Dickson, William Palmer Dixon, John Holmes Prentiss Dodge, Charles Arthur Doten, George Williams Ellis, George Washington Flaacke, William Riley Foster, J. Henry Fowler, Jr., Robert Ludlow Fowler, Andrew Gilhooly, Joseph Warner Greene, Augustus Traugott Gurlitz, Lovell Hall, Frederick Robert Halsey, George Henry Hart, Walter Howe, William Reed Jerome, Charles Dunn Jones, Clarence Delafolie Jones, Samuel Kalish, James Knox, Samuel Spamulaws, Thomas Alphonso McGlade, Jr., Robert Bach McMaster, William Fleming McRae, John McLean Nash, John Calvin Paulison, Henry Wilson Payne, Duane Livingston Peabody, Paul Pelletier, Samuel Edmund Perry, William Franklin Pitschke, James M. Poulsen, Arthur Rickards Robertson, Roderick Robertson, George Nicholas Sanders, Jr., William Brown Slocum, Kaufman Simon, Orrin Skinner, Nathaniel Phillips, Smith Thomas, William Knapp Thorn, Jr., Thomas Birdsall Van Boskerck, Albert Warren Wells, Ira Benjamin Wheeler, Henry Simmons White, James Henry Wood.

After the distribution of prizes and diplomas the valedictory address was delivered by Orrin Skinner, and the exercises concluded with music and the benediction.

William Dermody, one of the plasterers employed in the west wing of the Chicago court-house, when it fell, and who was under the ruins of the fallen roof for an hour and a half, has brought an action for damages against that city to recover $20,000 for injuries sustained by him.

TERMS OF THE SUPREME COURT FOR JUNE.

1st Monday, General Term, New York, Ingraham, Cardozo and Brady.
1st Monday, Special Term (Chambers), New York, Barnard.
1st Monday, Circuit and Oyer and Terminer, Kings, Pratt.
1st Monday, Circuit and Oyer and Terminer, Rensselaer, Miller.
1st Monday, Circuit and Oyer and Terminer, Goshen, Barnard.
1st Monday, Special Terms (Motions), Kings, Tappen.
1st Monday, Special Term, Goshen, Barnard.
1st Monday, Circuit and Oyer and Terminer, Greene, Peckham.
1st Monday, Circuit and Oyer and Terminer, Fonda, Rosekrans.
1st Monday, Circuit and Oyer and Terminer, Rome.
1st Monday, General Term, Rochester.
1st Monday, Circuit and Oyer and Terminer, Erie, Talcott.
2d Monday, Circuit and Oyer and Terminer, Dutchess, Tappen.
2d Monday, Circuit and Oyer and Terminer, Westchester, Barnard.
2d Monday, Circuit and Oyer and Terminer, Jefferson, Morgan.
2d Monday, Circuit and Oyer and Terminer, Broome, Murray.
2d Monday, Circuit and Oyer and Terminer, Cattaraugus, Marvin.
2d Tuesday, Special Term, Schuyler, Boardman.
3d Monday, Circuit and Oyer and Terminer, Putnam, Barnard.
3d Tuesday, Circuit and Oyer and Terminer, Canton, Potter.
3d Tuesday, Special Term, Onondaga, Morgan.
3d Tuesday, Special Term, Chenango, Balcom.
3d Tuesday, Special Term, Erie, Barker.
4th Tuesday, Circuit and Oyer and Terminer, Sandy Hill, Potter.
Last Monday, Special Term, Monroe, J. C. Smith.
Last Tuesday, Special Term, Albany, Peckham.
Last Tuesday, General Term, Syracuse.

LEGAL NEWS.

The names of over 10,000 attorneys are on the English law rolls.

A court at Jacksonboro, Tennessee, was dispersed last week by the small-pox.

John Graham was paid $10,000 for defending McFarland.

Judge Noah Davis is named as a successor of United States District Attorney Pierrepont, of New York.

The Connecticut legislature have elected Hon. Thomas B. Butler chief justice of the supreme court to succeed the late Chief Justice Hinman.

A clergyman in Pittsburg has been sued for "fifty pounds Pennsylvania currency," under an old law, for marrying a minor without the consent of her parents.

Syeed Ameer Ali, the first Mussulman who obtained the degree of Master of Arts from the Calcutta University, is now living in London with the purpose of being called to the English bar. He is already a member of the bar in India.

One hundred and twenty-five criminals will escape punishment in Louisiana, owing to the legislature having changed the laws and made no provision for those offenses committed prior to April 1, 1870, when the new law went into effect.

Chief Justice Gilpin, of Delaware, says that the best liquor law the state ever had, was almost a literal transcript of one framed by William Penn, and that the legislature, by its persistent tinkering has been steadily making it worse for the last thirty years.

The law of evidence has been so amended in Pennsylvania as to allow the testimony of either husband or wife to be given in his or her own behalf, in any proceeding in divorce, where either personal service of the subpœna is made on the opposite party, or where either may appear and defend.

Judge Wood, one of the new circuit judges, assumed the bench at New Orleans on the 26th ult., and for the first time in eleven years, organized the circuit court in that city. As the docket of the appeal cases was called it was found that in many cases all the parties had died, including the lawyers. In some of them the lawyers on both sides had fallen in the late war.

In a suit brought against the State National Bank of Boston, to recover $125,000 on a check certified by the cashier thereof, and afterward disclaimed by the bank, on the ground that the cashier had no authority to certify checks without first consulting the bank, Judge Brady, in the supreme court circuit, has decided against the bank.

The law students of Hartford (Conn.) have formed a club, and hold meetings every week, at which cases are tried in due form of law, and considerable benefit derived by the members. Four of the members act as counsel, and one as judge, but it is proposed to have some practicing attorney occupy the latter position hereafter.

A stockbroker sued the Abbe Peyer, in Paris, for differences amounting to 5,000 francs on various Bourse operations. The reverend father came into court in his robes, and pleaded that stock-gambling, being an immoral transaction, the law could afford no relief; but the court held that a priest could not be supposed to do any thing immoral, and therefore he must pay.

The Junior Bar Association, of the city of New York, have elected the following officers: President, David McClure; Vice-President, Joseph H. G. McGlone; Secretary, Wm. H. Graham; Treasurer, E. C. F. Gasleyger. An executive committee, composed of the following gentlemen, was also elected: Maurice J. De Vres, James Barry, Wm. J. Stanford, Aaron Levy and Timothy Donovan.

A correspondent of the Hartford *Post*, writing from the legislature on the subject of the divorce law, says: "Some of the petitions for a change in our law of divorce have come over from the last session, and are re-enforced this year by new ones. There has been a good fight on this object before two or three legislatures, but so long as the judiciary committee is composed of lawyers who have a lucrative practice in procuring divorces there will be nothing done to make our laws upon this subject more strict than they now are. They have dodged it every time so far, and I presume they will this year."

The telegraph announces the death of Franklin T. Backus, of Cleveland, one of the oldest members of the bar of Ohio. Mr. Backus was born in Lee, Berkshire county, Mass., graduated at Yale College, and went to Cleveland in 1836. He read law in the office of Messrs. Bolton & Kelly, and was afterward elected prosecuting attorney of Cuyahoga county. He was a representative and senator in the state legislature, a candidate for judge of the supreme court, and for congress, and was strongly recommended by men of both parties for the place of district judge for the northern district of Ohio. He was an honest man, a good citizen, and an ornament to his profession, and has left to his family and friends a good name.

A proceeding in a murder trial in San Francisco attracts attention, not so much because of its importance in the particular case as on account of the possibility it indicates that judges so disposed might take advantage of a similar occasion to entirely defeat the object of the law. James Dwyer was tried for killing Diedrich Whollers. The trial lasted four days. Five hours after its conclusion the jury reported their disagreement, asking for further explanations from the judge, which he declined to give. They saw no possibility of agreement with the information they possessed, and he discharged them. If a judge can discharge a jury that disagrees after only five hours' deliberation, on the testimony of a four days' trial, why could he not within one hour, or, for that matter, within ten minutes, "with the thanks of the court?" If not, why not?

A singular case has just been decided in Naples by the Duke d'Ossena, who is looked upon as "a second Daniel come to judgment." A very rich and bigoted citizen died and left his property to a convent of monks, with a proviso that the brotherhood should give his son, a deserving young man, what part they liked. The monks took possession of their legacy, and offered a very small portion of it to the rightful heir; but instead of accepting it the youth carried the case before Ossena. Having heard both sides of the matter he turned to the magistrate who administered the will and stated his surprise that a man so famous as a lawyer should have so wrongly interpreted the terms of the testament, which ordained that the monks should give the testator's son the part they liked. When they offered him forty thousand dollars, and propose to retain the two hundred and ten thousand dollars remaining, it was quite plain that the greater sum was the part they liked; consequently the monks were ordered to carry out the terms of the will, and pay the amount they preferred to the testator's heir. And so it was decreed.

The Bloomington (Ind.) *Progress* relates that several weeks ago a farmer and his wife, living near that place, indulged in a little quarrel, and the woman went to Bloomington that she might cool off and the sooner recover her good nature. Soon after she left home her husband proceeded to Bloomington, consulted a lawyer, and arranged for a divorce on the ground of desertion and incompatibility of dispositions. The court met the following Monday, and the business was transacted at once. Notice was served for the wife, and left at the residence of the husband, but as the wife was in town getting over her "pet" she was, of course, unaware of service. The case was called in the common pleas, and the husband brought in evidence to show that his wife had left him, that they did not live together harmoniously, and that there was no probability of a reconciliation. The divorce was granted. Several days afterward the wife, having recovered her equanimity, returned to what she still believed to be her home only to find that she was divorced and homeless.

NEW YORK STATUTES AT LARGE.*

CHAP 322.

AN ACT to authorize corporations to change their names.

PASSED April 21, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Any incorporation, incorporated company, society or association organized under the laws of this state, excepting banks, banking associations, trust companies, life, health, accident, marine and fire insurance companies, railroad companies and corporations created by special charter, may apply, at any general term of the supreme court of the judicial district in which shall be situated the principal corporate property of such corporation, or its chief business office, if any, for an order to authorize it to assume another corporate name.

§ 2. Such application shall be by petition, which shall set forth the grounds of the application, and shall be verified by the chief officer of the corporation. Notice of such application shall be published for six weeks in the state paper, and in a newspaper of every county in which such corporation shall have a business office, or, if it have no business office, of the county in which its principal corporate property is situated, such newspaper to be one of those designated to publish the session laws; and it must appear to the satisfaction of the court that such notice has been so published, and that the application is made in pursuance of a resolution of the directors, trustees or other managers of the corporation applying.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

§ 3. If the court to which such application is made shall be satisfied, by such petition so verified, or by other evidence, that there is no reasonable objection to such corporation changing its name, it may make an order authorizing it to assume the proposed new corporate name. A copy of said order shall be filed in the office of the secretary of state, and with the county clerk of every county in which said corporation has a business office, or if it have no business office, of the county in which its principal corporate property is situated, and be published at least once in each week for four weeks in some newspaper in every county where such corporation has a business office, or if it have no business office in the county in which its principal corporate property is situated, such newspaper to be designated by the court.

§ 4. When the requirements of this act shall have been complied with, the corporation applying for a change of name may, from and after the day specified in the order of the court, be known by and use the new corporate name designated in the order of the court.

§ 5. No suit or legal proceeding commenced by or in behalf of or against any corporation shall abate by reason of a change of its corporate name made as herein authorized. Such change of the corporate name of the said corporation or company shall in no way affect the rights or liabilities of said corporation or company. All obligations of said company or corporation may be enforced against said corporation or company in the changed name, and all actions and proceedings commenced and pending against said corporation or company at the time said corporate name is changed shall be continued in the name in which said action or proceedings were commenced, or the court may, on the application of either party, allow the action or proceeding to be continued in the corporate name to which said corporation or company has been changed.

§ 6. This act shall take effect immediately.

CHAP. 325.

AN ACT to provide for relief from erroneous or illegal assessments and taxation of farms or lots of land divided by the county line between counties.

PASSED April 21, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Any person who shall have heretofore owned, or shall hereafter own a farm or lot of land which has been or shall be divided by the county line between two or more counties, which farm or lot shall have been or shall be assessed in whole or in part in or for the same year or years in towns in said counties, and who shall have paid the taxes so imposed thereon in said counties, may commence an equitable action in the supreme court against said counties to determine in which of said counties said land was properly taxable for said year or years, to recover of the county or counties wherein said taxes have been or may be wrongfully collected, the amount thereof with interest thereon from the time of the payment thereof; and for such other relief in the premises as to the court shall seem equitable and just.

§ 2. Said action may be commenced by the service of a summons, or summons and complaint, upon the chairman of the boards of supervisors of the counties made defendant, each of whom shall have authority to employ counsel to appear for and represent his county in said action. The court shall take cognizance of such actions in the same manner as other civil actions, and shall render the proper judgment therein, and the chairman of such board of supervisors are hereby authorized to verify pleadings or affidavits in such actions.

§ 3. All the proceedings of the code of procedure, not inconsistent with this act, are made applicable to said actions, and to the judgment and subsequent proceedings therein, except that costs in such action shall not be recovered against any county unless the plaintiff shall, before the commencement of said action, have applied to the board of supervisors thereof to refund such taxes.

§ 4. Upon the final determination of said action in favor of the plaintiff therein, or of the appeal, if one be taken, the board of supervisors of the county against which such judgment shall be rendered, requiring it to refund said taxes, are hereby authorized and required to pay the amount thereof, with interest from the time of its rendition, and cause the amount thereof to be levied upon the taxable property of said county and paid to the plaintiff therein; and in assessing and levying such tax they shall adjust and apportion the same upon the different towns and cities therein as in their judgment shall be equitable, taking into consideration the amount of state, county and local tax included in such original assessment.

§ 5. No claim shall be made upon the state, by such county or any town or city therein, for the repayment of any part of said tax so refunded.

§ 6. The remedies given by this act shall not extend to assessments made more than three years next prior to the passage hereof.

§ 7. This act shall take effect immediately.

CHAP. 331.

AN ACT to amend an act entitled "An act to incorporate dental societies, for the purpose of improving and regulating the practice of dentistry in this state," passed April seven, eighteen hundred and sixty-eight.

PASSED April 21, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section eight of the act entitled "An act to amend an act entitled 'An act to incorporate dental societies, for the purpose of improving and regulating the practice of dentistry in this state,'" passed April seven, eighteen hundred and sixty-eight, is hereby amended so as to read as follows:

§ 8. The state dental society, organized as aforesaid, at its first meeting shall appoint eight censors, one from each of the said district societies, who shall constitute a state board of censors, and at the first meeting of the said board, the members shall be divided into four classes, to serve one, two, three, and four years, respectively; and said state dental society shall, at each annual meeting thereafter, appoint two censors, to serve each four years, and until their successors shall be chosen, and fill all vacancies that may have occurred in the board by death or otherwise. Each district society shall be entitled to one, and only one member of said board of censors. Said board of censors shall meet at least once in each year, at such time and place as they shall designate, and being thus met, they, or a majority of them, shall carefully and impartially examine all persons who are entitled to examination under the provisions of this act, and who shall present themselves for that purpose, and report their opinion in writing to the president of said state dental society, and on the recommendation of the said board, it shall be the duty of the president aforesaid to issue a diploma to such person or persons, countersigned by the secretary and bearing the seal of said society, conferring upon him the degree of "Master of Dental Surgery" (M. D. S.), and it shall not be lawful for any other society, college, or corporation to grant to any person the said degree of "Master of Dental Surgery."

§ 2. Any person who shall knowingly and falsely claim or pretend to have or hold, a certificate of license, diploma, or degree, granted by any society, organized under and pursuant to the provisions of this act, or who shall falsely and with intent to deceive the public, claim or pretend to be a graduate from any incorporated dental college, not being such graduate, shall be deemed guilty of a misdemeanor.

§ 3. This act shall take effect immediately.

CHAP. 366.

AN ACT in regard to public libraries incorporated in the state of New York.

PASSED April 23, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. If any officer, clerk, agent, or member of any public library duly incorporated under the laws of the state of New York, or any other person whatever, shall thereafter willfully cut, mark, mutilate, or otherwise injure any book, volume, map, chart, painting, or engraving belonging to any public library so incorporated as aforesaid, or shall procure such injury to be done as herein stated, every such person shall be deemed to be guilty of a misdemeanor, and upon conviction thereof by any court of competent jurisdiction, shall be liable for each offense to a fine of not more than one hundred dollars, at the discretion of the court; provided, however, that no prosecution shall be maintained under this act, unless the library prosecuting shall have a printed copy of this act conspicuously placed upon its premises, and shall also have a printed copy pasted upon the cover, or otherwise attached to any book or volume which may be claimed to have been injured as before described.

§ 2. This act shall take effect immediately.

CHAP. 341.

AN ACT to amend the sixth section of the third title of the eighth chapter of the second part of the Revised Statutes, conferring authority upon surrogates to appoint guardians for minor children.

PASSED April 22, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The sixth section of title third of chapter eight of part second of the revised statutes is hereby amended so as to read as follows:

§ 6. The surrogate to whom application may be made under either of the preceding sections shall have the same power to allow and appoint guardians as is possessed by the supreme court; and may appoint a guardian for a minor whose father is living, and in all cases he shall inquire into the circumstances of the minor and ascertain the amount of his personal property and the value of the rents and profits of his real estate, and for that purpose may compel any person to appear before him and testify in relation thereto.

§ 2. This act shall take effect immediately.

CHAP. 361.

AN ACT to amend an act entitled "An act to vest in the board of supervisors certain legislative powers, and to prescribe their fees for certain services," passed April third, eighteen hundred and forty-nine.

PASSED April 22, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four of chapter one hundred and ninety-four of the laws of eighteen hundred and forty-nine, being "An act to vest in the board of supervisors certain legislative powers, and to prescribe their fees for certain services," passed April third, eighteen hundred and forty-nine, is hereby amended by adding thereto, as subdivision fifteen of said section, the following:

15. To fix, establish, locate and define disputed boundary lines between the several towns in their respective counties, by a resolution to be duly passed by a majority of all the members elected to such board. A notice of intention to apply to such board, to fix, establish, locate and define such disputed boundary line, particularly describing the same, and the line, as proposed to be acted upon by such board, signed by the supervisor, town clerk, and two or more of the justices of the peace of some one of the towns to be affected by such resolution, shall be published for four weeks successively before the meeting of the board at which such resolution is to be presented, in all the newspapers printed in such county, if not more than three in number, but if they exceed three in number, then in the three having the largest circulation in such county. A copy of such printed notice shall also be served personally, at least fifteen days before the meeting of such board, on the supervisor and town clerk of each of the other towns to be affected thereby. A copy of the resolution as adopted, which shall contain the courses, distances, and fixed monuments specified in such boundary line or lines, together with a map of the survey thereof, with the courses, distances and fixed monuments referred to therein, plainly and distinctly marked and indicated thereon, shall be filed in the office of the secretary of state within thirty days after the adoption of such resolution, and it shall be the duty of such secretary to cause the said resolution to be printed with the laws of the next legislature, after the adoption thereof. A copy of such resolution shall also, within the same time, be published for two successive weeks in all the newspapers printed in such county, but if they exceed three in number, then in such three as the said board shall designate for that purpose, the expenses of such publication to be paid by the town causing the publication of the notice of the application of such board.

§ 2. This act shall take effect immediately.

CHAP. 370.

AN ACT to amend an act entitled "An act to designate the holydays to be observed in the acceptance and payment of bills of exchange and promissory notes," passed April fourth, eighteen hundred and forty-nine.

PASSED April 23, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The following days, viz.: the first day of January, commonly called New Year's day, the twenty-second day of February, the fourth day of July, the twenty-fifth day of December, and any day appointed or recommended by the governor of this state, or the president of the United States, as a day of fast or thanksgiving, shall, for all purposes whatsoever as regards the presenting for payment or acceptance, and of the protesting and giving notice of the dishonor, of bills of exchange, bank checks and promissory notes, made after the passage of this act, be treated and considered as is the first day of the week, commonly called Sunday, and when either of those days shall occur on Sunday the following Monday shall be deemed a public holyday, and any bill of exchange, bank check or promissory note made after the passage of this act, which, but for this act, would fall due and payable on such Sunday or Monday, shall become due and payable on the day following such Sunday or Monday.

§ 2. All acts and parts of acts inconsistent herewith are hereby repealed.

§ 3. This act shall take effect immediately.

CHAP. 394.

AN ACT to confer additional powers upon surrogates, and to authorize an examination as to the effects of deceased persons.

PASSED April 27, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever any executor or administrator to whom letters testamentary or of administration, shall have been issued by any surrogate's court in this state, shall have reasonable grounds to believe that any goods, chattels, credit or effects of the deceased, or of which he had possession at the time of his death, or within two years prior thereto, shall not have been delivered to such executor or administrator, nor accounted for satisfactorily by the persons who were about the person prior to his decease, or in whose hands the effects of the deceased, or any of them, may be supposed at any time to have fallen, such executor or administrator may institute an inquiry concerning the same, and upon satisfying the

surrogate of the county in which said letters shall theretofore have been issued, by affidavit, that there are reasonable grounds for suspecting that any such effects are concealed or withheld, such executor or administrator shall be entitled to a subpœna to be issued by such surrogate, under his seal of office, to such persons as may be designated by said executor or administrator, requiring them to appear before such surrogate, at the time and place therein to be specified, for the purpose of being examined touching the estate and effects of the deceased.

§ 2. If the surrogate be absent, such application for a subpœna may be made to any justice of the supreme court, to the county judge, and, in the county of New York, to any judge of the court of common pleas, or to the mayor or recorder of any city, either of whom is hereby authorized to issue such subpœna under his hand and seal, in the same manner as the surrogate.

§ 3. Such subpœna shall be served in the same manner as in civil causes, and if any person shall refuse or neglect to obey the same, or shall refuse to answer touching the matters hereinafter specified, such person shall be attached and committed to prison by the said surrogate or other officer so issuing such subpœna, in the same manner as for disobedience of any citation or subpœna issued by a surrogate in any case within his jurisdiction.

§ 4. Upon the appearance of any person so subpœnaed before such surrogate or other officer, such person shall be sworn truly to answer all questions concerning the estate and effects of the deceased, and shall be examined fully and at large in relation to said effects.

§ 5. If, upon the inquiry, it shall appear to the officer conducting the same that any effects of the deceased are concealed or withheld, and the person having the possession of such property shall not give the security in the next section specified for the delivery of the same, such officer shall issue his warrant, directed to the sheriff, marshals, and constables of the city or county where such effects may be, commanding them to search for and seize the said effects; and for that purpose, if necessary, to break open any house in the day-time, and to deliver the said property so seized to the executor or administrator of the deceased; which warrant shall be obeyed by the officers to whom the same shall be directed and delivered, in the same manner as the process of a court of record.

§ 6. But such warrant shall not be issued to seize any property if the person in whose possession such property may be, or any one in his behalf, shall execute a bond, with such sureties and in such penalty as shall be approved by the surrogate or other officer acting in his place, to the executor or administrator of the deceased, conditioned that such obligors will account for and pay to the said executor or administrator the full value of the property so claimed and withheld, and which shall be enumerated in the said condition, whenever it shall be determined, in any suit to be brought by said executor or administrator, that said property belongs to the estate of such deceased person.

§ 6. This act shall take effect immediately.

CHAP. 409.

AN ACT to authorize circuit courts and courts of oyer and terminer to require the attendance of additional jurors.

PASSED April 27, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever any circuit court or court of oyer and terminer shall find that the public interest require the attendance at such court, or at any adjourned term thereof, of a greater number of petit jurors than is now required to be drawn and summoned for such court, then said court may, by order entered in its minutes, require the clerk of the county to draw, and the sheriff to summon, such additional number of petit jurors as it shall deem necessary, which number shall be specified in the order, not exceeding thirty-six. The clerk of the county in which such court is held shall forthwith bring into court the box containing the names of the petit jurors from which jurors from said county is required to be drawn, and the said clerk shall, in the presence of said court, proceed publicly to draw the number of jurors mentioned in the order of said court, and, when said drawing is complete, the said clerk shall make two lists of the persons so drawn, each of which shall be certified by him to be a correct list of the names of the persons so drawn by him, one of which he shall file in his office, and the other he shall deliver to the sheriff. The sheriff shall thereupon proceed to summon the persons named in such list to appear in the court in which the order requiring the attendance of such jurors shall have been made, on the day to be designated, which day shall not be less than two days from the date of the entry of such order, and the persons so summoned shall appear in obedience to such summons. All provisions of law relating to the swearing in and summoning of jurors, and their punishment for non-attendance, not inconsistent with this act, shall apply to the swearing in, summoning and punishment of the jurors drawn and summoned under this act.

§ 2. The jurors drawn pursuant to the first section of this act shall be subject to the same challenges as are the jurors under existing laws, and no other or different.

§ 3. This act shall not apply to the city and county of New York.

§ 4. This act shall take effect immediately.

CHAP. 432.

AN ACT to amend section six of chapter eight hundred and fifty-five of the laws of eighteen hundred and sixty-nine, entitled "An act to extend the powers of boards of supervisors, except in the counties of New York and Kings."

PASSED April 27, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section six of chapter eight hundred and fifty-five of the laws of eighteen hundred and sixty-nine is hereby amended so as to read as follows:

§ 6. The bills rendered by justices of the peace for services in criminal proceedings shall in all cases contain the name and residence of the complainant, the offense charged, the action of the justice on such complaint, the constable or officer to whom any warrant on such complaint was delivered, and whether the person charged was or was not arrested, and whether an examination was waived or had, and witnesses sworn thereon; and the account shall also show the final action of the justice in the premises.

§ 2. This act shall take effect immediately.

CHAP. 595.

AN ACT to amend section one, chapter three hundred and twenty-two, entitled "An act to encourage the planting of shade trees along the side of public highways," passed April twenty-sixth, eighteen hundred and sixty-nine, and making the same applicable to fruit trees.

PASSED May 3, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section three hundred and twenty-two of the laws of eighteen hundred and sixty-nine is hereby amended so as to read as follows:

§ 1. Any inhabitant liable to highway tax who shall transplant by the side of the public highway any forest shade trees or fruit trees, of suitable size, shall be allowed by the overseers of highways, in abatement of his highway tax, one dollar for every four trees set out; but no row of elms shall be placed nearer than seventy feet; no row of maples or other forest trees nearer than fifty feet, except locust, which may be set thirty feet apart; fruit trees must also be set at least fifty feet apart; and no allowance, as before mentioned, shall be made, unless such trees shall have been set out the year previous to the demand for said abatement of tax, and are living and well protected from animals at the time of such demand.

§ 2. This act shall take effect immediately.

The Albany Law Journal.

Albany, June 4, 1870.

LAW AND LAWYERS IN LITERATURE.*

XXI.

LADY DUFFERIN,

In a lively letter to Miss Berry, relating her experience in recovering some stolen property, gives us some pleasant views of the administration of criminal law. "Altogether, my Old Bailey recollections are of the most pleasing and gratifying nature. It is true that I have only got back three pairs and a half of stockings, one gown, and two shawls, but that is but a trifling consideration in studying the glorious institutions of our country. We were treated with the greatest respect, and ham sandwiches; and two magistrates handed us to the carriage. For my part, I could not think we were in the *criminal* court, as the law was so uncommonly *civil.* * * * We have gone through two examinations in court; they were very hurrying and agitating affairs, and I had to kiss either the Bible or the magistrate, I don't recollect which, but *it* smelt of thumbs. * * * I find that the idea of *personal property* is a fascinating illusion, for our goods belong, in fact, to our country, and not to us; and that the petticoats and stockings I have fondly imagined *mine*, are really the petticoats of Great Britain and Ireland. I am now and then indulged with a distant glimpse of my most necessary garments in the hands of different policemen; but, in this stage of the proceedings, may do no more than wistfully recognize them. Even on such occasions the words of justice are, 'Policeman B, 25, produce *your* gowns.' 'Letter A, 36, identify *your* lace.' 'Letter C, tie up *your* stockings." All this is harrowing to the feelings, but one cannot have every thing in this life. We have obtained *justice*, and can easily wait for a change of linen."

NAPOLEON.

This great law giver had some funny ideas about lawyers and law-suits. The latter, he said, were "an absolute leprosy, a social cancer. My code had singularly diminished law-suits, by placing numerous causes within the comprehension of every individual. But there still remained much for the legislator to accomplish. Not that I could hope to prevent men from quarreling, this they have done in all ages; but I might have prevented a third party in society from living upon the quarrels of the other two, and even stirring up disputes to promote their own interest. It was therefore my intention to establish the rule that lawyers should never receive fees except when they gained causes. Thus, what litigations would have been prevented! On the first examination of a cause a lawyer would have rejected it had it been at all doubtful. There would have been no fear that a man, living by his labor, would have undertaken to conduct a law-suit from mere motives of vanity, and if he had, he himself would have been the only sufferer in case of failure."

These are despotic ideas, and go far to demonstrate that lawyers flourish only under free institutions. It is but a step from this to the despotism of Persia, under which the emperor's physician is slain unless he cure the sick emperor. Napoleon was wise to depress our profession, for if he had not done so we should doubtless have deposed him. But he had not learned to distinguish between simplifying the law, and degrading and hampering its administrators. His code did the former; the latter was consistent with the arbitrary rule that muzzled the press and interdicted free speech.

OF A LAWYER AND THE DEVIL.

I translate the following from the Latin of a legend of the middle ages: "A certain man was a lawyer of different towns, pitiless, grasping, and making great exactions from all in his power. On a certain day, when, for the purpose of exacting tribute, he was hastening to a certain town, the devil, in the likeness of a man, joined him on his journey, whom, as well from the horror which he felt as from their conversation, he perceived to be the evil one. He greatly feared to go with him, but in no way, either by praying or by making the sign of the cross, could he shake him off. As they walked on together, a certain poor man approached them leading a pig by a string. And as the pig ran hither and thither, the angry man cried out: 'Devil take thee!' Hearing this, the lawyer, hoping that by this means he could free himself from his companion, said to him: 'Listen, friend, that pig is given to thee; go, seize him.' The fiend responded: 'He is not given to me from the heart, and so I cannot take him.' Then, as they were passing through another place, a baby cried, and its mother, standing in the door of her house, exclaimed, in a petulant tone: 'Devil take thee! why dost thou trouble me with thy crying?' Then the lawyer said: 'See, you are the richer by one soul; take the baby, which is yours.' To whom the devil, as before, said: 'It is not given to me from the heart; but such is the way of speaking that people have when they are angry.' But as they began to draw near to the town to which they were bound, some men, seeing them afar off from the town, and knowing the occasion of the lawyer's coming, cried out: 'Devil take thee, and go to the devil!' Hearing this, the fiend, wagging his head and laughing, said to the lawyer: 'Behold, they have given thee to me from the bottom of their hearts, and therefore thou art mine.' And the devil seized him that very hour, but what he did with him is not known. This conversation and these things are related by a servant of the lawyer, who was with him on the journey."

RYCH,

an author whom I have before quoted, in "The Honestie of this Age, proving by good circumstance that the World was never Honest till now," has the following: "Shall we yet make a steppe to Westminster Hall, a little to ouer-look the lawyers? My skill is vnable to render due reuerence to the honorable judges according to their worthinesse, but especially at this instant as the benches are nowe supplyed;

neyther would I eclips the honest reputation of a number of learned lawyers, that are to be held in a reuerent regard, and that are to be honoured and esteemed, yet amongst these there be a number of others that doe multiplie suites, and drawe on quarrelles betweene friend and friend, betweene brother and brother, and sometimes betweene the father and sonne; and amongst these, although there bee some that can make good shift to send their clients home with penilesse purses, yet there be other some againe, that, at the end of the tearme, doe complaine themselves that their gettings have not bin enough to defray their expences, and doo therefore thinke that men are become to be more wise in these dayes then they have beene in former ages, and had rather put uppe a wrong then fee a lawyer; but I doe not thinke there is any such wisedome in this age, when there are so many wrangling spirits that are ready to commence suites, but for a neighbours goose, that shall but happen to looke ouer a hedge; now what conceipt I have in the matter I will partly make manifest by this insuing circumstance:

"As the worthy gentlemen that haue beene Lords Maiors of the honourable cittie of London have beene generally renowned for their wisedome in gouernment, so they have beene no lesse famed for their hospitality and good housekeeping during the time of their Mairolties. Amongst the rest, there was one who long sithens being readie to set himselfe downe to his dinner with his company that were about him, there thronged in on the sodaine a great company of strangers in that onreuerent manner as had not formerly beene accustomed, whereupon one of the officers, comming to the L. Maior, sayd onto him: If it please your lordship, here be too few stooles. Thou lyest, knave (answered the Maior). There are too many guests.

"Now I am perswaded that if lawyers (indeed) haue iust cause to complaine of their little gettings, it is not for that there be too few suites, but because there be too many lawyers, especially of these aturnies, soliciters, and such other petty *Foggers*, whereof there be such abundance that the one of them can hardly thrive by the other: and this multitude of them doe trouble all the partes of Englande.

"The profession of the Law I doe acknowledge to be honorable, and (I thinke) the study of it should especially belong to the better sort of gentlemen, but our Innes of Court now (for the greater part) are stuffed with the ofspring of farmers, and with all other sorts of tradesmen; and these, when they haue gotten some few scrappings of the law, they do sow the seedes of suites, they doe set men at variance, and doe seeke for nothing more then to checke the course of iustice by their delatory pleas; for the better sort of the learned lawyers I doe honour them.

"They say it is an argument of a licentious commonwealth, where Phisitians and Lawyers have too great comminges in, but it is the surfeits of peace that bringeth in the Phisitians gaine, yet in him there is some dispatch of businesse, for if he cannot speedily cure you he will yet quickly kill you; but with the Lawyer there is no such expedition; he is all for delay, and if his tongue be not well typt with gold, he is so dull of language, that you shall not heare a comfortable worde come out of his mouth in a whole Michaelmasse Tearme; if you will unlocke his lips, it must be done with a golden fee, and that perhaps may sette his tongue at libertie to speak (sometimes) to as good a purpose as if he hadde still beene mute."

"JACKE OF DOVER,

His Quest of Inquirie, or his Privy Search for the Veriest Foole in England," is the title of a scarce tract published about 1600, in which I find this: "There was of late (quoth another of the jurie) a ploughman and a butcher dwelling in Lancaster, who for a trifling matter (like two fooles) went to law, and spent much money therein, almost to both their undoings; but at last, being both consented to be tride by a lawyer dwelling in the same town, each of them, in hope of a further favour, bestowed gyftes upon him: the ploughman first of all presented him a cupple of good fat hens, desiring Mr. Lawyer to stand his good friend, and to remember his suite in law; the which he courteously tooke at his hands, saying, that what favour he could show him, he should be sure of the uttermost. But now when the butcher heard of the presenting of these hens by the ploughman, he went and presently killed a good fatte hogge, and, in like manner, presented it to the lawyer, as a bribe to draw him to his side; the which he also tooke very courteously, and promised the like to him as he did before to the other. But so it fell out, that shortly after, the verdict passed on the butcher's side; which, when the ploughman had notice of, he came unto the lawyer, and asked him wherefore his two hens were forgotten? Marry, quoth he, because there came in a fatte hogge and eate them up. Now a vengeance take that hog, quoth the ploughman, that eate both my suite in law and hens together."

DE TOCQUEVILLE,

In "Democracy in America," makes some interesting observations on lawyers in the United States, and a comparison between them and French advocates. He says: "In visiting the Americans and studying their laws, we perceive that the authority they have intrusted to numbers of the legal profession, and the influence which these individuals exercise in the government, is the most powerful existing security against the excesses of democracy." And again: "The more we reflect upon all that occurs in the United States the more shall we be persuaded that the lawyers, as a body, form the most powerful, if not the only, counterpoise to the democratic element." This statement is singularly at variance with Burke, who, as we have seen, attributes the birth and growth of American independence and freedom in a great measure to the influence of legal studies and pursuits among the people. Further: "The special information which lawyers derive from their studies insures them a separate rank in society, and they constitute a sort of privileged body in the scale of intellect. This notion of their superiority perpetually recurs to them in the practice of their profession; they are the masters of a science which is necessary, but which is not very generally known; they serve as arbiters between the citizens, and the habit of directing to their purpose the blind passions of parties in litigation inspires them with a certain contempt for the

judgment of the multitude." "The English and American lawyers investigate what has been done; the French advocate inquires what should have been done; the former produce precedents, the latter reasons. A French observer is surprised to hear how often an English or American lawyer quotes the opinion of others, and how little he alludes to his own; while the reverse occurs in France. There the most trifling litigation is never conducted without the introduction of an entire system of ideas peculiar to the counsel employed, and the fundamental principles of law are discussed in order to obtain a perch of land by the decision of the court. This abnegation of his own opinion, and this implicit deference to the opinion of his forefathers, which are common to the English and American lawyer, this servitude of thought which he is obliged to profess, necessarily gives him more timid habits and more conservative inclinations in England and America than in France." If our author were now alive he would recognize the need of adding a note to this text, to acknowledge the change which years have wrought, in this country at least. The maxim *stare decisis* has had its day, and now we are called on instead to stare at the decisions of our highest courts, which alter the rule of law on any given point every year. Nay, even from one term of court to another, and that on the gravest constitutional questions, before the highest legal tribunal of our land. The "opinion of our forefathers" seems to have lost its potency. Sheridan's father once counseled him to take a wife; "Whose wife shall I take?" replied the witty profligate. So now, if we look for a precedent we may well ask, considering their contrariety, which one shall we stand by? Our law books are subject to the reproach which some infidels allege against the Bible—you can prove any doctrine by them. That De Tocqueville was right to some extent in his idea that French lawyers are less attentive to precedents than others, must be admitted. Nothing can exceed the license, turbulence and uncertainty of French trials, even in these times. Witness the recent great trial of Prince Pierre Bonaparte for the murder of Victor Noir. The *Nation* newspaper says of it: "The examination, or cross-examination of counsel is unknown in France, that duty being reserved to the court, and dexterity in it is one of the qualifications of a good judge. But the result is that there are no rules of evidence. Every thing that has the remotest connection with the case is welcome, hearsay of all kinds included; and the witnesses mix up their opinions with their facts somewhat in the style of a parlor narative, broken by attempts on the part of the judge to trip the narrator up, or point out the moral of what he is saying, or indicate the course which virtue ordained under the circumstances described. Considering that every pains was taken to make the trial decorous and solemn, the report suggests some amusing speculation as to what would have been the nature of the proceedings had Rochefort's demand in the chambers been complied with, and the prince been 'tried by the people.'"

Our author also says: "In America there are no nobles or literary men, and the people are apt to mistrust the wealthy; lawyers consequently form the highest political class, and the most cultivated portion of society. They have nothing to gain by innovation, which adds a conservative interest to their natural taste for public order. If I were asked where I place the American aristocracy, I should reply, without hesitation, that it is not among the rich, who are united by no common tie, but that it occupies the judicial bench and bar." "The lawyers of the United States form a party which is but little feared and scarcely perceived, which has no badge peculiar to itself, which adapts itself with great flexibility to the exigencies of the time, and accommodates itself without resistance to all the movements of the social body. But this party extends over the whole community, and penetrates into all the classes which compose it; it acts upon the country imperceptibly, but finally fashions it to suit its own purposes." Since DeTocqueville's day, a great body of literary men has sprung up in this country, and the monopoly of the legal profession over political offices is at an end. There is now a great fourth estate, composed of platform lecturers, authors, and notably of editors, who gather a large share of political honors. Within a few years we have witnessed the novel spectacle of the second of the most lucrative offices in the gift of the general government bestowed on a novelist, and a historian now represents us at the court of St. James. The man selected to go to England and defend the cause of our government against the doctrine of secession, was chosen more for his shining abilities as a platform lecturer, than even his elevated reputation as a clergyman. We construct senators and governors, even, out of wholesale grocers, shoemakers, and country general-store-keepers, and iron founders and cotton manufacturers sit in the lower house of congress. The day, then, is gone by for lawyers to monopolize political preferment, but they may still lead and dictate the policy of our government, provided they are counselors and not pettifoggers.

BISHOP HALL,

in the third Satire of the second book, animadverts on the Law and Lawyers:

"Who doubts? the laws fell down from heav'n's height,
Like to some gliding star in winter's night?
Themis, the scribe of God, did long agone
Engrave them deep in during marble stone,
And cast them down on this unruly clay,
That men might know to rule and to obey.
But now their characters depraved bin,
By them that would make gain of others' sin.
And now hath wrong so mastered the right,
That they live best that on wrong's offal light.
So loathly fly, that lives on galled wound,
And scabby festers inwardly unsound,
Feeds fatter with that poisonous carrion,
Than they that haunt the healthy limbs alone
Woe to the weal where many lawyers be,
For there is sure much store of malady.
'Twas truly said, and truly was foreseen,
The fat kine are devoured of the lean.
Genus and Species long since barefoot went
Upon their ten toes in wild wonderment;*
Whiles father Bartoll† on his footcloth rode,
Upon high pavement gally silver strow'd.
Each homebred science percheth in the chair
While sacred arts grovel on the groundsel bare.
Since peddling Barbarisms 'gan be in request,
Nor classic tongues, nor learning found no rest,
The crouching client, with low bended knee,
And many worships, and fair flattery,
Tells on his tale as smoothly as him list,
But still the lawyer's eye squints on his fist;
If that seem lined with a larger fee,
Doubt not the suit, the law is plain for thee.
Tho' must he buy his vainer hope with price.
Dishclout his crowns, and thank him for advice.

* *I. e.*, the professor of logic is obliged to go a foot.
† Bartholus, a civil lawyer of the fourteenth century.

So have I seen in a temptestuous stowre,*
Some briar-bush showing shelter from the show'r,
Unto the hopeful sheep that fain would hide
His fleecy coat from that same angry tide;
The ruthless briar, regardless of his plight,
Lays hold upon the fleece he should acquite,†
And takes advantage of the careless prey,
That thought she in securer shelter lay.
The day is fair, the sheep would far to feed,
The tyrant briar holds fast his shelter's need,
And claims it for the fee of his defence:
So robs the sheep, in favour's fair pretence."

COLERIDGE,

in "Table Talk," has this chapter on "Duties and Needs of an Advocate": "There is, undoubtedly, a limit to the exertions of an advocate for his client. He has a right, it is his bounden duty, to do every thing which his client might honestly do, and to do it with all the effect which any exercise of skill, talent, or knowledge of his own may be able to produce. But the advocate has no right, nor is it his duty to do that for his client which his client *in foro conscientiæ* has no right to do for himself; as, for a gross example, to put in evidence a forged deed or will, knowing it to be so forged. As to mere confounding witnesses by skillful cross-examination, I own I am not disposed to be very strict. The whole thing is perfectly well understood on all hands, and it is little more, in general, than a sort of cudgel-playing between the counsel and the witness, in which I think I have seen the witness have the best of it as often as his assailant. It is of the utmost importance in the administration of justice, that knowledge and intellectual power should be, as far as possible, equalized between the crown and the prisoner, or plaintiff and defendant. Hence, especially arises the necessity for an order of advocates — men whose duty it ought to be to know what the law allows and disallows; but whose interest should be wholly indifferent as to the persons and characters of their clients. If a certain latitude in examining witnesses is, as experience seems to have shown, a necessary means toward the evisceration of the truth of matters of fact, I have no doubt, as a moralist, in saying, that such latitude within the bounds now existing is justifiable." "Still, I think, that, upon the whole, the advocate is placed in a position unfavorable to his moral being, and indeed to his intellect also, in its higher powers. Therefore I would recommend an advocate to devote some part of his leisure time to some study of the metaphysics of the mind, or metaphysics of theology; something, I mean, which shall call forth all his powers, and center his wishes in the investigation of truth alone, without reference to a side to be supported. No studies give such a power of distinguishing as metaphysical, and in their natural and unperverted tendency they are ennobling and exalting. Some such studies are wanted to counteract the operation of legal studies and practice, which sharpen indeed, but like a grinding-stone, narrow while they sharpen."

Considerable sensation has been caused in San Francisco by reports that Judge Fields and Hoffman are to be impeached by Congress for misconduct in office. The leading journals discredit the charges.

*Shock.
†Acquit.

THE LAW OF INSANITY.

The attention of the public and the profession has of late been so strongly called to this subject that we have deemed it advisable to give a brief statement of what the law of the State of New York is on that subject.

That law is to be found in our statutes and in the reports of the decisions of our courts.

SAFE KEEPING OF LUNATICS.

Title three of chapter twenty of the first part of the revised statutes (1 N. Y. Statutes at Large, page 586) is devoted to "the safe keeping and care of lunatics."

The person to whom this statute is made applicable is one who "by lunacy or otherwise becomes furiously mad, or so far disordered in his senses as to endanger his own person, or the person or property of others, if permitted to go at large." And it is enacted as follows:

§ 1. When such person has sufficient property to maintain him it is made the duty of the committee of his person and estate to confine and maintain him in such manner as may be approved by the overseers of the poor.

§ 2. If he has not such property, then his father, mother and children, if of sufficient ability, shall provide a suitable place, and so confine and maintain him.

§ 4. In case that is not done, it is made the duty of the overseers of the poor to apply to two justices of the peace to have him arrested and his lunacy inquired into, and then have him safely locked up and confined, either in some place to be provided by those overseers, or in the county poor-house, or in such private or public asylum as the board of supervisors may approve, or in the asylum in the city of New York.

§ 6. No such person shall be committed as a disorderly person to any prison, jail or house of correction, in any other way than thus directed.

§ 7. No such "lunatic, or mad person, or person disordered in his senses" — here it will be noted a different language is used, embracing more than the furiously mad — shall be confined in the same room with one accused or convicted of crime, nor be confined in jail at all, more than four weeks; and if he continue furiously mad or dangerous he shall be removed to the poor-house or an asylum.

§ 8. Any two justices of the peace, without an application from the overseers of the poor, may so apprehend and confine such "lunatic or mad person."

§§ 9, 10. When such lunatic is confined in a county poor-house, the county superintendents may send him to the lunatic asylum in New York, and provide for the expenses of keeping him there.

In addition to the foregoing, there is this provision in the poor law, 1 N. Y. Stat. at Large, 583, § 73: "In those counties where county poor-houses may be established, the superintendents may provide for the support of paupers that may be idiots or lunatics, out of such poor-house, in such manner as shall best promote the interests of the county, and conduce to the comfort and recovery of such paupers."

THE PROPERTY AND ESTATE OF LUNATICS.

By § 10 of article second of title 1 of chap. 1 of part 2 of the revised statutes, 1 N. Y. Stat. at Large, 667,

"idiots and persons of unsound mind" are declared incapable of conveying any interest in land, though by section eight they are declared capable of holding the same, and of taking it by descent, devise, or purchase.

But there is a subsequent act, passed in 1864, providing for the sale and conveyance of any interest in real estate belonging to lunatics. 6 N. Y. Stat. at Large, 291.

Title 2 of chap. 5 of part 2 of the revised statutes, 2 N. Y. Stat. at Large, 53, relates to "the custody and disposition of the estates of idiots, lunatics, persons of unsound mind, and drunkards."

Herein is given to the chancellor (now the supreme court), the care and custody of all such persons, and of their real and personal estates, so that the same shall not be wasted or destroyed, and it is made his duty to "provide for their safe-keeping and maintenance, and for the maintenance of their families and the education of their children," etc.

That title contains sundry provisions which need not be here stated in detail, for executing these powers and performing these duties, making ample provision for trying the question of unsoundness of mind, and for restoring the property to its owner on his restoration to soundness of mind, or distributing it among his heirs or next of kin, in case of his death. This act was amended in 1865, as to such distribution. 6 N. Y. Stat. at Large, 581.

Thus far, it will be seen that provision is made for the confinement and maintenance of such persons and the preservation of their property, and to that extent the law is ample. But it does not stop there.

THE MARRIAGE TIE.

By article second of title one of chapter eight of part two of the revised statutes, 2 N. Y. Stat. at Large, 147, it is provided:

§ 20. That the chancellor (now the supreme court) may declare void the marriage contract for this, among other causes, "that one of the parties was an idiot or lunatic."

§ 24. When sought to be annulled on the ground of idiocy, it may be declared so on the application of any relative interested to avoid the marriage.

§ 25. When sought to be annulled on the ground of lunacy, it may be declared so on similar application.

In the former case, it may be so declared during the life-time of either of the parties; in the latter case, during the continuance of the lunacy, or after the death of the lunatic in that state, and during the life-time of the other party.

INSANE CRIMINALS.

By title one of chapter one of part four of the revised statutes, 2 N. Y. Stat. at Large, 678, §§ 16, 17, 18, it is provided, that if a convict, sentenced to death, shall become insane, the sheriff shall, with the concurrence of a judge, summon a jury of twelve electors to inquire into the insanity. If that jury find him insane, the sheriff shall convey him to the asylum for insane convicts, there to be confined until his recovery, and, on his recovery, the governor shall order the sentence to be executed.

By title seven of the same chapter of the revised statutes, 2 N. Y. Stat. at Large, 720, it is provided:

§ 2. No act done by a person in a state of insanity can be punished as an offense, and no insane person can be tried, sentenced to any punishment, or punished for any crime or offense while he continues in that state.

Such has been our statute law since 1830. In 1842 an act was passed "to organize the state lunatic asylum, and more effectually to provide for the care, maintenance and recovery of the insane." 4 N. Y. Stat. at Large, 18.

Section twenty of that act modifies section four of title three of chapter twenty, above mentioned, by directing subjects to be sent, within ten days, to the state or some other asylum, and forbidding their confinement in any other place beyond ten days, and especially makes it the duty of the superintendents and overseers of the poor "to see that this provision be carried into effect in the most humane and speedy manner, as well in case the lunatic or his relatives are of sufficient ability to defray the expenses as in case of a pauper."

Section twenty-one provides for an appeal from the order of the two justices, when the case may be fully tried before a county judge.

Section twenty-two forbids a warrant by two justices, unless upon the evidence of two respectable physicians.

Section twenty-four requires the name, residence, occupation and office of every person bringing such lunatic to an asylum to be recorded.

Section twenty-six provides for admission to the asylum of a person in indigent circumstances, but not a pauper, becoming insane.

Sections thirty-one, thirty-two, thirty-three and thirty-four provide for the cases of persons charged with crime who become or are insane.

When the accused is acquitted on the ground of insanity, the court shall carefully inquire and ascertain whether the insanity still exists, and if it does, shall order him into safe custody, and to be sent to the asylum.

When a person is in confinement under any other than civil process a county judge shall institute a careful investigation, call two respectable physicians, and other witnesses, invoke the aid of the district attorney, and a jury, and, if it be that the man is insane, order him removed to the asylum, where he shall remain until restored to his right mind, and on his restoration, to be set free or remanded to his imprisonment, as the case may require.

When the person is imprisoned on an attachment or other civil process, or for non-payment of a militia fine, similar proceedings may be taken; but on his restoration to a sound mind he shall be set free, with liberty, however, for the creditor to arrest him on new process.

When a person is charged with a misdemeanor and acquitted on the ground of insanity, he may be dealt with in the same way as persons charged with crime.

By section forty-two of that act, a patient of the criminal class may be discharged by order of one of the justices of the supreme court, if, upon due investigation, it shall appear safe, legal and right to make such order.

By chapter 446 of the laws of 1851 (4 N. Y. Statutes

at Large, 31), section 20 of the act of 1842 was modified so as to allow the county judge to send indigent lunatics to the county poor-house, or the asylum, as he may deem best.

By chapter 282 of the laws of 1850 (4 N. Y. Statutes at Large, 30), section 26 of the act of 1842 was modified as to persons in indigent circumstances and not paupers, requiring as a condition of their admission to the state asylum that their derangement shall be of recent origin, and providing for their support after being two years in the asylum.

It will be observed that different terms are used in these statutes to designate the objects of them, such as "idiots," "lunatics," "insane," "unsound mind," and out of this some uncertainty might grow. Thus, in the criminal law, the word used is "insane." In the act respecting property it is "lunatics and persons of unsound mind," and in the marriage act it is "lunacy."

This mischief, however, is a measure guarded against by the statutes themselves. Thus in the marriage law, it is enacted that the term "lunatic" extends to every person of unsound mind except idiots," (2 N. Y. Stat. at Large, 149, § 29); in regard to criminals it is enacted that the terms "lunacy," "lunatic" and "insane" include every species of insanity, and extend to every deranged person, and to all of unsound mind other than idiots. 4 N. Y. Statutes at Large, 28, § 46.

From these enactments, it would seem that every case was provided for, and a complete system established whereby the lunatic and the community are alike provided for by statute. That, however, is not so to the full extent.

For instance, take the case of a man who is arraigned on an indictment, and who seems to be too unsound of mind to know what is occurring around him, what is to be done in that case? Is his insanity to be taken for granted? If it is, a sane man may escape a just punishment. If it is not, then an insane man, too far afflicted with the disease to know or guide the circumstances surrounding him, may be tried and convicted, and, perchance, executed.

The statutes are silent as to what is to be done in such a case, but the courts have power to remedy the evil, and an enlightened tribunal will readily find the means of doing justice.

Several cases in our reports show how far this may be relied upon. In *The People* v. *Freeman*, 4 Denio R. 9, the court says the provision of our statute, that "no insane person can be tried," is only declaratory of the common law, and they say that, though other modes of trying the question of insanity than by jury may be resorted to, that is the proper mode in important cases.

In *The People* v. *Lake*, 2 Parker Cr. C. 215, rules and directions are given to govern the jury in trying the question of present insanity.

In *The People* v. *Kleim*, 1 Edmonds' Sel. Cas. 13, the whole proceedings on the trial of the question preliminary to the trial on the indictment are given. A jury was impaneled — the form of their oath is given — the prisoner was held to have the affirmative on that issue, and that jury found against the issue of present insanity. He was then tried on the charge of murder, and acquitted on the ground of insanity. And notwithstanding the finding of the first jury, the court made an order in these words:

"The prisoner having on his trial for murder been acquitted by the verdict of the jury on the ground of insanity, and the court being certified of the fact, and having also carefully inquired and ascertained that such insanity does still continue, it is *ordered* that the said prisoner be detained in safe custody, and be sent to the State Lunatic asylum; that the sheriff of the city and county of New York do forthwith transport the said prisoner to the said asylum, and that the said prisoner be detained and kept in safe custody in the said asylum until thence discharged according to law."

To that case is appended a note that the prisoner remained a few years in the asylum and died there—his disease having steadily grown worse until he became a mere driveling idiot.

In that same volume of reports there are other cases of insanity as a defense in criminal cases.

In *The People* v. *Griffen*, page 126, where the prisoner murdered the seducer of his wife, there was no preliminary inquiry, but an acquittal, on the ground of insanity, and a commitment to the lunatic asylum, because of the continuance of the disease. The confinement in the asylum continued some four years, and the report of this case is interesting as showing the *modus operandi* of discharging a prisoner under the act of 1842.

The People v. *Catharine Doran*, in the same volume, page 580, is another case where a woman who murdered her own son was committed to the asylum and afterward discharged.

INSANE CONVICTS.

Taking, then, these enactments and reported cases, and we seem to have worked out a complete system, on which the public mind may rest secure of protection. But there is an additional link in the chain to make the system entire.

Some years ago there was great complaint by the officers of our state prisons that some of the convicts were insane and no provision was made for them. In 1843 a scrutiny showed that more than thirty of the convicts in one prison (Sing Sing) were insane.

In 1846 a law was passed (5 N. Y. Stat. at Large, 188) directing the removal from the state prison, to the state lunatic asylum, of all convicts who were insane, there to be retained so long as the insanity should continue, and on their recovery, to be remanded to the prisons.

In 1855 it was enacted (5 N. Y. Stat. at Large, 241) that provision should be made in the prisons for insane convicts, and then that they should be removed from the state asylum.

In 1858 an act passed (5 N. Y. Stat. at Large, 242) organizing a state lunatic asylum for insane convicts, which was erected at Auburn, and now contains all the insane convicts in the state, numbering at this time some eighty subjects.

It was in February, 1859, that the first patients were received in that asylum. From that time to the first of October, 1868, there were 180 insane convicts received there, of whom 81 were discharged, six escaped and seventeen died.

This institution is provided only for those who are found to be insane while confined in the state prisons. Those who are not yet convicted of crime are sent to the state asylum at Utica. Thus maintaining here, as in the outside world, a distinction between those who have been convicted of crime and those who have not been.

We have thus given a general view of the state of the law among us, as to the insane. Our limits compel us to be thus succinct and to omit many of the details, and an enumeration of the various provisions which have been adopted to carry out the humane purposes of our legislation. It will readily be seen that due care is taken of those thus dreadfully afflicted, and every available opportunity of ultimate recovery is provided, and especially for the criminal, the pauper and the indigent, and, at the same time, that the law is abundant for the protection of the community against the madly furious, and even against those who are liable to a return of homicidal mania, or mania for stealing or burning. If the community are put in danger from such persons being turned loose upon society the fault is not in the law, but in those who administer it. And when a judge presides over a trial where the homicide, the thief, or the incendiary is acquitted on the ground of insanity, he may well be asked how he excuses the omission to obey that law which says that in such case he *shall* carefully inquire and ascertain whether the insanity *in any degree* continues, and if it does *shall* order him in safe custody, and to be sent to the asylum.

ON USURY.*

The subject of usury has been a fruitful source of discussion and contention among the ablest theorists, and, down to the present time, has arrayed in antagonistic relations the most profound and philosophical minds that, through successive ages, have adorned the world.

And to-day, when unlimited wealth flows into the coffers of our merchants and bankers, the subject is necessarily exercising the mind and attention of commercial men throughout the state and country in a very large degree. Almost every nation and country has fixed by law a rate of interest for the use of money. Centuries ago, usury was understood to mean the taking of any money for its use; at the present time, if money be paid for its use, according to the legal rate, it is denominated interest; if more be taken it is pronounced usury.

The laws in England, regulating interest and usury, have been quite various and significant.

In the third year of Henry VII (A. D. 1488) an act was passed prohibiting the taking of interest for money on any bargain, promise, by bill or otherwise, as being "contrary to the law of natural justice, to the common hurt of the land and the great displeasure of God." Such bargains were to be void, and the parties or their agents to forfeit £500.

Eight years after the passage of that act, so general were the evasions of its provisions, another act was passed which repealed the former, and substituted what was deemed a more efficient remedy.

Great complaint also being made of this law as being injurious to commerce and the improvement of the country, an act was passed in the 37 of Henry VIII, entitled "a bill against usury," by which it was forbidden to take above the sum of ten pounds in the hundred for the forbearing or giving day of payment of one whole year.

Thus, in the language of an eminent writer, "for the first time in England, interest was negatively and indirectly sanctioned by law — the sense of mutual benefit having at length triumphed over both the decrees of the church and the prejudices of mankind."

This act, however, was repealed seven years afterward, and things were restored to their former footing by an act which declared all interest whatever illegal, and subjected the taker to severe penalties.

But, notwithstanding the rigor of this last statute, the necessities of a growing trade had suggested numerous expedients for evading its provisions, and accordingly in the 13 of Elizabeth the act of Henry VIII was revived, and interest again tolerated at ten per cent. The act of Elizabeth, though at first temporary, was afterward, in the 39 of the same reign, declared to be perpetual.

The rate thus established continued, with but slight variation, until James I came to the throne (1603), when it was reduced to eight per cent.

While England was a commonwealth, interest was only six per cent, which rate was re-enacted under Charles II (1661).

Here we cannot but notice the change which, in a comparatively short period of time, had taken place in regard to the law of usury. The taking of interest for the use of money, which, from the earliest periods of antiquity, had been visited with these verest penalties, was now established and regulated by positive law; and that which had been stigmatized as a "damnable sinne," now became divested of its odiousness, and was incorporated into the policy of the country.

From this period may be dated the era of commercial enterprise. It was soon discovered that, as the restrictions were removed, the rate of interest lowered in a proportionate degree, and that both lenders and borrowers were placed upon a more equal and advantageous footing than ever before. But, notwithstanding this general revolution in society, the change was not complete.

Ever since the taking even the least amount of interest had been legalized, so quickly did its policy and expediency recommend itself to the trading community, that numerous propositions had been already made to repeal all remaining restrictions, and thus free commerce from the last vestiges of extraneous control.

This movement met with a firm resistance from the landed interests, upon the ground that it would cause capitalists to prefer the more remunerative investments of commerce rather than on mortgage security,

* The following article on usury was delivered before the Brooklyn Law Club, on the 12th of May, 1870, by John F. Baker, LL. B., of the New York bar, and has been furnished us by the club. The subject is one of general interest, and the manner in which it is herein discussed will be found interesting to the profession. — Ed. A. L. J.

and thus prevent the land owners from obtaining money, unless at rates which they could not afford to pay.

This contention between conflicting interests has continued, in some degree, down to the present time, and has given rise to much discussion upon the policy of the law of usury.

By statute 12 Anne (September 29th, 1714) the rate of interest was again reduced to five per cent. From this statute, which provides that no person shall take, directly or indirectly, upon any contract or loan of moneys, wares, or merchandise, above the value of 5*l.* in the hundred for a year; and that any person taking more than that rate shall forfeit and lose treble in value of the moneys and other things so lent — the states of our federal Union have carved their usury laws.

By act 3 and 4 William IV all bills or notes having "more than three months to run" were exempted from the operation of the usury laws.

Several interesting modifications in the law have been wrought during the reign of Victoria, as by statute 1 Vict. c. 80 and 2 Vict. c. 37, bills and notes are not affected by usury, if payable at or within twelve months, at legal interest, and not secured by mortgage, nor any contract for the loan or forbearance of money, above the sum of 10*l.*, shall be affected by the usury law. And by statute 17 and 18 Vict. c. 90, all laws then in force upon usury were repealed.

The Sexviri of Athens were commissioners who did watch to discern and discover what laws waxed improper or burdensome for the times, and what new law did in any branch cross or interfere with a former one, and so, *ex officio*, propounded or effected their repeal, upon the judicious maxim *salus populi suprema lex*.

In the absence of this system with us, it seems properly to devolve upon the members of the legal profession (more particularly) to suggest and point out the real wants of society and the needs of commerce. While there ought not to be a blind adherence to ancient or former rules, it is still necessary to exercise thought, judgment and discretion in weeding out the tares, lest in the reform we "root up also the wheat."

As opinion obtains in many states, and particularly in our community, that money, being worth only what it will bring, should be regulated by voluntary contract between parties subject to the mercantile usage governing merchandise contracts; in fine, that the tooth of usury ought to be blunted, and as this prevailing sentiment has exerted, and must continue to exert, no inconsiderable influence upon adjudications and commerce generally, I purpose to discuss and review three principal propositions. *First.* The status of usury in the United States; *second*, usury as administered in New York, with reference to decisions governing it; and *third*, the advisability of a reformation in the usury law. Legally and strictly speaking there are three or four requisites to constitute usury:

1. A loan of money either express or implied.

2. An agreement between the parties that the money lent shall or may be returned at a specific time.

3. That a greater rate of interest than is allowed by law shall be paid, or agreed to be paid; and

4. There must be a corrupt or unlawful intent confessed or proved.

This last ingredient is important to constitute the offense of usury.

In the interesting case of *Condit* v. *Baldwin*, 21 N. Y. Rep. 219, DAVIES, J., says: "It is the essence of an usurious transaction that there shall be an unlawful and corrupt intent, on the part of the lender, to take illegal interest, and so we must find before we can pronounce the transaction usurious." And quoting from the decision of Judge STORY in *Bank of United States* v. *Waggoner et al.*, 9 Peters R. 399, he says: "To constitute usury within the prohibition of the law, there must be an intention knowingly to contract for or take usurious interest; for if neither party intend it, but act *bona fide* and innocently, the law will not infer a corrupt agreement." * * * It is not sufficient that the defendants intended to make it usurious, so that when called on to return the money thus obtained by a fraudulent device, they could avail themselves of the protection of the statute. The intention to take the usury must have been in the full contemplation of the parties, not one party only, but of both, to the transaction. Also see *Powell* v. *Jones*, 44 Barb. 521.

A strict adherence to this rule seems necessary for the protection of designing and unprincipled men. Usury is a question solely for the jury to determine. So held in *Robbins* v. *Dillaye*, 33 Barb. 79.

It has been held by some judges in New York (5 Denio, 236) that an usurious contract is incapable of ratification; but Judge BALCOM, in the case of *Smith* v. *Marvin*, 25 How. Pr. 326, says the assertion is not strictly true, for where an usurious loan is "voluntarily paid," the contract is certainly ratified, except as to the unlawful interest, which may be recovered back. Also, in the case of *Dix* v. *Van Wyck*, 2 Hill R. 522, BRONSON, J., delivering the opinion of the court, observed that "contracts affected by usury are not so utterly void but that they may be ratified." Thus it follows, if a borrower repay a loan which he might have avoided for usury, he cannot recover the money back; though by the New York statute he may recover the excess which has been paid over lawful interest, within one year, as in Maine and Virginia, or at common law, at any time within six years.

Of contingent interest, it may be said that in ordinary transactions, if the gain to the lender, beyond legal interest, be made dependent upon the will of the borrower, as where he may discharge himself by a punctual payment of the principal — as if I covenant to pay $1,000 one year hence, and if I do not then pay it, to pay $500, or fifty per cent, being in the nature of a penalty for non-performance, it would not be usurious — for where there is no loan or forbearance there can be no usury, and, as I have said, both parties must intend to provide for the payment of more than legal interest.

Thus, the supreme court of the United States held, in the recent case of *Spain* v. *Hamilton*, 1 Wallace, 604, that, where the promise to pay a sum above legal interest "depends upon a contingency, and not upon any happening of a certain event, the loan is not usurious." Nor will usurious interest be inferred from a paper which, while referring to the payment

of a sum above the legal interest, is "uncertain, and so curious that intentional bad device cannot be affirmed."

The whole law of usury is in its nature penal, and is strictly construed as to the proof and intent.

The courts have repeatedly held that there can be no presumption in favor of usury; that the defense of usury must be proved, not presumed. *Arthur* v. *Wright*, 22 N. Y. 472.

In the well known case of *Jackson* v. *Smith*, 7 Cow. R. 717, the defendant sought to prove a certain transaction usurious by showing that the plaintiff was in the habit of exacting usury, and had done so in other and similar transactions. SUTHERLAND, J., in delivering the opinion of the court (on appeal) remarked: "The judge erred in intimating to the jury that they might legally presume the bonds of Dec. 1822 a renewal of or connected with the usurious loan of 1821. There were no facts in the case which could legally warrant such a presumption. That N. made an usurious loan to the defendant in 1821, for $370, was perhaps sufficiently established, but there was not a particle of evidence to connect the loan of 1822 with this transaction. * * * The transaction of 1821, therefore, should have had no influence upon the verdict, and the judge should have so charged the jury." Each case, where usury is alleged, must stand or fall upon its own merits.

It is well understood that the essence of the contract of bottomry and *respondentia* is, that the lender runs the risk, and is thus entitled to the marine interest. This mercantile rule is sanctioned either by usage or law in almost every country. There is a distinction made between such cases and those of personal risk of the debtor's being able to pay; if any thing is paid for such risk, it is usurious. And yet, where personal risk is taken in loans, it might excite wonder in the mind of the curious to know wherein the metaphysical scissors of the upholder of this law could be inserted to demonstrate the difference, in fact, between the risk run by the one and the other.

As to what interest will vitiate a contract, it is well understood that if interest be paid upon miscalculation, it does not render the contract usurious; but if taken through ignorance of law, it would be usurious, upon the familiar maxim, *ignorantia juris non excusat*. And it is not material in what form the contract is made, as the courts necessarily inquire into the real nature of the transaction, and no shift or device can protect it from the operation of the law.

A novel and interesting case was recently tried in Massachusetts, as to the liability of an executor who received unlawful interest innocently, which was reserved in a note due to his testator; and it was held that an action would not lie against an executor personally to recover back "three-fold" the amount of usury so paid, although he be described in the writ as executor. *Heath* v. *Cook*, 7 Allen, 59.

The question whether interest calculated by tables, upon the principle of 360 days being a year, is usurious, has been considerably mooted. The New York courts have generally held that usury would attach. 8 Cow. 398. In Massachusetts, however, their courts have decided otherwise. And also in Vermont, 12 Pick. 586; 8 Leigh, 253.

Prof. Parsons, in his excellent work on "Contracts," thinks the latter the better opinion. In Ohio, Iowa, and some of the other states, Rowlett's tables are authorized by statute. The courts of New York and Massachusetts hold that the taking of interest in advance by banks, upon discounting notes, is not usurious. This question was quite unsettled or undecided, until the case of *Marvine* v. *Hymers*, 12 N. Y. 223, which decision on that question now obtains in most of the states.

In New York and the New England states it has been generally held, that new securities for old ones which are tainted with usury, are void with the old ones, and subject to the same defense. But in Arkansas, where the plaintiff held several notes against the defendant, by agreement with him, calculated interest due on each note, and added it to the principal, took a new note for the whole sum bearing ten per cent interest, it was held not usurious. 1 Eng. R. 463.

Whether a note, valid in its inception, but usuriously transferred by the payee or indorsee, is valid against the maker, has been variously decided. Lord Kenyon once held that such an holder would be entitled to recover (1 East, 92); and in the case of *Campbell* v. *Read*, Martin & Yerg. R. 392, it was decided that a note thus usuriously indorsed is valid as against the maker, in the hands of a holder in good faith. By statute of Michigan, a holder of a bill or note in good faith, for valuable consideration, without notice and before maturity, shall be entitled to recover as if such usury had not been alleged and proved. This is a wise and equitable provision, working great benefit. New York repealed a similar provision by the amendment of 1837. There are but few cases in which a bill or note is void in the hands of an innocent indorsee for value, and those are when the consideration in the instrument is for money won at play, or where it is given for an usurious debt. Notes issued by a corporation in violation of a statute are void, even in the hands of an innocent holder. 3 McLean, 102.

In Mississippi a note was held to be void where the signature was procured by fraudulent representations. 12 S. and M. 602.

The payee of a note may transfer it at a discount exceeding the legal rate of interest; but where an indorsee buys a note (valid in its inception), he can recover against the indorser only the sum paid, with interest, though the full amount may be recovered against the maker. 15 Johns. 49; 4 Hill, 472.

If a usurious note be given up and canceled on the promise of the debtor to pay the original debt, with lawful interest, such promise would be binding; or if, when the interest is due and payable, or constitutes a then subsisting debt, the debtor ask to retain it, and agrees to pay interest upon the amount at the legal rate, the agreement is not usurious. Though a note be valid between the original parties, yet the indorser cannot sue the maker if the indorsement was on an usurious consideration. 1 Peters, 37; Story on Bills, 189.

(To be Continued.)

A New York court has decided that letters placed on the top of a lamp-post box are not mailed, and that it is not stealing to take them.

CURRENT TOPICS.

The courts of Connecticut did a thriving divorce business during the year 1869. Four hundred and ninety-one divorces were granted, being in a ratio of one to 9.7 marriages. The causes assigned are various — the principal being misconduct, desertion, adultery, intemperance and cruelty.

The full returns from the late judiciary election have been received. Messrs. Folger and Andrews are the successful nominees on the republican ticket. Folger's majority over Andrews is 1,807; Andrews' over Mason, 876, and Mason's over Hale, 1,401. Messrs. Andrews and Folger are both men of eminent ability and sound learning, and will do honor to the position. The court of appeals, as now constituted, is as follows:

Chief Justice. — Sanford E. Church.

Associate Justices. — William F. Allen, Rufus W. Peckham, Charles A. Rapallo, Martin Grover, Charles J. Folger and Charles Andrews.

The president has nominated James B. McKean, of Saratoga, for chief justice of the supreme court of Utah. Mr. McKean represented the fifteenth New York congressional district in the thirty-sixth and thirty-seventh congress. In 1861 he was appointed colonel of a regiment of volunteers, and served in the war with distinction. In 1867 he was nominee on the republican ticket of New York for secretary of state, but failed to secure an election. In 1868 Governor Fenton nominated him for auditor of the canal department, but the nomination was not confirmed by the senate. He has had some experience on the bench — has filled the office of county judge for one term, and is a thorough lawyer and a man of liberal culture.

The term of Judge BREESE, present chief justice of the supreme court of Illinois, will expire on Monday next, the 6th inst., on which day an election for his successor will be held in his — the first — grand division of the state. So ably, faithfully and satisfactorily has Judge BREESE discharged the duties of his office that he will be re-elected without opposition. Mr. Justice LAWRENCE will succeed as chief justice, having the shortest time to serve. We learn from one of the most prominent lawyers of that state that at one time all the members of the supreme court of Illinois were from New York state, and from the same county — Oneida. They were Judges BREESE, CATON and SKINNER. Oneida should write that down in her records as a thing to be proud of.

In pursuance of the supreme court act the governor has designated the general term justices by a proclamation, which we print elsewhere. The governor confesses to have found it difficult to designate justices of one department to act as justices in another department, and suggests that the inconvenience resulting be remedied by the general term justices continuing to hold circuits and special terms at their convenience. We fear that whatever inconvenience there may be will never be lessened in this wise. The general term justices will have sufficient to do to properly discharge the duties of their position without troubling themselves about circuits or special terms. There are to be six general terms in the first department, five in the second, and eight in each of the third and fourth. To hear the arguments, examine the cases and write the opinions, will afford about all the employment that the justices in any one department will be likely to attend to.

Miss Phœbe Cozzens, the St. Louis law student, has taken the stump after the manner of Anna Dickinson, Susan B. Anthony, *id genus omne*, and the burden of her song is woman's rights. She is said to handle the scriptures like a two-edged sword, slashing therewith right and left, at the male monsters. She announced in a recent speech that she had read law two years, and that her "whole soul had been moved to indignation" by some of the cases which had come to her knowledge. Among these she mentioned particularly that of a woman who, having beaten her husband and thrown scalding water on him, was fined ten dollars therefor, and a paper, in speaking of it, called her a "she devil," and intimated that the fine was too small. "She had never heard the epithet 'he devil' applied to brutal man," and regarded it as an outrageous partiality that should "make the judicious grieve." We are of the opinion that the fair and gentle Phœbe would better have stuck to her books, never caring about "she devils."

Some inquiry has been made whether there was likely to be any general terms held before the August convention of the justices. We are at a loss to know why not. The supreme court act fixes the time for holding the terms, and that law has taken effect. The old general terms are abolished and the new are *in esse*. Some inconvenience may, of course, result from the want of rules adapted to the new courts, and it is quite likely that no business of importance will be transacted until after the convention, but that the June and July terms will be held seems to us beyond question. Those terms are appointed for the following places and times: In first department, first Tuesday in June, at New York: in second department, second Tuesday in June, at Poughkeepsie; in the third department, at Binghamton, on first Tuesday in June, and at Plattsburgh, on the first Tuesday in July; and in the fourth department, in the city of Buffalo, on the first Monday in June.

The United States senate has at last added an amendment to the legislative, executive and judicial appropriation bill increasing the salaries of the justices and judges of the U. S. courts. The salaries are fixed as follows:

Chief justice of the supreme court	$10,000
Associate justices	8,000
United States circuit judges	7,500
United States district judges	5,000
Chief justice court of claims	6,000
Associate justices, same court	5,000
Chief justice supreme court District Columbia	5,500
Associate justices, same court	5,000

If there is one class of public officers more than another that should receive a liberal compensation for

their services, it is certainly the judiciary. It is essential that judges should be entirely independent; and one element of independence is an adequate salary, not only that they may devote the whole of their time to the discharge of official duty, but that they may be beyond even the temptation of bribery. It has been for years the wise policy of the English government to pay its judges a most liberal salary, and we are glad that our own government is beginning to follow the example, even though afar off.

The New York *Times*, in a recent article, very justly observes that the great need of the majority of the lawyers in that city is a good law library, accessible at all times to the poorest members of the profession. The Law Institute has an excellent library, and the new Bar Association is engaged in selecting another, but the great body of the profession is unable to reap their benefits on account of the large sum demanded for the privilege. The *Times* adds: "What is wanted, then, is a law library, free to all lawyers properly certified, in a central situation, within easy distance of the courts, and, most important of all, open at night. Then is the lawyer's harvest time, his only time, in fact, for study; for he who would master the science of law must be lavish of the midnight oil. To the practicing attorney, a library open only in the day time is the veriest cup of Tantalus. Such a collection as we suggest could readily be formed by concerted action on the part of the profession. There are probably two or three thousand lawyers in this city alone. If each of them gave a volume at a cost of say $4, a practical working library would be had at once, which one or two public-spirited bequests would speedily increase. But, if necessary, state aid should be invoked for the enterprise. We are used to scoff at New Jersey parsimony, but New Jersey can afford to give its lawyers the free use of an excellent law library in the state house at Trenton. Ought New York to do less?"

The writer of the article probably overlooked the fact that this state gives its lawyers the free use of one of the best law libraries in the country, as those familiar with the state library at Albany know.

We find in the April part of Howard's Practice Reports a "note" appended to the case of *Erickson* v. *Smith* — a court of appeals decision — which is entirely out of place in any report pretending to dignity or decency. After stating that "the copy of the above opinion, from which we publish, is certified in the following manner, to wit: 'A copy, *but not for publication*, S. Hand, State Reporter, fees $3.50,'" the writer proceeds at length with assertions and denunciations against Mr. Hand, which, to say the least, are in very bad taste, and not very good English. The ground of complaint seems to be the form of the certificate, "a copy, *but not for publication*;" which is understood by Mr. Howard to be a "preliminary injunction," as he terms it, against publishing the opinion. Now we happen to know that the words *but not for publication*, are not intended as a restriction of the right of publication. They are added as an indication that the copy is not prepared or intended for publication. Those familiar with the manner in which the court of appeals makes its decisions must know that no one not present at the consultation of the judges, or that has not access to the reporter's notes of the consultation, can properly or accurately report the opinions of the court. It is the custom for two judges to write opinions in each case — and they often arrive at the same conclusion from different premises and courses of reasoning. At the "consultation" the opinion of the one judge may be adopted as the opinion of the court, although the conclusions of the other are the same. Again, it frequently occurs that the propositions contained in an accepted opinion are considerably modified and changed at the consultation by the views of a majority of the judges. Therefore it is that one, to properly report a case, must be fully informed of what took place at the consultation. And an opinion, if prepared for publication, should contain any modifications or alterations that the court may have made to it. Mr. Hand would be imposing upon the profession and the public, should he certify an opinion, knowing it to be intended for publication, and knowing also that it did not present the correct views of the court. He has therefore adopted the plan of attaching to his certificate the words "not for publication," and if Mr. Howard, or any one else, sees fit to publish an opinion with those words attached, he runs his own risk of misleading and of inaccurately reporting. Thus much we have said, not in defense of Mr. Hand, for he needs none, but for the correction of an erroneous impression. We know of nothing that can be said to justify Mr. Howard in inserting such a note in the body of his report. It is bad enough for the profession to be compelled to endure in his reports such a *melange* of all sorts of decisions from the United States supreme court down to the county court, but when he goes still further, and seeks to make his reports the medium of conveying to the public his personal resentments and prejudices, it is adding insult to injury, and deserves to be resented.

OBITER DICTA.

The New York *World* announces, with great gravity, that "the British house of lords has officially decided that a man cannot marry his widow's sister."

A jury out West brought in a verdict that they had "agreed to disagree;" for which little joke they were fined twenty dollars.

The other day a judge holding court in Greenville, N. C., went to sleep on the bench, and not only that but actually snored, much to the amusement of all present.

"What do you mean," inquired an inquisitive lady of a facetious lawyer, "by the term of 'putting a leading question?'" "When I offer you my arm, dear," replied the learned gentleman, suiting the action to the word.

A certain barrister, who was remarkable for coming into court with dirty hands, observed that he had been turning over Coke. "I should have thought that it was coals you had been turning over," observed a wag.

A bad-tempered judge was annoyed by an old gentleman who had a very bad chronic cough, and after repeatedly desiring the crier to keep the court quiet, at length angrily told the offending gentleman that he

would fine him ten dollars if he did not cease coughing, when he was met with the reply: "I will give your honor twenty dollars if you will stop it for me."

A case was tried recently in one of the Connecticut courts, in which the plaintiff claimed damages for being violently ejected from a train on the New York and New Haven railway. The counsel for the defense, in his plea that no unnecessary violence was used, made out the conductor to be a second Chesterfield, and the brakemen, who had broken the unfortunate passenger's head, and cast him neck and heels out of the car, the most tender-hearted and amiable of living creatures.

"Observe, gentlemen of the jury," said the railroad lawyer, "the manner in which the gentlemanly conductor ordered the removal of this desperate man, by saying, in his good natured way, "now, boys, take hold and put this fellow off."

This expression did not escape the sharp ears of the plaintiff's lawyer, who, in his turn, illustrated it as follows:

"Gentlemen of the jury, my brother has told you that the conductor, in the most pleasant manner, said, 'Now, boys, take hold and put this fellow off.' Now, gentlemen, when is it that men are addressed as boys! Why, when they are expected to do something violent or dangerous. As the mate calls upon his crew—'Now, boys, lay aloft and furl topsails,' or the captain shouts to his men in the field, 'Now, boys, aim low and let 'em have it;' but, gentlemen, what would you think if a bank president should summon his directors together with 'Now, boys! let's go in and discount Brown's note,' or of the clergyman who should rise in his pulpit and shout—'Now, boys, let's sing the 42d Psalm.'"

Verdict was rendered for the plaintiff.

COURT OF APPEALS ABSTRACT.

MARCH TERM, 1870.

John W. Shumway and another, executors, etc., respondents, v. *Isaac Shumway, appellant.*

The plaintiffs and defendant were executors of an estate, and the will contained an express power to the executors to sell the testator's real estate. The action was brought to set aside a deed from the testator to defendant of part of such real estate, on the ground of want of capacity to convey, fraud and undue influence. The relief demanded in the complaint was, that the deed to defendant be declared void; that the same be canceled of record, and that the title to the premises be adjudged to be in the heirs, subject to the executors' power of sale. *There was no demand* of possession. The jury found for the plaintiff. The defendant moved at special term for an order vacating the judgment and for a new trial, on terms, on the ground that the action determined the title to real estate under 2 R. S. 309, §§ 36 and 37, and that "by the course pursued by the plaintiff in bringing an action in equity instead of one at law, the defendant is deprived of a new trial, to which, as matter of course, he would have been entitled under the provisions of the revised statutes. *Held*, that the action was neither in substance or effect an action of ejectment, and that therefore the right to a new trial given by the revised statutes does not apply.

The provisions of the revised statutes granting new trial in cases of ejectment remain in force since the code, and are applicable to those cases which would have been termed actions of ejectment before the code.

Charles C. Sherman, respondent, v. *Ruth Willett, appellant.*

The administrators have the right to sell the personal property of their intestate, and that right is not limited by section 25, 2 R. S. 87. They have the right to sell for the payment of debts and legacies for the purpose of distribution.

Where an administrator at vendue sold to plaintiff a crop of rye which was then growing on the land of the intestate, and which had been sowed prior to such intestate's death, and the land on which the rye was growing was afterward, but before the harvest, sold to defendant on the foreclosure of a mortgage given by intestate (the rye being reserved, and not included in the sale, as was announced by the auctioneer at the time of the sale, and in the presence of the defendant),—*Held*, that the plaintiff acquired a valid title to the rye under the administrator's vendue sale, and that the defendant—the purchaser of the farm on the foreclosure sale—did not acquire title to the rye as against the plaintiff. That plaintiff's title would have been equally valid, so far as related to the claim of defendant, had the rye not been excepted at the foreclosure sale. It was not necessary for the plaintiff to show that the sale of the rye by the administrator was necessary for the payment of debts of the intestate. The sale being apparently in due course of administration, the plaintiff had a right to presume that it was authorized and legal. The presumption is in favor of the legality of the sale.

Charles A. Russell and another, respondents, v. *Frederick T. Carrington and another, appellants.*

Action to recover the price paid to defendants for a quantity of corn, which, after the agreement of purchase and sale, and before actual delivery, was destroyed by fire. It appeared that the defendants sold to plaintiffs four hundred bushels of corn, parcel of a cargo from the schooner St. Helena, which was then stored in a warehouse in Oswego, known as the Empire elevator. The plaintiffs paid the price agreed upon and received a bill of sale, receipted, therefor. The corn in the elevator was stored there to the account of one Wright, and the man having charge of such elevator was authorized to deliver only upon the order of Wright. Immediately after the sale the defendants drew an order on Wright for the delivery to plaintiffs of the "400 bushels of corn from cargo schooner St. Helena." Thereupon Wright made an order to deliver such corn, which order was delivered to plaintiffs, and by them to their agents, with instructions to deliver it to the master of the schooner "Northerner," on her arrival at Oswego. At the time of the sale the plaintiffs informed defendants that they wanted the corn to make out a cargo, and that they wished to ship it by said schooner, which would arrive in about two days; but the schooner did in fact arrive next day, between ten and twelve o'clock, P. M. On the following morning, and before Wright's order to deliver had been presented, the elevator was burned down, and its contents, including the corn, destroyed or damaged, with fault or negligence of defendants. The four hundred bushels of corn were in no wise separate from the rest of the cargo of the St. Helena. The master of plaintiffs' schooner subsequently presented Wright's order, and demanded the amount of corn, which demand was refused. *Held*, that the title to the corn had passed to the plaintiffs, and that they could not maintain the action.

Upon the sale of a specified quantity of grain, its separation from a mass indistinguishable in quality or value in which it is included, is not necessary to pass the title, where the intention to do so is otherwise clearly manifested. The defendants having procured and delivered to the plaintiffs Wright's order of delivery, they (the defendants) had lost all control over the corn, and the keeper of the elevator became the bailee of the plaintiffs. The defendants having delivered Wright's order, nothing remained to be done by them, and the delivery was complete. The fact that there had not been an actual delivery of the grain was not material.

The lawyers in the breach of promise case of *Early* v. *Craig*, at Wytheville, Va., are very much disgusted, because their two clients have made up, married and ran away.

DIGEST OF RECENT AMERICAN DECISIONS.

SUPREME COURT OF IOWA.*

ASSIGNMENT.

1. *Without recourse: failure of title.* — While the words "without recourse," as used in the indorsement of commercial paper, will operate to limit the liability of the indorser, as such, only, and will not relieve him from liability in case he was not the lawful holder of or had no title to the note, yet they will have a different effect when used in connection with the sale and assignment of certain securities and choses in action, and if it turn out that the vendor or assignor had in fact no title to one of the choses assigned, though he supposed he had, he cannot in view of these words used in the assignment, be held liable. The words "without recourse," in such case will be so construed as to operate to relieve the liability of the assignor as a vendor. *Wolcott* v. *Timberman.*

2. *Application of the rule.* — W. and T. being sureties for L. in a certain judgment received from him an assignment, as collateral security, of certain claims and choses in action, among which was mentioned a promissory note upon a third party, which was described as being lost or mislaid. Subsequently L. assigned absolutely all his interest in the claims specified to the sureties, W. and T. Subsequently to this W. assumed to pay, and afterward did pay the judgment in consideration of T. assigning to him all his interest in said claims "without recourse," and paying to him $800 additional. It was afterward ascertained that the note described as being mislaid and which was the most valuable of the lot, had in fact been before assigned by the debtor to, and was held by a third party, and that the rest of the claims were nearly worthless. *Held,* no fraud being shown, that the words "without recourse" in the assignment protected the assignor from liability for failure of title in the note. *Ib.*

FRAUDULENT CONVEYANCE.

1. *Knowledge of grantee when a creditor.* — Where two or more *bona fide* creditors are engaged in a race for priority, the one securing it by a mortgage to him from the debtor, cannot have his right defeated by, or postponed to, a more tardy or less fortunate creditor, by showing a fraudulent intent on the part of the debtor in making the mortgage, and knowledge of such intent on the part of the creditor. Fraud in its legal sense cannot, without more, be predicated upon such a transaction. *Chase, Merritt and Blanchard* v. *Walters et al.*

2. A mortgage executed by a debtor to a creditor, with the intent on the part of the debtor to delay or defraud another creditor, will not be held fraudulent and void even though such intent is known to the creditor receiving the mortgage, if he accepts it for the purpose of securing a *bona fide* debt due him from the mortgagor. *Ib.*

HIGHWAY.

Compensation to land owner: constitutional law. — While a person through whose land a public road is located, is entitled to compensation under the constitutional clause guaranteeing that private property shall not be taken for public use without compensation, yet he is entitled to it only in the manner pointed out and provided by law; and if he fails to apply therefor, or within the time prescribed within the statute, or applying, his claim is rejected, and he takes no step, by appeal or otherwise, to reverse such order of disallowance, he cannot afterward resist the right of the public to open the road, upon the ground that the compensation guaranteed by the constitution has not been made to him. *Dunlap* v. *Polley et al.*

LIMITATION, STATUTE OF.

1. *Effect of payment and indorsements.*—Under our statute of limitations (Rev. Sec. 2740, subdivision 11) the acknowledgment arising from part payment and indorsement thereof on a promissory note, is not sufficient to prevent the bar of the statute. The admission of new promise required by the statute must, in all cases, be in writing, signed by the party to be charged. *Parsons* v. *Cary.*

2. The difference between our own and the English statute (9 Geo. IV, ch. 14) pointed out. *Ib.*

3. *Constitutional law.* — The fact that such part payment constituted an admission from which a new promise might have been implied under the law as it stood at the time of the execution of the original contract and new promise were made, does not prevent the application of the present statute, nor render such application violative of the constitutional provision against laws imposing the obligations of contracts. *Ib.*

MORTGAGE.

1. *Subsequent sale of parcels: liability of.* — It is the settled doctrine of this state that where incumbered real estate is subsequently sold by the mortgagor in parcels to different purchasers, each must contribute proportionately to the discharge of the incumbrance, and not in the inverse order of their alienation. *Barney* v. *Myers et al.*

2. *Foreclosure.* — Where a mortgagee, in a mortgage covering several distinct lots or parcels of real estate, releases some of them, sold by the mortgagor, upon the payment of amounts proportionate to the value which they bear to the mortgage debt, and all the remaining lots, except one in the possession of a purchaser from the mortgagor, are subsequently sold under foreclosure of the mortgage for amounts not proportionate to the actual value which they bear to the mortgage debt, though without any fault on the part of the mortgagee, the remaining lot which has not been released, and the purchase money of which was not applied to the mortgage debt, is liable in the hands of the purchaser for, and may be subjected, to the payment of any balance of the mortgage debt remaining unpaid. *Ib.*

PRACTICE.

1. *Objections to evidence.* — A general objection to the admission of evidence, specifying no ground upon which such objection is based, is sufficient, and cannot be taken advantage of on appeal. — *Chase, Merritt & Blanchard* v. *Walters et al.*

2. *Transfer of causes.* — A motion, under section 2615 of the revision, to transfer a cause from the chancery to the law docket, on the ground that it is not cognizable in chancery, should be made at the time of the filing of the answer to the original petition if it is then apparent that it is proper to be made; and the overruling of a motion made after the filing of such answer was *held* not erroneous. *Moore* v. *The District Township of Union.*

PRINCIPAL AND SURETY.

1. *Release: extension of payment.* — An extension of payment beyond the time fixed in a promissory note will not operate to release the surety, unless such extension is the result of an agreement founded upon a new consideration, and which would constitute a defense to the note in an action brought thereon by the payee against the principal, before the expiration of such extended time. — *Hunt* v. *Postlewait.*

2. Mere forbearance is not sufficient, even though the debtor shall pay therefor more than by law he was obliged to pay. It was accordingly *held,* that forbearance given to the principal in a promissory note after the same became due, upon his paying the usurious interest originally agreed upon and accrued, was insufficient to release the surety. *Ib.*

SUPREME COURT OF NEW YORK.*

1. *Action for breach of covenant of quiet enjoyment.* — An action for damages for the breach of a covenant of quiet enjoyment, contained in a lease executed by a person having a life estate in the premises, which breach was

* April Term, 1870. Prepared by E. H. Stiles, Esq., State Reporter.

* From Austin Abbott, Esq.; to appear in 8 Abbott, P. and R.

occasioned by the death of the life-tenant, will not lie against the executor of such life-tenant and the remainder men jointly, nor against the remainder men in any form. *Coakley* v. *Chamberlain.*

2. The mere fact that the remainder men, by an action instituted for that purpose, collected the rent reserved by the lease, from the death of the life-tenant up to the time of the final partition of the premises, cannot be construed into an adoption and ratification of such covenant on their part. *Ib.*

3. *Unexpired lease from life tenant.* — An unexpired lease, executed by a person having only a life estate in the demised premises, becomes void and inoperative upon the death of the life-tenant as against the remainder-men, and from that time constitutes no further lien or incumbrance upon the premises. *Ib.*

4. No tenure and no relation necessarily exists between remainder men and the tenant of the life-tenant. *Ib.*

5. *Contracts of married women.* — The acts of 1848 and 1849 did not confer any greater authority upon married women to make contracts generally, than previously existed, and did not remove the legal incapacity of a married woman to enter into a personal obligation; nor did those acts authorize a married woman to charge her separate estate for a debt which did not arise in connection with it, or which was not contracted for her own benefit, or the benefit of her separate estate. *Ib.*

6. The reported cases arising under these acts, reviewed, and the case of *Kolls* v. *De Leyer* (41 Barb., 208) explained. *Ib.*

7. Where a married woman, having a life estate in a certain premises, executed, prior to the year 1860, a ten years' lease of such premises, with a covenant contained therein that no payment of the rent thereby reserved, the lessee might quietly have and enjoy the said premises for the full term, and thereupon died before the expiration of the term, and the lessee was dispossessed by the remainder men, — *Held*, that no action for damages occasioned by the breach of such covenant could be maintained by the lessee against the executor of such married women, in the absence of proof that the covenant was for benefit of her separate estate. *Ib.*

8. *Bail in capital cases.* — Even in capital cases, the accused is entitled to be bailed, unless the proof is evident, or the presumption great. *People* v. *Perry.*

9. Where the prisoner had been twice tried, and on both occasions the jury were unable to agree on a verdict: *Held*, that it was a proper cause for exercising the power of bail. *Ib.*

10. *Dying declaration.*. — To lay a foundation for the admission in evidence of dying declarations, it must be shown that the declarant was under the impression of approaching death, and without hope of recovery. It is not enough that he was actually in a dying condition, and nodded assent when told that he was. *Ib.*

DIGEST OF RECENT ENGLISH DECISIONS.

(Q. B. refers to Queen's Bench; C. P. to Common Pleas; Ex. to the Exchequer; P. C. to the Privy Council; Ch. to Chancery; M. C. to Magistrates' Cases; P. & M. to Probate and Matrimonial, and L. J. R. to Law Journal Reports.)

ABATEMENT.

1. *Value of annuities: dead and living annuitants: reversionary annuity.* — The corpus of an estate charged by will with annuities, being insufficient to pay them in full, and some of the annuitants being dead and others living: *Held*, that the values must be ascertained with reference to the events which had occurred, and that the rule in *Todd* v. *Bielby* applied, notwithstanding the fact that the interest of one of the annuitants was reversionary at the death of testator. *Potts* v. *Smith*, Ch., 39 L. J. R. 131.

2. Mode of taking the accounts where the sums already paid to the several annuitants did not bear the same proportion to each other as the full amounts of their respective annuities. *Ib.*

3. *Acquiescence.* — In case of nuisance. See *Injunction.*

ATTORNEY AND SOLICITOR.

Imprisonment under the debtors' act, 1869. — A solicitor may be imprisoned for default in payment of a balance ordered to be paid on a common order to tax his bill of costs. Re *A. B.*, Ch., 39 L. J. R. 159.

AUCTION.

Reserved bidding: puffer employed. — A sale by auction of land is invalid if a puffer be employed to bid up to the reserved price, although the sale is stated in the conditions to be subject to a reserved bidding. *Gilliat* v. *Gilliat*, Ch., 39 L. J. R. 142.

ADMINISTRATION.

Administrator pendente lite acting under order of court of chancery. — An administrator *pendente lite*, acting under an order of the court of chancery, which directed the personal estate of the intestate to be applied in payment of her debts and funeral expenses in a due course of administration, advertised for sale the unrealized portions of the estate, consisting chiefly of personal ornaments and family relics. The estate, exclusive of such articles and things, was insufficient to meet the debts proved and claimed, but plaintiff, in order to prevent the sale, was willing to deposit in the registry a sum sufficient to cover the deficiency. The court, though deeming the offer of the plaintiff a reasonable one, declined to restrain the administrator from proceeding with the sale, and intimated that as a rule it would not interfere with an administrator acting under an order of the court of chancery. *Tichborne* v. *Tichborne; and in the goods of Tichborne*, P. and M., 39 L. J. R. 22.

ALIMONY.

Wife's petition for, pendente lite: practice when no answer. — The wife filed her petition for alimony, *pendente lite.* The husband filed no answer thereto: *Held*, that he was not entitled to cross-examine witnesses called in support of the petition. *Constable* v. *Constable*, P. & M., 39 L. J. R. 17.

ARBITRATION.

Award: costs: certificate of arbitrator: order of judge. — An action of trespass was referred by consent to an arbitrator who was to have all the powers of a judge at *nisi prius* as to certifying, etc., and the costs of the cause were to abide the event. The arbitrator awarded to the plaintiff the sum of 2*l.* 14*s.*, and made no certificate for costs. After a considerable lapse of time, the plaintiff obtained *ex parte* from the arbitrator a document in which he stated that it appeared to him at the reference that there was sufficient reason for bringing the action in the court of queen's bench. *Held*, that the court or a judge had power under the 30 & 31 Vict. c. 142, s. 5, to order that the plaintiff be allowed his costs, but that the court would not act upon the above document merely, and that under those circumstances the award ought to be remitted to the arbitrator. *Harland* v. *Mayor and Corporation of Newcastle-upon-Tyne*, Q. B., 39 L. J. R. 67.

BANKRUPTCY.

1. *Registered deed: concurrent jurisdiction: bill to set aside a sale by trustees: administration.* — The court will not, under ordinary circumstances, entertain a suit for the administration of the trusts of a deed registered under the bankruptcy act, 1861. *Stone* v. *Thomas*, Ch., 39 L. J. R. 168.

2. The bill alleged, and it appeared from the evidence in the suit, that the trustees had sold the good-will, business and stock in trade of the debtor to one of themselves at a slight under-value: *Held*, that this circumstance did not take the case out of the general rule, the court of bankruptcy having sufficient power to deal with such

questions. The question whether the court ought to exercise its jurisdiction, or leave the question to another tribunal, need not be raised by demurrer or plea. *Ib.*

3. *Plea of defendant's bankruptcy: order of discharge after action brought.* — A plea in the general form, according to the bankrupt act, 1861, s. 161, that defendant became bankrupt according to the statute in force concerning bankrupts, and that the cause of action accrued before defendant so became bankrupt, is not proved by showing that defendant was adjudicated bankrupt before, and received his order of discharge after, action brought. *Jones* v. *Hill*, Q. B., 39 L. J. R. 74.

BARON AND FEME.

Lunacy of husband: wife's authority to pledge husband's credit for necessaries. — In an action for the price of necessary repairs done to defendant's house, it appeared that he was a lunatic, and that the work was done by order of his wife, with knowledge on the part of plaintiff of the husband's lunacy. The wife had always received a sufficient allowance from her husband's estate. *Held*, that defendant was not liable, as, under the circumstances, the wife had no more authority to pledge his credit than she would have had if he had been sane, and had provided her with means for all necessaries. *Richardson* v. *Du Bots*, Q. B., 39 L. J. R. 69.

CARRIERS BY RAILWAY.

1. *Carriers' act: pictures in frames: picture frames.* — If a package containing pictures in frames exceeding 10*l.* in value, be delivered to a carrier to be carried for hire, without any declaration within the first section of the carriers' act as to the value and nature of the articles, picture and frame are to be considered as one article; and the carrier is protected by the act from liabilily in respect of damage done to the frame, as well as in respect of damage done to the picture itself. *Anderson* v. *London and North Western Railway Co.*, Ex., 39 L. J. R. 55.

2. *Mileage rate: usual and accustomed route.* — A railway company, in carrying goods, took them past C. Junction to N. E. station and back, and then on by other lines, and charged a mileage rate which included the mileage to and fro between these places; such route was reasonable, usual, and accustomed. *Held*, that they could so charge. *The London and South Western Railway Co.* v. *Myers*, C. P., 39 L. J. R. 57.

3. *Refusal of consignee to accept goods: subsequent misdelivery: negligence by involuntary bailee.* — Goods intrusted to a railway company having been tendered by them for delivery at the address of the consignees, were refused acceptance, and the company thereupon took them back to their own premises. They then (in accordance with their practice under such circumstances) sent an advice note to the consignees' address by post, stating that the goods remained at the risk of the "consignees," and would be delivered to the person producing the note. They subsequently delivered the goods to a person who had formerly been in the service of the consignees, and who, having obtained the advice note fraudulently, produced it at the company's premises. *Held*, that upon the goods being returned on the company's hands their duty as carriers was at an end, and they became involuntary bailees; and that in an action brought against them by the consignors for misdelivery and conversion, it was a question of fact whether they had acted under the circumstances with due and reasonable care and diligence. *Heugh* v. *The London and North Western Railway Co.*, Ex., 39 L. J. R. 84.

CHILDREN.

Abandonment and exposure of, endangering life. — The prisoners were convicted on an indictment which charged that they did abandon and expose a child, under the age of two years, whereby the life of the child was endangered. The indictment was framed on the 24 and 25 Vict. c. 100, s. 27. One of the prisoners was the mother of the child, which was illegitimate, and both the prisoners put the child in a hamper at S., wrapped up in a shawl, and packed with shavings and cotton wool, and the mother took the hamper to the booking office of the railway station at M., and left it, having paid the carriage of it to G. The hamper was addressed to the lodgings of the father of the child at G. She told the clerk at the office to be very careful of it, and to send it by the next train, which was due in ten minutes from that time. Upon the address were the words written, "With care; to be delivered immediately." The hamper was carried by the passenger train, and was delivered at its address in a little less than an hour from leaving M. On its being opened the child was found alive. The child was taken by the relieving officer the same evening to the union workhouse, where it lived for three weeks afterward, when it died from causes not attributable to the conduct of the prisoners, or either of them. It was proved to have been a delicate child: *Held*, by a majority of the judges, that the conviction was right. *Regina* v. *Falkingham*, M. C., 39 L. J. R. 47.

COLONIAL LAW.

1. *Cape of Good Hope: ordinances of court of policy: effect of Roman-Dutch law.* — By the Roman-Dutch law, ordinances of the governor and the court of policy at the Cape of Good Hope form part of the lex scripta of the colony. *Van Breda* v. *Silberbauer*, P. C., 39 L. J. R. 8.

2. A land owner in the colony petitioned the governor and court of policy to be relieved from certain ordinances made in respect to the right to the flow of certain water from his land into and upon the land of certain adjoining land owners, but "offered" to permit the flow of the water, subject to certain restrictions. By an ordinance of the governor and court of policy, it was resolved to release the land owner from the former ordinances, and to accept the "offer" contained in his petition. *Held*, that, inasmuch as the legislature could only modify an existing law by passing a new law, such ordinance, though informal, had the force of law. *Ib.*

CONTRACT. See *Damages. Evidence.*

CONTRIBUTORY.

1. *Conditional contract to take shares.* — S. offered to take shares in a company in consideration of his being secured a contract for adding to and altering the company's premises. The directors passed a resolution to give him the contract, and on the faith of such resolution he sent a formal application for shares without condition, and paid the deposit. The shares were allotted, and notice of the allotment was sent to S., and his name was entered on the register; but the certificates were never delivered nor was S. required to pay any calls. The contract was never given to S., on account of the winding up of the company. *Held* (affirming the decision of the Master of the Rolls), that there was a contract to take shares by S. only on condition of his obtaining the building contract; that that condition had not been fulfilled by the company nor waived by S., and that, therefore, S.'s name must be removed from the list of contributories. *In re The Aldborough Hotel Company; Simpson's Case*, Ch., 39 L. J. R. 121.

2. *Liability of past members: owner of shares forfeited.* — The person, who was the owner of shares which have been forfeited, may be put upon the list of contributories as a past member, whether he was owner of the shares at the time they were forfeited, or previously, if within one year of the date of the winding up. *In re The Blakeley Ordnance Company; Creyke's Case*, Ch., 39 L. J. R. 124.

3. For the purpose of considering the liability of past members forfeiture and transfer are equivalent. *Ib.*

4. *Compromise ultra vires.* — In 1846 D. became a shareholder in an unlimited company, upon the faith of a promise by W., the local manager, that he should not become responsible as a shareholder until an act of parlia-

ment should be passed incorporating the company with limited liability. D. never paid any calls upon his shares, all calls being paid by W.; but he acted as a shareholder in some particulars. No act, such as that alluded to, was ever passed. Upon D.'s application that his shares should be canceled, the directors in 1848 passed a resolution to cancel the shares. Such a resolution by directors was *ultra vires*, but no steps were taken by the company to enforce D.'s liability as a shareholder, and for twenty years D. held no communication with the company. In 1869 the official liquidator (the company being then in course of winding up) sought to place D. upon the list of contributories. *Held*, on the authority of *Spackman* v. *Evans*, *Houldsworth* v. *Evans*, and *Stanhope's case*, that D. must be placed upon the list of contributories. *In re The Agriculturist Cattle Ins. Co.; Dixon's case*, Ch., 39 L. J. R. 134.

COPYRIGHT.

1. *Registration: newspaper: injunction.* — A newspaper is not a "book" within section two of the Copyright act (5 and 6 Vict. c. 45), nor a periodical under section 19, and, therefore, need not be registered under section 24, in order to enable the proprietor to sue for an infringement of copyright; the modified property conferred upon him by section 18 in any contribution to his paper for which he has paid, will, without registration, be sufficient to enable him to maintain a suit. *Cox* v. *The Land and Water Journal Co.*, Ch., 39 L. J. R. 152.

2. An injunction to restrain the piracy of a list published in a newspaper will be refused on interlocutory application, where the information supplied by the list is to be easily obtained and where the court would be unable to decide whether it had been properly obtained or not. *Ib.*

3. *Semble:* That in this case an injunction would also be refused at the hearing, and an inquiry ordered as to damages. *Ib.*

COSTS.

Bankruptcy of defaulting trustee. — A trustee in default to the trust estate, and having executed a creditor's deed duly registered before bill filed against him for the execution of the trusts, is entitled to his costs from the date of the bankruptcy as between solicitor and client, from the party liable to the costs of the suit. *Held*, that there is no difference in this respect between an executor and a trustee. *Bowyer* v. *Griffin*, Ch., 39 L. J. R. 159.

—— of adjourned summons. See *Security for Costs.*

COVENANT.

To give by will. See *Marriage Articles.*

DEBENTURE.

Charge on undertaking: going concern: priority. — A debenture-holder, in whose favor the undertaking of a company is charged, although he cannot come upon the assets and property of the company so long as it is a going concern, yet upon its stoppage, and the sale of its property, has a lien upon the proceeds in priority to general creditors. *Furness* v. *Caterham Railway Company*, 27 Beav. 348, followed. *In re Panama, New Zealand & Australian Royal Mail Co.*, Ch., 39 L. J. R. 162.

DEBTORS' ACT, 1869.

Imprisonment under. See *Attorney and Solicitor.*

DAMAGES.

1. *Proximate cause: acts of independent parties conjointly causing damage: contributory negligence.* — Defendants, a gas company, having contracted to supply plaintiff with a service pipe from their main to the meter on his premises, laid down a defective pipe from which the gas escaped. A workman, in the employ of a gas-fitter engaged by plaintiff to lay down the pipes leading from the meter over the premises, negligently took a lighted candle for the purpose of finding out whence the escape proceeded. An explosion then took place, whereby damage was occasioned to the plaintiff's premises, to recover compensation for which plaintiff brought his action against defendants. *Held*, that the damage was not too remote, and that plaintiff, not being the master of the workman, could not be considered as contributing to the damage by reason of this act, and was therefore entitled to recover. *Burrows* v. *The March Gas and Coke Co.*, Ex., 39 L. J. R. 33.

2. *Measure of: agreement to accept and pay bills.* — Defendants, for a commission, agreed with plaintiff's to accept bills of exchange drawn upon them by a house at Alexandria, against grain consigned to England, and to pay the bills at maturity, being in the mean time placed in funds by plaintiffs, from the proceeds of the sale of the grain. Defendants accordingly accepted bills to a large amount, and were placed in funds to meet them by plaintiffs, but afterward, and before the bills came to maturity, defendants stopped payment and gave notice to plaintiffs that they should not pay the bills. Plaintiffs thereupon obtained an advance from a third person, for the purpose of taking up the bills, paying a commission for the advance. They incurred expenses in telegraphing to Alexandria for information respecting the holders of the bills, and for telegraphic replies from Alexandria. They also paid for the noting and protesting of the bills. In an action brought by plaintiffs against defendants to recover damages for defendants' breach of contract, defendants paid into court the amount claimed for the noting and protesting, and the jury gave a verdict for plaintiffs for the amount of the commission paid for the advance and the telegraphic expenses. Upon a rule to enter a nonsuit or verdict for the defendants upon the ground that such damages were not recoverable; *held*, that they were recoverable; and, per KELLY, C. B. — By the analogy of actions brought against banks for not paying customers' checks, the amount given by the jury might be given as general damage; and per MARTIN, B. and PIGOTT, B. — The damage for which the verdict was given was special and not general damage; but it was special damage, arising naturally from the defendants' breach of contract, and therefore was recoverable. *Prehn* v. *The Royal Bank of Liverpool*, Ex., 39 L. J. R. 41.

EVIDENCE.

1. *Contract for work done and materials provided: collateral issue.* — At the trial of an action, brought to recover from defendant a sum of money for work done and materials supplied in respect of certain dwelling houses and premises, it was alleged by plaintiff and denied by defendant, that he (plaintiff) had received orders from defendant to do the work and supply the materials. The dwelling houses were being erected by L. & B., who had originally given orders to plaintiff, and at the trial it was contended for defendant that credit had been given to L. & B., and that he was simply mortgagee. It was contended for plaintiff that defendant was really owner and personally interested in the premises, and that L. & B. were his agents; *held*, that plaintiff was at liberty to call other persons to prove that they had received orders from defendant personally to do work or to supply materials upon or for the same dwelling houses, as such proof was evidence to show that defendant was really the owner and person interested in the dwelling houses. *Woodward* v. *Buchanan*, Q. B., 39 L. J. R. 71.

2. *Proceeding in consequence of adultery: testimony of reputed parents to bastardize issue: independent evidence required: presumption of non-access.* — A petition which sought to establish a claim on the ground that a certain person was illegitimate by reason of the adultery of his mother, who had since been divorced: *held*, not to be "a proceeding instituted in consequence of adultery," within the meaning of the "Evidence Further Amendment act, 1869," § 3, so as to make the husband competent to give evidence tending to prove the fact of non-access. But

held, also, that independent evidence showing that, on the only occasion when the husband visited the place where his wife was residing, he was engaged in collecting evidence with a view to a divorce, would be sufficient to raise a presumption of non-access. *In re R——'s Trusts*, Ch., 39 L. J. R. 192.

EXECUTOR

1. *Assignment in favor of one creditor: breach of trust.*— Although an executor may prefer a single creditor to the extent of giving him money or money's worth, he cannot assign the whole of his testator's estate as security to such creditor. *Vane* v. *Rigden*, Ch., 39 L. J. R. 143.

2. An executrix assigned all the book-debts, etc., of testator, to the nominal amount of 2,000*l.*, to a creditor to secure a debt of 534*l.* due to him from testator. The property so assigned amounted substantially to the whole of the assets. *Held*, in a creditor's administration suit, that the deed must be set aside. *Ib.*

—— See *Costs*.

FRAUDS, STATUTE OF.

Contract to procure lease of house: interest in land. — A contract to procure for a person the assignment of a lease of a house is a contract of an interest in or concerning land, within the fourth section of the statute of frauds (29 Car. 2, c. 3), and must therefore be in writing, although it be made by one who has not the lease himself or any interest under it. *Horsey* v. *Graham*, C. P., 39 L. J. R. 58.

GUARANTEE.

Construction of: continuing guarantee: consideration. — Defendant, who had annually given plaintiff a guarantee expressly limited for a year, by each of which defendant guaranteed the amount "for the time being due" from F. to plaintiff for coals sold to him, gave plaintiff during the currency of the last of these annual guarantees, a guarantee which, after reciting that F. was then indebted to plaintiff in 2,205*l.* 3*s.* 9*d.*, in addition to his liability upon two acceptances of defendant for 750*l.* each, indorsed by F. to plaintiff, and that plaintiff was pressing for the immediate payment of the said sum of 2,205*l.* 3*s.* 9*d.*, was as follows: "Now I do hereby, in consideration of your forbearing to take immediate steps for the recovery of the said sum, guarantee the payment of and agree to become responsible for any sum of money for the time being due from F. to you, whether in addition to the said sum of 2,205*l.* 3*s.* 9*d.* or not." *Held*, that this was a continuing guarantee, and extended to a debt due from F. to plaintiff for goods supplied after the guarantee had been given, and that there was therefore a good consideration for such guarantee. *Coles* v. *Pack*, C. P., 39 L. J. R. 63.

HUSBAND AND WIFE.

Equity to a settlement: ultimate remainder. — Courts of equity only so far interfere with the husband's marital right as is necessary for the purpose of providing for the wife and her children. Therefore, where a fund to which a husband became entitled in right of his wife is being settled by order of the court, the ultimate remainder will, as a rule, be to the husband absolutely, without reference to the question of survivorship. Successive modifications of the practice of the court on this point. *Spirett* v. *Willows*, followed. *Croxton* v. *May*, Ch., 39 L. J. R. 155.

INDICTMENT.

Form of: surplusage: false declaration. — An indictment charged the prisoner with the offense of making a false declaration before a justice, that he had lost a pawnbroker's ticket, "whereas in truth and in fact he had not lost the said ticket, but had sold, lent or deposited it, as a security to one S. C.," etc.: *Held*, that the allegation "but had sold, lent or deposited it," etc., did not render the indictment ambiguous or uncertain, but was pure surplusage, which might be rejected and need not be proved. *The Queen* v. *Richards* overruled. *Regina* v. *Parker*, M. C., 39 L. J. R. 60.

INFANT.

Ratification of contract to take shares. — An infant applied for shares, which were allotted to him, but he never paid any money in respect of them. After he came of age the company was ordered to be wound up, and he then executed a transfer of the shares to avoid liability: *Held*, that there was sufficient evidence of his having ratified the contract after coming of age. *The Constantinople and Alexandra Hotels Co., ex parte Ebbetts*, Ch., 39 L. J. R. 158.

INJUNCTION.

1. *Nuisance: difficulty of removal: expected legislation: form of order.* — The corporation of a borough, acting as a local board of health, constructed a sewage system which resulted in a gradually increasing nuisance to plaintiffs and the public generally. It being represented on their behalf that the evil could only be dealt with effectually by a comprehensive scheme, and that no such scheme could prudently be adopted pending a parliamentary inquiry into the whole subject, the court granted an immediate injunction against any extension of the system, and restrained the continuance of the existing nuisance from and after the expiration of one year from the filing of the bill. Form of order in such a case. *Attorney-General* v. *Corporation of Halifax*, and *The North Staffordshire Rail. Co.* v. *Tunstall Local Board*, Ch., 39 L. J. R. 129, 131.

2. Whether a person who stands by and sees an act done, knowing what the necessary consequences will be, is estopped from afterward complaining of those consequences, *quere*. *Ib.*

See *Copyright; Mining Lease; Staying Proceedings.*

INTERROGATORIES.

Defendants setting up fraud: trover. — In an action of trover for certain barley, the defendants sought to interrogate the plaintiffs on the grounds that the barley was shipped on board the defendants' ship by one H., that S., his agent, sold to D. & G. and on arrival the barley was delivered to S. as had been done on previous occasions without the bill of lading, in order to forward to D. & G., that the plaintiffs' claim was not made till three months after the arrival, just after D. & G. had failed, that the plaintiffs were D. & G.'s bankers, and that there was reason to believe that the plaintiffs intended the barley to be delivered to D. & G., and knew, and had the means of knowing, that it had been delivered before claim made. *Held*, that it was a proper case for interrogatories. *The Derby Commercial Bank (limited)* v. *Lumsden*, C. P., 39 L. J. R. 72.

(To be continued.)

OBITUARY.

JUDGE FIELD, OF NEW JERSEY.

The Hon. RICHARD STOCKTON FIELD, late judge of the United States district court of New Jersey, died at his residence in Princeton on Wednesday of last week, of an illness with which he was suddenly attacked a few weeks ago while addressing the grand jury at Trenton. Judge FIELD was born at Princeton in the early part of the present century, and was a nephew of Richard Stockton, one of the signers of the Declaration of Independence, and a cousin of Commodore Stockton. He was educated at Princeton college and afterward studied law under the tuition of John S. Green. He was for some time professor of law in Princeton college, and was attorney-general of the state for several years. On the death of United States Senator Thompson in 1862, he was appointed to fill the unexpired term. In 1863 he was appointed by President Lincoln judge of the United States district court for New Jersey, which position he filled with ability till seized with the illness which terminated his life.

ANSWERS TO CORRESPONDENCE.

NEWTON, N. C., *May 10th*, 1870.

Editors LAW JOURNAL:

Will you please answer the following inquiries through your LAW JOURNAL. The homestead law, section two of our new constitution, reads in substance as follows:

Every homestead, and the dwelling used therewith, not exceeding in value $1,000, "*owned* and *occupied* by any resident of this state shall be exempt from execution," etc.

1. Has the true meaning of the words *owned* and *occupied* been fixed by construction by any of the courts of New York?

2. Has it been determined whether the law contemplates an *actual occupation* or not, at the time of applying for the exemption? If not, what are your views from the language used by the section above referred to.

3. Does the word *owned* contemplate a legal title in the debtor: to illustrate, where a party has a bond for title, not having paid the purchase money, is he regarded as the *owner* in the sense employed by the statute?

4. What constitutes a *non-resident*? Suppose a man owning a house and lot in the city of Albany, which he rents annually, is in some other state or states, at some constant occupation, would he be considered a non-resident?

Our new constitution was copied in many, if not in all respects, from that of New York, and I think it probable that the homestead exemption law is the same.

J. H.

ANSWER.

1. We are not aware that the true meaning of the words *owned* and *occupied* has been fixed by construction in this state.

2. The law of this state — and of your own state, according to the words quoted above by you — so clearly contemplates *an actual* occupancy as to need no judicial interpretation. Here the law exempts "the lot and buildings thereon, occupied as a residence, and owned by the debtor, being a householder and having a family," etc. The obvious intent of the law is to provide a home for a debtor's family as well as for himself; and if the debtor could rent the property, or occupy it "constructively," and still preserve the exemption, the object of the law would be frustrated, and he be enabled to practice fraud upon his creditors and the community.

3. The force of the word *owned* in your statute may depend upon the reading of the whole statute. In this state the "homestead act" provides that "to entitle any property to such exemption, the *conveyance* of the same shall show that it is designed to be held as a homestead under this act, or if already purchased, or the *conveyance* does not show such design, a notice that the same is designed to be so held shall be executed," etc. The chapter on "recording of deeds" in the revised statutes of this state provides that the term "conveyance" shall not embrace "executory contracts for the purchase or sale of lands." We conclude, therefore, if your statute is similar to that of this state, that an executory contract does not give such title as is contemplated.

4. To constitute *residence* there must be both the fact of the abode and the intention of remaining indefinitely. Therefore, in the case you put, if the man is abiding in another state, with the intention of remaining there indefinitely, he would be a resident of that state and a *non-resident* of this. The fact of his owning property here does not affect the question. — ED. L. J.

AUBURN, *May*, 1870.

Dear Sir — Will you please inform me as to the time and place for examinations of students for admission to the bar. I find by the new laws that the terms have been changed, and every thing seems to be in doubt.

W. A. W.

There will probably be no further examinations of candidates until after the convention of the general term justices, which is to meet in Albany on the first Wednesday in August. The rules of the court will be then so amended as to conform to the new arrangement of the court. — ED. L. J.

NEW YORK, *May* 19, 1870.

Sir — Please inform a subscriber of the JOURNAL how to serve a notice of foreclosure of mechanics' lien (on an absent defendant) in the city of New York. Under the general law they can get service by publication; under the New York city lien law there is no provision of this kind. SUBSCRIBER ALBANY LAW JOURNAL.

The fourth section of the New York city lien law (Laws 1863) provides for service by publication "as to any of the parties not residing in this state, or who may have removed therefrom." We are not aware that this provision has been repealed. — ED. L. J.

Mr. Editor — Will you inform an unsophisticated country practitioner what you think of the head note to the case of *Hudson Canal Co.* v. *Pennsylvania Coal Co.*, 8 Wallace U. S. Reports, 276 (just out). It seems to me to be (to coin a word) a *queerity*. Yours,

SUBSCRIBER.

The head note referred to reads as follows:

"In the case of a contract drawn technically, in form, and with obvious attention to details, a covenant cannot be implied in the absence of language tending to a conclusion that the convenant sought to be set up was intended. The fact that the non-implication of it makes the contract, in consequence of events happening subsequently to its being made, quite unilateral in its advantages, is not a sufficient ground to imply a covenant which would tend to balance advantages thus preponderating."

"This," as poor Artemus Ward used to say, "requires some thought, but will amply repay attention." — ED. L. J.

TINSLAR v. WATERVLIET RAILROAD COMPANY. — Action for damages on account of injury sustained by plaintiff, by the premature starting of the defendants' horse car, as she was stepping off. Defense, that the bell, the signal for starting, was not rung by any of the defendants' employees, but by another passenger, without authority or permission, the strap to which the bell was attached being within reach of the passengers. Judgment for defendants. Supreme court, special term, before INGALLS, J.

GENERAL TERM JUSTICES.

Governor Hoffman has issued the following paper:

STATE OF NEW YORK, EXECUTIVE CHAMBER,
ALBANY, N. Y., *May* 25, 1870.

Pursuant to chapter 408 of the Laws of 1870, I this day file in the office of the secretary of state a designation of the presiding and associate justices to compose the general term in each of the four judicial departments. I have found it impossible, as the departments are constituted, and the times for holding the general terms fixed, to make any arrangement mutually satisfactory to the judges and myself, for transferring judges from one department to another, to act as presiding or associate jus-

tices; and I am constrained to designate for the general term in each department judges who reside within it. Some inconvenience, more particularly in the second department, will necessarily result, but it can be to a great extent remedied by the general term judges continuing, as they may lawfully do, to hold circuits and special terms at their convenience, and by changing the organization of their general term, as occasion may from time to time require, by exchanging with general term judges in other departments, or in such other way as is provided for by law. JOHN T. HOFFMAN.

STATE OF NEW YORK, EXECUTIVE CHAMBER.
ALBANY, N. Y., *May* 25, 1870.

In accordance with the provision of chapter 408 of the Laws of 1870, entitled "An act relating to the supreme court and the election of a judge of the court of common pleas in and for the city of New York," I designate the following as presiding justices and associate justices for each of the judicial departments to compose the general term therein:

For the first department, consisting of the first judicial district, Daniel P. Ingraham, presiding justice; Albert Cardozo and George G. Barnard, associate justices.

For the second department, consisting of the second judicial district, Joseph F. Barnard, presiding justice; and Jasper W. Gilbert and Abraham B. Tappen, associate justices.

For the third department, consisting of the third, fourth, and sixth judicial districts, Theodore Miller, presiding justice; and Platt Potter and John M. Parker, associate justices.

For the fourth department, consisting of the fifth, seventh, and eighth judicial districts, Joseph Mullen, presiding justice; and Thomas A. Johnson and John A. Talcott, associate justices.

JOHN T. HOFFMAN.

By the governor: JOHN D. VAN BUREN, Private Sec'y.

TERMS OF THE SUPREME COURT FOR JUNE.

1st Monday, Special Term (Chambers), New York, Barnard.
1st Monday, Circuit and Oyer and Terminer, Kings, Pratt.
1st Monday, Circuit and Oyer and Terminer, Rensselaer, Miller.
1st Monday, Circuit and Oyer and Terminer, Goshen, Barnard.
1st Monday, Special Terms (Motions), Kings, Tappen.
1st Monday, Special Term, Goshen, Barnard.
1st Monday, Circuit and Oyer and Terminer, Greene, Peckham.
1st Monday, Circuit and Oyer and Terminer, Fonda, Rosekrans.
1st Monday, Circuit and Oyer and Terminer, Rome.
1st Monday, General Term, 4th Department, Buffalo, Mullen, Johnson and Talcott.
1st Monday, Circuit and Oyer and Terminer, Erie, Talcott.
1st Tuesday, General Term, 1st Department, New York, Ingraham, Cardozo and Barnard.
1st Tuesday, General Term, 3d Department, Binghamton, Miller, Potter and Parker.
2d Monday, Circuit and Oyer and Terminer, Dutchess, Tappen.
2d Monday, Circuit and Oyer and Terminer, Westchester, Barnard.
2d Monday, Circuit and Oyer and Terminer, Jefferson, Morgan.
2d Monday, Circuit and Oyer and Terminer, Broome, Murray.
2d Monday, Circuit and Oyer and Terminer, Cattaraugus, Marvin.
2d Tuesday, General Term, 2d Department, Poughkeepsie, Joseph F. Barnard, Gilbert and Tappen.
2d Tuesday, Special Term, Schuyler, Boardman.
3d Monday, Circuit and Oyer and Terminer, Putnam, Barnard.
3d Tuesday, Circuit and Oyer and Terminer, Canton, Potter.
3d Tuesday, Special Term, Onondaga, Morgan.
3d Tuesday, Special Term, Chenango, Balcom.
2d Tuesday, Special Term, Erie, Barker.
4th Tuesday, Circuit and Oyer and Terminer, Sandy Hill, Potter.
Last Monday, Special Term, Monroe, J. C. Smith.
Last Tuesday, Special Term, Albany, Peckham.

LEGAL NEWS.

A woman in Iowa City, Iowa, whose husband has been in the insane asylum for two years, recently applied for divorce on the ground of desertion. The suit was dismissed at plaintiff's cost.

A man who killed another at Atlanta, Ga., some time ago, was tried the other day, and when the sentence of three years in the penitentiary was pronounced, he was perfectly delighted. The time was thirty-seven years less than he expected.

"To protect home industries," the legislature of Alabama has laid a tax of $40 on non-resident lawyers. The attorneys of Georgia, who enjoy considerable practice from Alabama clients, don't like the law, and will contest its legality.

Four men are under arrest at Clinton, Conn., charged with stealing a church organ of small dimensions. They plead in extenuation that the church owes them twenty dollars, and seeing no prospect of ever getting the same, they took the organ as security.

Judge Cardozo, of New York, in a recent decision laid it down as a rule that "the only proper course, when a question has been fully considered and disposed of by one judge, is for every other judge of the court to act upon that decision *as conclusive evidence of the law until reviewed by an appellate court.*"

At Salt Lake city recently, the Mormon authorities, during a recess of Chief Justice Wilson's court, at noon, closed the house against him and the United States marshal, and refused to allow him to continue his sitting. After a consultation, however, they surrendered the hall to the possession of the court.

The attorney-general of the United States has caused to be painted a portrait of Hon. John McPherson Berrien, who was attorney-general under the administration of President Jackson. The portrait is to be placed in the portrait gallery attached to the office of the attorney-general.

David Bates, Esq., a prominent lawyer of Cherry Valley, died at his residence in that place on Thursday of last week, aged sixty years; and Hugh McCormick, a prominent member of the Clark county (West Virginia) bar was killed a few days ago by falling from a third story window in the Mansion House, at Alexandria.

The members of the Philadelphia bar have presented a portrait of Judge Sharswood to the University of Pennsylvania, at Philadelphia. In their letter of presentation the donors say they have felt it due to the eminent legal ability and long judicial services of Judge Sharswood, that they should cause his likeness to be painted for preservation in some public hall, and they have come to the conclusion that the most fitting place for it is the hall of the University of Pennsylvania, where, for fifteen years, Judge Sharswood lectured to the law class, and where many of the members of the Philadelphia bar were prepared for useful service to the public. At the last meeting of the trustees of the university a resolution was passed accepting the portrait, and tendering the thanks of the board to the gentlemen presenting the same.

An interesting case (*Mayhugh* v. *Rosenthal*) has just been decided by Mr. Justice Storer, of Ohio. Mayhugh, in 1856, deserted his family and went to California; in 1859 he wrote to his wife, sending her a small remittance; he was not heard of again until 1868, when he made his appearance in Cincinnati. Meanwhile, in 1867, more than seven years after he had been last heard from, his wife had exchanged, upon the legal presumption of his death, a house in the city for a farm in the country. Mayhugh brought his action to recover the city property; but Judge Storer, in a very able opinion, held that, after a desertion of seven years, the wife had clearly the right to suppose her husband dead; and as his heir, together with her children, to make such disposition of the estate as she saw fit. The court, therefore, refused to interfere with the conveyance to Rosenthal of the city property, and intimated pretty strongly that the husband's title to the farm taken in exchange was rather dubious.

NEW YORK STATUTES AT LARGE.*

CHAP. 524.

AN ACT further to provide for the payment of certain certificates issued to the militia of the state for services in the war of eighteen hundred and twelve.

PASSED April 29, 1870, by a two-third vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The additional sum of one hundred thousand dollars is hereby appropriated out of any money which shall be in the treasury not otherwise appropriated, to be apportioned, paid out and disbursed, in all respects, as is provided in the act entitled "An act to provide for the payment of certain certificates issued to the militia of this state, for services in the war of eighteen hundred and twelve, and which certificates are now held by residents of this state named therein," passed May first, eighteen hundred and sixty-nine, except as the same may be otherwise herein directed.

§ 2. In making the distribution of the money hereby appropriated among the persons entitled thereto aforesaid, there shall first be apportioned and paid to those first entitled under the act aforesaid, who have not received any moneys under such act, a sum equal to thirty-six dollars and eighty-two and thirty-seven one-hundredth cents, on each one hundred dollars of the principal of their respective certificates, and the residue of the said sum shall be apportioned and paid to those entitled by the terms of the act aforesaid, and in the order there prescribed.

§ 3. This act shall take effect immediately.

CHAP 597.

AN ACT to amend an act entitled "An act to vest in the board of supervisors certain legislative powers, and to prescribe their fees for certain services," passed April third, eighteen hundred and forty-nine.

PASSED May 3, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section two of an act entitled "An act to vest in the board of supervisors certain legislative powers, and to prescribe their fees for certain services," passed April third, eighteen hundred and forty-nine, is hereby amended so as to read as follows:

§ 2. Whenever any board of supervisors shall form a new town within its respective county from parts of other towns, or town which shall have bonded to aid in the construction of any railroad under any act authorizing the same, and such bonds or any part thereof shall remain unpaid; or when any board of supervisors shall change the line of any town which shall have bonded to aid in the construction of any railroad in this state, and such bonds, or any part thereof, shall remain unpaid, the new town so formed, and the town to which shall be annexed the part taken from another town, shall pay a proportionate share of such bonds as shall remain unpaid, which share shall be ascertained from the assessed valuation of such town or towns as contained in the last equalized valuation of the assessment roll made prior to the formation of such town or the change of any such town line.

§ 2. It shall be the duty of the railroad commissioners of a town, any part of whose territory shall have been detached as aforesaid, to render a true statement to the board of supervisors, as now required by the general railroad act, of the amount necessary to pay the proportionate share belonging to the territory detached from their town which may be then coming due, and the board of supervisors shall add such proportionate share to the sums to be collected from the town so formed, or to which shall have been added the territory detached from the other town or towns, to be collected as heretofore provided for by statute.

§ 3. Such proportionate share of moneys so collected shall be paid by the supervisors of the town wherein collected to the railroad commissioners of the town or towns from which such territory shall have been detached, and such commissioners shall use such moneys for the payment of the bonds issued in the same manner they are required to use the moneys raised in their own town.

§ 4. This act shall take effect immediately.

CHAP. 529.

AN ACT in relation to mechanics' liens.

PASSED May 2, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The provisions of the laws relating to mechanics' liens, heretofore passed, shall apply to bridges and trestle work erected for railroads and materials furnished therefor, and labor performed in constructing said bridges, trestle work and other structures connected therewith, and that the time within which said liens may be filed shall be extended to ninety days from the time when the last work shall have been performed on said bridges, trestle work and structures connected therewith, or the time from which said materials shall have been delivered. This act shall apply to all uncompleted work commenced previous to the passage of this act.

§ 2. This act shall take effect immediately.

CHAP. 636.

AN ACT to provide for the better protection of life and safety of property transported on the several railroads of this state.

PASSED May 5, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. No person shall be employed as an engineer by any officer or agent acting for or in behalf of either of the railroads of this state, who cannot read the printed time tables and ordinary handwriting.

§ 2. No person shall run an engine on a regular or special train upon either of the railroads of this state who cannot read printed time tables and ordinary handwriting.

§ 3. Any person offending against the provisions of this act shall, upon conviction thereof, be deemed guilty of a misdemeanor, and punishable for each offense by a fine not exceeding one hundred dollars, or six months' imprisonment in the county jail, in the discretion of the court having cognizance of the offense.

§ 4. This act shall take effect immediately.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

The Albany Law Journal.

Albany, June 11, 1870.

SKETCHES OF EMINENT ENGLISH JUDGES.

I.

KENYON.

The subject of this sketch was a compound of contrary characteristics. He was deeply learned in the law, and profoundly ignorant of every thing outside of it; of the loftiest integrity and scorn of wrong, yet guilty of frequent practical injustice; of unaffected piety, yet sometimes approaching profanity in his coarse license of speech; of despotic and irascible temper, yet melted to tears by the occasional petulance of others; uncouth in address and clumsy and obscure in rhetoric, but never failing to enforce his points by an overwhelming directness; utterly destitute of wit and imagination, yet keenly appreciating them in his favorite Erskine; it is only for his vigorous impoliteness, his slovenliness, and his parsimony, that I can discover in his character no counterpoise in kind.

He was a Welshman, which may account for an irascibility that seems common to that race. The necessity of learning and pronouncing the Welsh language may reasonably be imagined sufficient to stamp an enduring irritability on the character. It is related in the life of Sir Leoline Jenkins, that a French courtier asked him where he was born; he replied that he was a Cambro-Briton. The Frenchman desiring to hear some of the language of the place, the judge complied by quoting the Welsh proverb, "Nid with y bag mae abnabod cyffyldy," which signifies that the goodness of a woodcock is not to be known by the length of his bill; a saying as fully applicable to lawyers as to woodcock. But Kenyon was proud of his country, and sensitive of her geographical honor. He once applied to Dunning for a frank, and the latter directed the letter "North Wales, near Chester," which made Kenyon exceedingly angry. Kenyon was born in 1732. His early educational advantages were small. Not being intended by his father for any thing higher than an attorney, he acquired but little classical knowledge. In this respect he was worse off than Shakespeare, for he had little Latin and no Greek. What little Latin he had was very bad, and his vanity of airing it rendered him constantly ridiculous. He was articled to an attorney, with whom he expected a partnership, but fortunately for him and the world, terms could not be agreed on, and he came to London and the chief justiceship. While he was in the attorney's office he was guilty of some poetry — another singularity in his character. Happily for our amusement a portion of his verses have been preserved. They commence thus:

> "Whilom as through the distant groves I strayed,
> And tender pastorals on my flag'let play'd
> The chirping birds in songs their joy exprest;
> All nature in a gay attire was drest."

He then eulogizes Sir Watkin Wynn, the hero of Welshmen:

> "There Watkin stood, firm to Britannia's cause,
> Guard of her ancient manners, and her laws.
> Oh, great good man! borne on the wings of fame,
> Far distant ages shall revere thy name:
> While Clwyd's streams shall lave the verdant meads,
> And Snowdon's mountains raise their lofty heads;
> While goats shall o'er thy hills, O Cambria, stray,
> And day succeed to night, and night to day,
> So long thy praise, O Williams, shall remain
> Unsullied, free from dark oblivion's chain."

It is evident from these specimens that Kenyon was not an inspired bard, and that if he had allowed poetry to monopolize his attention, his praise would have been troubled by the clanking of the aforesaid "dark oblivion's chain." We read that during his student days he was of a grave and serious deportment, of most correct habits, passionately addicted to the study of the law, and that he despised all amusements, such as dancing, the opera, and the drama. In later life he fell asleep at the first representation of Pizarro, which provoked Sheridan to say, "Alas, poor man, he fancies himself on the bench!" His intimate companions were Dunning and Horne Tooke. It is related that when they dined together, as was their constant custom, for seven and one-half pence a head, Dunning and Tooke would give the waiter a penny each, but Kenyon never more than a half-penny, and seldom more than a promise.

After being called to the bar in 1761, Kenyon followed the circuit for ten years. In his study and in his waiting for patronage, he acquired a knowledge of law more profound and various than that of any other lawyer of his time. Others excelled in particular departments; his acquirements comprehended all. At the age of 39, and when he had been twelve years in the profession, he married his cousin, with whom he lived long and happily. He left a fortune of £200,000. In 1781 and 1782, the last two years of his practice at the bar, his fees for cases and opinions alone were respectively 2,369 and 3,020 guineas. Court business came more slowly. His first great case was Lord Pigot's, against Stratton, in which he appeared for the prosecution. In that trial were, besides himself, Wedderburne, Wallace, Mansfield, Dunning, Arden, Wilson, and Erskine — a very respectable array of counsel, certainly. A little later he was senior to Erskine in the defense of Lord George Gordon. In 1782 he was appointed attorney-general, and carried confusion to friends as well as foes by his unsophisticated persistence in prosecuting the public accountants, to compel them to pay over to the government the balances which they had been in the habit of retaining, and using long after they should have been paid — a custom which corruption, otherwise called courtesy, had long winked at. In 1784 he was appointed master of the rolls, with a baronetcy. He recommended the prime minister, Pitt, to insist on the famous Westminster scrutiny directed against Fox. This led the latter to flay him in this fashion: "A third person there is whom I might in reason challenge — a person of a sober demeanor, who, with great diligence and exertion in a very respectable and learned profession, has raised himself to considerable eminence; a person who fills one of the first seats of justice in this kingdom, and has long discharged the functions of a judge in an inferior, but very honorable, situation. This person, sir, has to-day professed and paraded much upon the impartiality with which he should discharge his conscience in his judicial

capacity as a member of parliament in my case. Yet this very person, insensible to the rank he maintains, or should maintain, in this country, abandoning the gravity of his character as a member of the senate, and losing sight of the sanctity of his station, both in this house and out of it, even in the very act of delivering a judicial sentence, descends to minute and mean allusions to former politics, comes here stored with the intrigues of past times, and instead of the venerable language of a good judge and a great lawyer, attempts to entertain the house by quoting, or by misquoting, words supposed to have been spoken by me in the heat of former debates, and the violence of contending parties, when my noble friend and I opposed each other. This demure gentleman, sir; this great lawyer; this judge of law and equity and the constitution, enlightens this subject, delights and instructs his hearers, by reviving the interesting intelligence that when I had the honor of first sitting in this house for Midhurst, I was not full twenty-one years of age, and all this he does for the honorable purpose of sanctifying the high bailiff of Westminster, and defrauding the electors of their representation in this house." Fox's followers satirized Kenyon in the "Criticisms on the Rolliad," which, named after Rolle, the obnoxious member from Devon, they dedicated to Kenyon, with a caricatured half-length portrait of him on the title page, representing him like a lion demi-rampant, with a roll of parchment between his paws. After praising him for voting at the Westminster election as the delegate of his coach-horses (he lived in Lincoln's Inn Fields, but voted in right of some stables), the wits of that wicked miscellany sum up his parliamentary misdeeds in the following caustic satire:

'How shall the neighing kind thy deeds requite,
Great Yahoo champion of the Hounhuhm's sight?
O, may they gentle pacing o'er the stones,
With no rude shock annoy thy battered bones;
But when a statesman in St. Stephen's walls,
Thy country claims thee, and the treasury calls,
To pour thy splendid bile in bitter tide
On hardened sinners who with Fox divide,
Then may they, rattling on in jumbling trot,
With rage and jolting, make thee doubly hot,
Fire thy Welsh blood, inflamed with zeal and leeks,
And kindle the red terrors of thy cheeks,
Till all thy gathered wrath in furious fit
On Rigby bursts — unless he votes with Pitt.'

Kenyon's decrees as master of the rolls were sometimes overruled, from his pedantic adherence to precedents and a rigid construction, but his fidelity and industry were without parallel.

In 1788 he was ennobled, and on Mansfield's retirement created chief justice of England. In this position his treatment of his associates was cynical, overbearing and contemptuous. Impatient of contradiction, he regarded any dissent from his opinion (which rarely occurred) as a personal affront. He spoke unreservedly of his predecessors; wondered that Holt should descend to petty quibbles to overturn law and justice, and accused Mansfield of talking loosely. In one case, where there was a difference of opinion in the court, he thus went on: "If the present action could not be supported, he had now for twelve years been deceiving the people of his country. Was he now, when from years, perhaps, the progress of his intellect had been retrograde, to unsay it? Where could he go to hide his head, if this should new be recorded otherwise? What could he say to the people of his country?" And when his associates overruled him: "Good God! what injustice have I hitherto been doing!"

His treatment of the bar was even worse. To all, save Erskine, his manner seems to have been very offensive. To Law, who had unsuccessfully moved for a new trial, he sneered, "Well, sir, you have aired your brief once more." To Baldwin, who begged him, on the trial of a disputed account, to observe the distinction between two bills, he replied: "If you will give me leave, I think I have just sense enough to comprehend this bill." Complaint being made against Lawless, an honorable attorney, of some imputed misconduct, Kenyon, on the ex parte application, after granting the rule to show cause, added, "And let Mr. Lawless be suspended from practicing until the rule is disposed of," "My lord," exclaimed the attorney, in deep agitation, "I entreat you to recall that judgment; the charge is wholly unfounded; suspension will lead to my ruin; I have eighty causes now in my office." "So much the worse for your clients who have employed such a man!" was the reply of this ermined brute. The rule was eventually discharged, but the attorney died of a broken heart. To abolish sham pleas, Kenyon directed attorneys to attend the court, and disclose the reasons for their instructions.

Once in a while Kenyon met his match, and quailed. On the famous trial of Fox against his former companion Horne Tooke, the defendant, pleading his own case, started off "with informing the jury that there were only three efficient and necessary parties — the plaintiff, himself, and you, gentlemen of the jury. The judge and the crier of the court attend alike in their respective situations, and they are paid by us for their attendance; we pay them well; they are hired to be assistants and reporters, but they are not, and they never were, intended to be controllers of our conduct." On being interrupted by the judge, Tooke said: "Sir, if you please, we will settle this question between us now in the outset, that I may not be liable to any more interruptions from you." He then defended himself in his course, concluding, "At my peril I shall proceed, and expect to meet with no further interruption from your lordship." He was not interrupted again.

In the same speech Tooke made some observations on the source of the judicial tenure, which I commend to the attention of those who are favorable to the selection of judges by appointment: "I do not believe the dependence of the judges on the crown was so great formerly as at present. I believe the judges then were less dependent on the crown and more dependent on the people than they are at this hour. The judges then sat on the bench, knowing that they might be turned down again to plead as common advocates at the bar; and indeed it was no unusual thing in those days to see a counsel at the bar brow-beaten and bullied by a chief justice on the bench, who in a short time after was to change places with the counsel, and to receive himself the same treatment in his turn; and character and reputation were of more consequence to the judges then than they are now. They are now completely and forever

independent of the people, and have every thing to hope for for themselves and their families from the crown." I do not see how any republican, after reading the lives of such men as Eldon and Ellenborough, can advocate the choice of judges by appointment. A perusal of such biographies must convince one that even the wisest and purest men are safely intrusted with only a measured degree of irresponsible power.

As an example of Kenyon's intemperance toward suitors, I may cite General Gunning's case, in which he told the jury that the defendant Gunning was "an abominable, hoary, degraded creature."

Kenyon's morality was of the loftiest but narrowest kind. He encouraged actions of *crim. con.*, and under his rule verdicts of £5,000 and £10,000 were not unusual. He resolutely set his face against gambling, and threatened to prosecute those of the nobility who indulged in it. "They think they are too great for the law," said this amiable judge; "though they should be the first ladies in the land, they shall certainly exhibit themselves on the pillory." Gillray published a caricature, entitled the "Exaltation of Faro's Daughters," in which Ladies Buckinghamshire and Archer are represented side by side in the pillory, upon which is a placard, inscribed "Cure for Gambling, published by Lord Kenyon in the Court of King's Bench, on May 9th, 1796." An imitation of this print appeared shortly after, entitled "Cocking the Greeks," in which the same ladies were similarly exposed, the short and plump Lady Buckinghamshire being depicted as obliged to stand tip-toe on her own faro-bank box to raise her neck to her taller companion's level. Lord Kenyon, in the character of public crier, ringing his bell, proclaims, "Oh yes! oh yes! this is to give notice that several silly women, in the parishes of St. Giles, St. James, and St. George, have caused much uneasiness and distress in families, by keeping bad houses, late hours, and by shuffling and cutting have obtained divers valuable articles; whoever will bring before me," etc. His efforts to abolish the crime of duelling were more dignified and commendable. He also punished the libelers with a vigorous lash. His utter want of humor was amusingly evinced in the libel case of Lord Lonsdale. The libel complained of was as follows: "The printers are much perplexed about the likeness of the devil. To obviate this difficulty concerning his infernal majesty, the humorous Peter Pindar has recommended to his friend Opie the countenance of Lord Lonsdale." Erskine prefaced his argument for the defense by remarking that the writer made no malicious insinuation, for he did not recommend his lordship to be painted with horns. Kenyon hastily interrupted him: "The tongue of malice has never said that." It is unnecessary to follow him in his oppressive rulings of the law in these cases, to aid the cause of tyranny and the suppression of free speech.

It will be a comparative relief to turn from these considerations, and look for a moment at two less serious offenses — his parsimony and his bad Latin. In regard to the first, his idea of money is inferable from his remarks in a will case, in which, arguing for the right of testamentary disposition, he said: "If they were disappointed in that" — the right to leave their money as they please — "*the great and main pursuit of men in society* was disappointed." "Why do you mention his spit," said Jekyll, "when you know nothing turns upon that!" In relation to his want of hospitality, the same bitter wag said: "It is Lent all the year round in his kitchen, and passion week in his parlor." His penuriousness and his bad Latin were hit off by Ellenborough. After Kenyon's death, a hatchment was put on his house, with the motto painted by mistake, *Mors janua vita.* Eldon insisted that Kenyon so ordered it to save the extra expense of the final dipthong. In the house of lords he talked about *flagrante bello*, for *pendente bello.* He was continually lugging in classical quotations without regard to their appositeness, or care or knowledge of their correctness. When he wished to express the idea *stare decisis*, he would say *stare super antiquas vias.* Another favorite was *melius est petere fontes quam sectari rivos.* He would inform the bar that "the court will take time to consider this case '*propter difficultatem.*'" "Go to chancery," said he to an importunate suitor, "*abi in malem rem.*" "Taffy," said Thurlow (he always called him Taffy), "when did you first think the court of chancery was such a '*mala res?*' I remember that you made a very good thing of it." To illustrate the conclusiveness of some fact, he said: "It is as plain as the noses on your faces — '*latet anguis in herba.*'" In "Westminster Hall," a miscellany of legal anecdote, he is scarcely caricatured when represented as saying to a jury: "Having thus discharged your consciences, gentlemen, you may retire to your homes in peace, with the delightful consciousness of having performed your duties well, and may lay your heads upon your pillows and say, '*aut Cæsar aut nullus.*'"

His choice of English was hardly more judicious, and mixed metaphors disfigured his speech. For instance: "The allegation is as far from the truth 'as old Bolerium from the Northern Main,' a line I have heard or met with Gods know wheer" — (his mode of pronouncing *where*). "This is the last hair in the tail of procrastination." "If a individual can *break down* any of those safeguards, which the constitution has so wisely and so cautiously erected, by *poisoning* the mind of the jury when they are called upon to decide, he will *stab* the administration of justice in its most vital parts." The estimate which his contemporaries put on his learning is evidenced by Coleridge's apochryphal story that he referred to the emperor Julian as "so celebrated for every christian virtue that he was called Julian the Apostle!" Add to this that his elocution was extremely ungraceful and indistinct, and his attire slovenly and mean, and we think he must have been a pretty figure for chief justice of England!

What, then, was the secret of the success of this man, set to succeed the learned, the courtly, the persuasive Mansfield? In a word, it was this: he knew the law, and honestly and fearlessly administered it. When Erskine and Mingay were in high debate, he settled the controversy in his own rough way: "This is a contest, gentlemen, for victory, and not for justice; but I have made up my mind and will not be moved from it, though assailed by rudeness on the

one hand and flattery on the other." This was the key-note of his entire course. He never missed attending church in twenty-six years. He was an uxorious husband and a fond father. He revered the jury system almost to adulation. These last three traits were sufficient to endear him to the British public, even if he had not been an accomplished lawyer. I have dwelt on his foibles and short comings because they are not found in the books. His learning adorns every page of the reports, and has left the marks of its forming hand on a vast quantity of our law.

ON USURY.

(*Concluded from page* 431.)

As to usury, in parties procuring loans, it may be said that, whether a bonus or premium is in the nature of a gift or promise at the time of the transaction, is a question of fact; if the undertaking assumes distinctness enough to become a contract for additional interest, the penalties of the usury law would attach. In New York city a very large business is done by brokers in procuring loans of money, and the question often arises, what transactions are usurious? It is clear that if the borrower pays a broker, or any other person, a commission for his services, in effecting a loan, in addition to paying lawful interest, it does not render the loan usurious: provided, the broker or the persons acts as agent merely, and is not in fact the person making the loan, and the lender receives no part of the commission. *Condit* v. *Baldwin*, 21 N. Y. 219. On the other hand, if the loan was in fact made by the person pretending to act as broker, his receiving a commission beyond simple interest would constitute usury.

It is abundantly sustained by Prof. Parsons, in his work on Contracts, and by decisions of this state and others, that the lender, whether banker or broker, may charge, in addition to the discount, a reasonable sum for his trouble and services in procuring the loan. And this principle or rule is not confined to bankers and brokers, but is extended to all cases in which there may be such services as are fairly entitled to compensation, although the lender be neither banker or broker, nor engaged in trade, and lends his own money. Nor, if it be in words and form usurious, will it be held so, if in substance and in fact it is entirely legal. And all these questions are for the jury to determine, who must judge of the intention of the parties, which lies at the foundation of the inquiry, from all the evidence and circumstances. The ordinary discount of a bank, although it take in fact something more than lawful interest, is held not usurious.

In the case of *Stores* v. *Coe*, Judge WOODRUFF says: "The lender, when he claims for extra trouble, must show the trouble and expense particularly, and then he may recover. If there has been a *bona fide* sacrifice of time, money or property, for the benefit of the borrower, or for his accommodation, he may recover an extra premium, and it will not be usury; and as to what is a reasonable commission or compensation cannot be gathered from reported cases, but must, of course, be a matter of proof. 11 Barb. 80.

The most recent and controlling case, perhaps, on this question is the case of *Thurston* v. *Cornell*, 38 N. Y. 281; therein it was held that, where a party is solicited to make a loan, and, to procure the means of doing so, spends time and incurs trouble and expense in collecting the same from others, and does this at the request of the borrower, and upon his agreement to pay for such services and expenses, the transaction is not usurious.

And the amount of the commission is of no importance, except so far as it may bear upon the question of fact, whether there was an usurious intent. So, also, held in the case of *Smith* v. *Marvin*, 27 N. Y. 137.

In a case which we tried at the January circuit, 1870 (*Lange* v. *Hempstead*), where our client sued to recover a large sum, being the amount of several loans, the defendant set up usury. The case turned principally upon the questions whether the amounts received by the plaintiff, or agreed to be paid by the defendant, over the sums loaned, were agreed to be paid as extra interest, or for trouble and expense in getting the money to loan.

The court charged the jury that they were to judge of those facts, and decide from all the circumstances in the case, and that if the sums agreed to be paid were intended as for the trouble and expense in getting the moneys, there could be no usury; and the jury returned a verdict for the plaintiff.

In determining the question of usury each particular loan must stand distinct and separate, and must be sustained or fall by itself, and cannot ordinarily be varied or modified by extrinsic circumstances. Thus, no evidence of prior loans is admissible to prove usury against the loans in suit, unless they be connected, and in some way be a part of the same transaction. This view is well established in the court of appeals case of *Catlin* v. *Gunter*, 11 N. Y., 368; also, it is so laid down in the case of *Eagle Bank of Rochester* v. *Rigney*, 33 N. Y., 613.

If a party guarantee or indorse paper for two months at two and one-half per cent, it is not usurious (where there is no loan), for a man may lend or sell his credit as well as goods and lands, dealing fairly, at any price he can get. This principle is fully sustained in the cases of *Reed* v. *Smith*, 9 Cowen R., 647, and 4 Denio, 264.

If A loan money to B on simple interest, and on paying the same B expresses gratitude by a gift to A, either of money or goods, this would not be usurious. But, if it be given in accordance with a previous promise, usury would attach.

The best authorities recognize the principle that none but parties or privies to an usurious contract can take advantage of it: and to avoid a security it must be shown that the agreement was usurious from its origin or inception. *Nichols* v. *Fearson*, 7 Peters R., 103; 8 Mass., 101.

Usury, though commonly considered an unconscionable defense, is still a legal one, and if proved clearly, the courts are bound to sustain it; if impolitic (as we shall endeavor to show), the legislature alone can annul or repeal it.

It is a defense which is not encouraged by the courts in New York state; and by the laws of 1850

neither a corporation nor a receiver of one can maintain an action to recover back usurious premiums paid by it.

As I have already indicated, the courts of New York do not encourage the defense of usury; in fact they are prone to look upon it with disfavor, and to hold the party who sets it up to strictest proof.

The technical, honorable and astute Judge LOTT, in delivering the opinion of the court in the case of *Valentine* v. *Conner*, 40 N. Y., 249, says: "It must be considered the settled rule of law in this state that the *onus* is upon the party seeking to avoid an agreement as usurious, not merely to establish an usurious intent, but to prove the facts from which that intent is to be deduced." Also see 32 N. Y., 605.

And the able Judge BROWN, in commenting upon the statute of usury (passed 1837), in the renowned case of *Curtis* v *Leavitt*, 15 N. Y., 151, observes: "It is in fact a barbarous act, unworthy of the age and country where it is found, for it abrogates the just and equitable maxim that a plaintiff, to entitle himself to equity, must do equity, and required the chancery courts to lend their aid to enforce a penalty or forfeiture."

Although the sentiment expressed by Judge BROWN is positive and strong, and may seem to go rather far, yet the judges of our state, we are led to believe, are prone to view the law in a similar aspect.

As to the mode of pleading usury, we may observe that, where usury is set up as a defense, the usurious contract should be so pleaded that it may appear what rate or amount of interest was taken or secured, and on what sum or sums, and for what time; and the answer should show a corrupt intent.

When these facts appear from the terms of the answer, nothing further is necessary to make it sufficiently definite.

If the answer avers that the plaintiff discounted the drafts (for example), sued on at an usurious rate of interest, contrary to the statute, and then specifies the amount of interest taken, this, though it may or may not be an insufficient averment of a corrupt intent, is not so palpably defective in this respect as to authorize a judgment for the plaintiff for frivolousness. It was thus substantially held in the recent case of *The National Bank of the Metropolis* v. *Orenth*, 48 Barb.

Having thus given a bird's-eye view, and some illustrations of the practical bearing of the usury law of the States, let us proceed to consider its incommodities, and the desirability of a reform in the law of New York.

We are told that the Mosaic law prohibited the Jews from taking interest; but this may be shown to have been more a political than a moral precept, for it only prohibited them from taking usury of their own race, expressly allowing them to exact it of strangers. As we read in Deut. xxiii, 19, 20: "Thou shalt not lend upon usury to thy brother; usury of money, usury of victuals, usury of any thing that is lent upon usury. Unto a stranger thou mayest lend upon usury, but unto thy brother thou shalt not lend upon usury."

Which is conclusive from this stand-point, that the taking of usury, or a reward for the use — (for so the word signifies) — is not *malum in se*. Overscrupulous writers have often drawn arguments from this source, and from the fanciful theories of Aristotle, Domat, and Pothier, that, as money is naturally barren, to make it breed money is preposterous.

Against the taking of usury, some theorists have held that it were a "pity the devil should have God's part, which is the tithe;" that the usurer is the greatest Sabbath breaker, because his plow goeth every Sabbath, and that he is the drone Virgil speaketh of, *Ignavum fucos pecus a præsepibus arcent.*

The canon law likewise prohibited the taking of any interest for money loaned, pronouncing it a "mortal sin." It is not surprising, that under such strenuousness, the taking of interest should have been looked upon with profound jealousy; and, as some writer has said, with "horror and contempt."

In that age, when nothing was considered honorable but the plow and the sword; when money, as such, was comparatively a secondary consideration — not a merchantable commodity as now; it may be readily imagined how thoroughly the popular mind became imbued with this sentiment. There seems to be no foundation in natural or revealed religion, inhibiting a man from realizing a profit on his money as well as on articles of merchandise; or, if A were to let his horse to B to go a journey, it is no more than just that A should receive an equivalent for such benefit; and, within the purview of the statute, a compensation in such cases greater than the rate of seven per cent, is a simple hiring. 4 Wend. 679: Ord on Usury, 28.

Before proceeding further in this inquiry, it may be proper to enumerate the arguments used by able authorities on the respective sides; and, firstly, those sustaining their policy.

It is observed by Dr. Adam Smith, in his "Wealth of Nations," "that if the legal rate of interest was fixed at a high rate, the greater portion of the money of the country would be lent to prodigals and projectors, who, alone, would give so much, and thus, instead of being employed to profit and advantage, as it might be in better hands, it would most likely be wasted and destroyed; and that such an alteration would lessen the value of land."

That these reasons are the principal ones relied upon in support of this side of the question, may be shown by the language of Lord Chief Justice BEST, who, in delivering the opinion of the twelve judges, in the house of lords, on a question of foreign interest, observed: "That the supposed policy of the usury laws, in modern times, is to protect necessity against avarice; to fix such a rate of interest as will enable industry to employ with advantage a borrowed capital, and thereby to promote labor and increase the national wealth; and to enable the state to borrow on better terms than would be made, if speculators could meet the minister in the money market on equal terms."

With all due deference to the weight of authority, there seems much in these arguments subject to denial and exception.

First, it is asserted "that the greater portion of the money of the country would be lent to prodigals who alone would give so much." Here we remark, in the first place, that the lender — unless more simple than is characteristic of that class — would never lend his

cash to prodigals without ample security for its payment; and, on the other hand, the prodigal, however prodigal he might be, would not be likely to pay exorbitantly when it could be procured at a cheaper rate.

If the prodigal could give security, he could borrow on equal terms with others. If he can give no security, he cannot borrow at all; or, if lent to him on risk, such risk ought to justify the excess over the regular rate.

With respect to the efficacy of protecting men against themselves, however desirable such a course might be, it is, in this respect, impracticable, unless by placing such parties under the guardianship or administration of their friends. Besides this, those who require this protection against themselves are very few, and would not justify a rule which would affect the great majority alike with the others.

As for the argument that the government would be able to borrow money on better terms if a rate of interest be fixed, it may be said that at whatever rate it be fixed, yet the capitalist would still not lend when other good investments paid a higher rate. So that, in any event, the government would be subject to competition in this respect, and would be still affected by its current price. But let us examine authorities on the other side.

"Money," observes Mr. Locke, "is an universal commodity, and is as necessary to trade as food is to life; and everybody must have it at what price they can get it, and invariably pay dear when it is scarce; you may as naturally hope to set a fixed price upon the use of houses or of ships as money." "Those who will consider things," he continues, "beyond their names, will find that money, as well as all other commodities, is liable to the same change and inequality, and the rate of money is no more capable of being regulated than the price of land; because, in addition to the quick changes that happen in trade, this too must be added, that money may be carried in or out of the kingdom, which land cannot." Lord Bacon also, considering this subject, remarks, "that it is vanity to suppose there can be borrowing without profit; and as great inconveniences would arise if borrowing were cramped, in order to retain the advantages and avoid the disadvantage of usury, two rates of interest, a less and a greater, should be adopted, the one to suit the borrower who has good security, and the other to suit the merchant, whose profit being higher will bear a greater rate."

Similar views are expressed by Jeremy Bentham, in his defense of usury, where it is said that "the idea of fixing one rate of interest for every kind of security, and at every period, is as absurd as if the law were to fix the same price for all horses, as the value of horses differs not more than the value of money on different occasions."

And Lord Brougham, in a speech delivered in the house of commons in 1816, declared that the repeal or modification of the usury laws was a measure, in the present age, all mankind agreed was perfectly safe, calculated to afford the greatest measure of relief, and innoxious to the borrower, the lender, and to the state. It has always seemed to us that a valid and principal objection to these laws is that they establish an uniform rate for all risks; and the risk being always greater or various in mercantile affairs, their operation is manifestly injurious to the trading interests.

It seems clear that no one would lend on *bottomry* or *respondentia* at the same rate as upon mortgage security; and to make a distinction on principle would be vacating the reasons upon which the usury laws rest.

In 1834 a petition was presented to the legislature of Massachusetts from certain citizens of Boston, which, after setting forth that such laws were founded on erroneous principles, and were at variance with the commercial spirit of the age, asked that they be totally repealed. In the same year the committee to whom it was referred submitted a report which indorsed the arguments of the petitioners, and admitted that, on principle, their total repeal would be justified. The committee, however, in considering that such sudden and extensive changes in the laws would be generally inexpedient, were content with recommending their repeal only so far as they affected promissory notes and bills of exchange.

Amendments of a similar import were proposed by a committee of the house of commons in England as early as 1818.

To establish a just and proper medium, so that moneyed men will be induced to lend their wealth, and thereby quicken trade, has been considered by practical thinkers as the safer and more politic principle, especially in a government whose organic law partakes either of the republican or democratic form.

In the Athenian republic, Solon is said to have permitted the people to regulate the rate of interest by contract; but De Pauw observes, that usage finally fixed the rate at twelve per cent, in certain cases, and eighteen per cent in others.

Grotius believed that a "reasonable interest" ought to be allowed upon loans; but as to what constitutes a reasonable rate must, in the nature of things, be determined and regulated by circumstances — the peculiar state of society, commerce, and country, and the manner and kind of business transacted — for what would suit the demands of the people in China would not meet with favor in England, neither will the rate of interest adapted to an inland state or city satisfy the people of a seaport city or state.

That it is desirable to inaugurate a reform in the usury law of New York seems apparent, but how, and in what particular mode, is not an easy problem to solve.

In times of great financial embarrassment — when money seems to be worth almost any price to the borrower — when men are ready to hypothecate their real estate or stock in trade, and stipulate to pay enormous rates of interest — at such times it is that a law just and equitable should limit the rate of interest. It is necessary for the security of the community that some rate, commercially just and equitable, should regulate interest, so that the rash borrower or speculator shall be properly curbed in his eagerness to raise money; and thus, while the borrower is restrained, the creditor is protected.

To establish a legal rate at, say six or seven per cent, with the privilege of allowing the parties to

contract for a larger rate — say as much as ten or fifteen per cent per annum, or without having any limitation whatever — it seems to us that it would be better adapted to the wants of the community, particularly in our larger cities, than the present law.

The late Henry Thomas Buckle (who was one of England's brightest intellects), in descanting upon Aristotle — whom he considered little inferior to Plato in depth, and much his superior in comprehensiveness — of his speculative idea, that no one should give or receive interest for the use of money, remarks: "An idea, which, if it had been put into execution, would have produced the most mischievous results; would have stopped the accumulation of wealth, and thereby have postponed for an indefinite period the civilization of the world."

Thus, upon Mr. Buckle's philosophy, the receiving a reward for the use of money, during the past few centuries, has not only not made the world more corrupt, but has produced a healthy zest in trade, yielding wealth and all the desirable elements of a true civilization.

Keeping in view the wants of commerce, the courts of New York state have invariably leaned toward the side of equity — deprecating the plea of usury. And who can deny but that it is better for a people to have laws which will be administered with respect and meet a ready acquiescence, than to have them evaded by the business community and the courts.

There are but five states that have the same law governing usury as the one of our state, and those are New Jersey, Virginia, North Carolina, and Florida; and in each of those states shifts and devices are continually being propagated by business men to avoid the penalty.

Prior to May 15, 1837, the laws against usury had much relaxed; but by an act of that date, the rigor of this prohibition was restored in fullest force, and usury thereby is made a penal offense. In 1850 (Laws, chapter 172), an act was passed prohibiting corporations interposing the defense of usury in any case. That was a step, at least, in the right direction. Fortunes are daily being made in Wall street by money begetting money, despite this rigorous law; and no one rails on the man now-a-days who loans his money to the best advantage, taking his chances of the breach of honor and of law, nor is the matter even tauntingly cast up to such lenders, as was the wont a few centuries ago, against which old exacting Shylock is represented as having retorted:

> ——"he rails,
> Even there where merchants most do congregate,
> On me, my bargains, and my well-won thrift,
> Which he calls interest."—*Merchant of Venice.*

The incommodities or disadvantages of this usury law of New York must be apparent to every candid and thinking mind. If the law were to be repealed or modified, who can doubt that there would be more merchants and greater thrift, as more capital would then be employed in a thousand avenues where now is nought but inactivity. For certainly nothing can promote thriftiness in every branch of trade more readily than perfect freedom to buy and sell.

The statute makes an exception in contracts of *bottomry* and *respondentia*, when, in fact, in money loans the compensation received for the benefit, we submit, ought to be commensurate with the use and inconvenience or hazard incurred by the lender. And we fail to discover any thing in the nature of such contracts necessitating this sharp distinction. The theory that prodigality would follow by greater facility in borrowing has been exploded; and it has never been so demonstrated by history. On the contrary, we hold that by restrictive laws in times of emergency or panic, money is largely enhanced, causing the pressure greater upon the distressed, compelling ruinous sacrifices of property, as in such times men will not lend at regular rates of interest, and if more be stipulated for, would continuously tremble under usury's fearful arm. Men have thus been bankrupted and ruined rather than run the risk of violating this law, which in doing, perhaps, would lose for him both "itself and friend."

The prohibitory system thus aggravates the very evils which it was intended to mitigate, making often the poor poorer, as was realized in the panic of 1857; the rich more avaricious, the cautious more timid, the prodigal more prodigal, the rash more rash, and introducing many perturbations in society, which secretly impair or sap the foundations of truth and commerce.

The statutes of some of the states have wisely provided, that a greater rate than simple interest may be recovered if specified in writing, which provision has proved to be (as in Michigan and Illinois, for example) far more advantageous than a law like that of New York. And even in California, where they have no penalty for usury, but parties are left free to contract for money or goods, commerce thrives almost beyond comparison. A usury law of some kind may possibly be shown to be necessary in New York, but we hold that the present one works indubitable evils.

From our experience and observation, we would earnestly recommend that interest be still legalized at six or seven per cent, to be taken by moneyed corporations; but we hold that it would be most politic and beneficial, at the present time, to allow individuals to make such contracts relative to money advances or loans as they shall determine, limiting them, say to two per cent a month. Such a reform in our law would, without doubt, work very beneficent results, and commercial men and the courts would then respect and strenuously uphold the law; as with Lord Bacon, we believe, "it is better to mitigate usury by *declaration* than to suffer it to rage by *connivance.*"

CURRENT TOPICS.

The time has gone by when the belief was generally entertained that English law was the perfection of human reason, and, consequently, the reluctance to alter it is found only among a small class, that might properly be termed ancient conservatives. The bills of Lord Chancellor Hatherly, to reform the law and practice in England, have stirred up a couple of these ancients, in the persons of Lord St. Leonard, and Lord Chief Justice COCKBURN, who have severally written letters to the lord chancellor, strongly denouncing his proposed reform. We confess our inability to understand, from the data at hand, the ground of the opposition; but that it is not the proposed

fusion of law and equity is evident. We wonder at this, since the union of law and equity is the very climax of revolution. The result of these letters, coming as they do from such high sources, may be to postpone for the session legislation on the subject. A strong effort was made in the house of lords, on the 30th ult., to postpone the high court of justice bill; the Marquis of Salisbury said all the judges and two ex-chancellors were opposed to the measure, and Lord Cairns announced his intention to oppose the bill clause by clause. But the lord chancellor refused to postpone, and the house went into committee on the bill and adopted several amendments.

Both the new court of appeals and the commission of appeals are to meet and organize at the capitol, in Albany, on the first Monday (4th) of July next. On Tuesday following the court of appeals will commence a term for the hearing of causes in the senate chamber. The causes and matters on the existing calendar not pending on the first day of January, 1869, are to be placed upon the new calendar, and are to be deemed regularly noticed and ready for hearing. Causes and matters not upon the existing calendar, and brought into the court of appeals since the above date, may be noticed for hearing at such term and placed upon the calendar. The commissioners of appeals are to commence a sitting on the same day — Tuesday 5th — to dispose of the business on the calendar on the first day of January, 1869. The calendar prepared for 1870 is to be taken as the calendar of the commission, and causes are not required to be further noticed.

The election of Judge GROVER to the new court of appeals devolves upon the governor the duty of selecting two commissioners of appeals. The three other commissioners are the remaining judges of the old court — John A. Lott, Robert Earl and Ward Hunt.

The United States senate has passed the bill to change the judicial circuits. The amendment of Mr. Ferry, to add Connecticut to the second circuit was lost, so that New York alone constitutes that circuit. The bill constitutes the various circuit courts as follows:

First — Maine, New Hampshire, Vermont, Massachusetts, Rhode Island and Connecticut.
Second — New York.
Third — New Jersey, Pennsylvania, Delaware, Maryland and Virginia.
Fourth — Mississippi, Louisiana, Texas and Arkansas.
Fifth — North Carolina, South Carolina, Georgia, Florida, Alabama and Tennessee.
Sixth — Ohio, Michigan, Kentucky and West Virginia.
Seventh — Illinois, Indiana and Wisconsin.
Eighth — Minnesota, Iowa, Nebraska, Kansas and Missouri.
Ninth — California, Oregon and Nevada.

The supreme court justices, except the chief justice, are required to reside in their respective circuits.

Mr. Drake, who believes that there is something in a name, succeeded in putting in an amendment, which he explained as intended, in any possible future impeachment trial of the president, to prevent the chief justice of the supreme court from arrogating to himself the title of chief justice of the United States, which, he said, was done by Mr. Chase when presiding at the trial of President Johnson.

The supreme court of Kansas has decided that an Indian has an inalienable right to go to Washington whenever he pleases, provided he pay his own expenses and refrain from a too free use of the tomahawk and scalping knife. The case arose in this wise: Keokuk, chief of the Sac and Fox tribes, having discovered that Washington was the Mecca to which great white men and great negroes made pilgrimages, concluded that great Indians should do the same. When lo, one Wiley, the agent whom the government had in its generosity appointed to look after the temporal welfare of these tribes in general, and of himself and special friends in particular, notified the aforesaid Keokuk that Commissioner Mix, of the Indian department, had directed that no delegation from any tribe should visit Washington, as there was no appropriation to pay their expenses. Keokuk, however, determined to make an appropriation himself; and, having put money in his purse, started. At Lawrence, Kansas, he was overtaken by the aforesaid Wiley, arrested and put in durance vile, from which he was at length liberated by a writ of *habeas corpus*. Whereupon he brought suit against Wiley for assault and battery and false imprisonment, and recovered a verdict of $1,000. On appeal the judgment was affirmed by the supreme court. The argument of James Christian, counsel for Keokuk, of which we have received a copy, was a very able and elaborate review of the status and rights of "Lo, the poor Indian."

The June number of the *Galaxy* has an interesting chapter from the autobiography of the Hon. Thurlow Weed, entitled "Early Incidents of the Rebellion," from which we extract the following reference to the death of Col. Edward D. Baker, of whose life we gave a brief sketch on page 365:

"Several weeks afterward, but during that disastrous summer, I was again in Washington, when the news of that appalling defeat at Ball's Bluff was received. Coming as it did when we were disheartened by repulses in other quarters, it had a sickening effect upon the public mind. I was sitting, about 9 o'clock in the evening, alone with Mr. Lincoln, endeavoring to find encouragement or hope from intelligence received from the operations of the army in other places, when a messenger announced an officer from Ball's Bluff. That officer proved to be a brother of Colonel Baker, who had fallen in that battle. He was accompanied by a young son of Colonel Baker, the brother and son having been both engaged in the fight. An impression had already reached Washington that Colonel Baker had imprudently engaged a superior force, and was, therefore, responsible for the disaster. The colonel's brother handed to the president the order from General Stone under which Colonel Baker acted. That order was found in the colonel's cap, so saturated with blood (the colonel was shot through the head) that it was scarcely legible. The president, however, succeeded in reading the

whole of it. Its preservation, fortunately for Colonel Baker, was a perfect vindication of his conduct. He had acted in strict obedience to its letter and spirit. I left the brother and son of Colonel Baker with the intention of informing the secretary of war that Colonel Baker had lost his life in the gallant discharge of his duty, and in obedience to the orders of his superior officer. Near the residence of Secretary Seward I met Colonel Thomas A. Scott, the assistant secretary of war, who informed me that he was on his way to the office of the agent of the associated press, with a dispatch in relation to Ball's Bluff. I informed him that I had information which might change the character of his dispatch. He replied that he had just left General McClellan (whose house was but a few rods off), who had made up the dispatch from the latest information. He went with me, however, into Secretary Seward's library, where, on reading the dispatch, I found that it threw the responsibility of the battle and the defeat upon Colonel Baker, though expressed in kindly language and with mitigations. Colonel Scott, at my suggestion, went immediately to the White House, and, I believe, from there back to General McClellan's, where the dispatch was so modified as to relieve the memory of a gallant officer of the greatest injustice.

"The body of Colonel Baker was rescued from the field by Louis Bierrel, a soldier from the city of New York, who stood by his gun until the enemy were upon him, when, with a comrade, he bore away the lifeless body of his commander. At the close of the war I obtained a situation for this faithful soldier in the Custom House; but I regret to say that some two years ago, for no fault of his own, he was discharged."

OBITER DICTA.

Interesting to abuttors on highways—"Ram on Facts."

Can trover be brought for a converted Jew?

"Sweet are the uses of adversity" no doubt, but we generally prefer the "uses and trusts of prosperity."

When the Hanlon brothers are performing their trapeze feat, does not each one hold himself out as a partner?

The rule in Shelley's case (and in pretty much every other, according to a popular error), that where the lawyers get the oyster and their client the shells.

Leading question. (Sharp-featured maiden lady to absent-minded whist player on her right.) Perhaps you are not aware, Mr. Wobbler, who took that last trick?

If a tenant at will should set himself on fire upon the premises with intent to consume them, whether the landlord could put him out without giving notice?

It has been suggested that the easiest way to dispel a crowd is to pass around a hat and take up a collection. But this would have no effect on a mob: there is no contribution among wrong doers.

A wag wrote on a constable's slate: "I have a writ against Bailey's menagerie. Will you attach the lion and put a keeper in his cage? I guess you had better attend to this personally."

We noticed an advertisement lately, "Law office to let, —— porter, furnished with gas and water." Porter furnished with gas and water, we should imagine, might exhibit some of the pleasing and exhilirating effects of whisky and soda-water, concerning which we only can speak, of course, from hearsay.

In the supreme judicial court of Massachusetts recently an attorney asked leave to take up a case.

Judge. What is it?

Attorney. Libel for divorce, your honor.

Judge. How long will it take?

Attorney. About an hour, sir.

Judge. What is the charge?

Attorney. Fifty dollars, your honor.

His honor could not have thought that unreasonable, though he had to put the question again to find out whether "cruelty" or "adultery" was alleged.

Jerry Slocum is a pretty good sort of a fellow, but, as the French say, he never invented gunpowder. His talents were not exactly adapted for an effective address to the jury. Jerry could not wax eloquent without a good deal of effort; and if any thing occurred to change the current of his observation Jerry was certain to go hard and fast ashore. One day he was pleading for a rather sorry looking plaintiff, who sued on a grocery bill for cheap whisky,— where the other side set up a liquor defense. Jerry concluded to go in "on the pathetic."

"Gentlemen, my client comes here and sues on this bill, and they are trying to cheat him out of it. He is an honest, hard working man; a poor man, gentlemen, who is trying to eke out a precarious subsistence by selling a little liquor"—

"No I aint!" interrupted his client, who, though pretty seedy in appearance, wanted the jury to understand that he stood *somewhere* in the community,

Jerry did not enjoy arguing the rest of that case.

DIGEST OF RECENT ENGLISH DECISIONS.

(*Concluded.*)

(Q. B. refers to Queen's Bench; C. P. to Common Pleas; Ex. to the Exchequer; P. C. to the Privy Council; Ch. to Chancery; M. C. to Magistrates' Cases; P. & M. to Probate and Matrimonial, and L. J. R. to Law Journal Reports.)

LIBEL.

Army: reports made by commanding officer: military discipline: articles of war.—To a declaration, in an action for libel, setting out letters written of and concerning the plaintiff, the defendant pleaded, in substance, that when he wrote the letters he was the superior military officer of the plaintiff, and that it was his duty, as such superior officer, to forward to the adjutant-general letters written by the officers under his command, and sent to him in relation to their military conduct, etc., and to make reports in writing to the adjutant-general upon such letters for the information of the commander-in-chief; that he (defendant) had received such letters from the plaintiff, and had forwarded them in the ordinary course of his military duty, as such superior military officer, to the adjutant-general as an act of military duty, and not otherwise, and had made certain reports in writing, etc., which letters and reports were the libels complained of. To this plea the plaintiff replied that "the said words in the declaration mentioned were written and published by the defendant of actual malice on his, the defendant's, part, and without reasonable, probable, or justifiable cause, and not *bona fide* or in the *bona fide* discharge of the defendant's duty as such superior officer, as in the said second plea alleged." *Held*, by Mellor, J., and Lush, J., that even though the words complained of were published of actual malice, and without any reasonable, probable, or justifiable cause, as alleged in the replication, yet that, inasmuch as the

question raised was one purely of military cognizance, the plaintiff and the defendant being officers in the army, and both bound by the articles of war, the plaintiff had no remedy at law. *Held*, by Cockburn, C. J., that the plaintiff was entitled to judgment. *Dawkins* v. *Paulet*, Q. B., 39 L. J. R. 53.

LIEN. See *carriers by railway.*

LANDS CLAUSES CONSOLIDATION ACT.

1. *Land owners having absolute title between them: cost of re-investment in land to be conveyed to different uses.* — A railway company took, under their compulsory powers, land which was settled in such a way that a father and son had at that time between them the absolute beneficial interest. The purchase-money, as fixed by arbitration, having been paid into court: *Held*, that the owners were entitled to have part of the fund paid out to them as absolutely entitled, and at the same time to have another part re-invested in the purchase of land, to be settled to somewhat different uses, at the expense of the company. *Re Jones's Trust Estate*, Ch., 39 L. J. R. 190.

2. The petition having asked that part of the fund should be applied in paying off a mortgage created after the payment into court, the petitioners had to pay the costs of the mortgagees' appearance. *Ib.*

LEASES AND SALES OF SETTLED ESTATES.

1. *Undivided share: entirety: title under order of court.* — Testator devised an estate in fee, upon trust to let and manage it during the life of his wife, and the minority of any of his children, and to pay a moiety of the net profits to the wife for life, and subject thereto in trust for the children in fee in equal shares. The trustees, with the widow and children, having obtained an order for the sale of part of the estate, under the settled estates act, the purchaser objected that one moiety of the estate was not "settled": *Held*, that the whole was a *settled estate* within the act. *Held also*, that, if the order was wrong, the purchaser having the concurrence of all persons beneficially interested would take an indefeasible title under the 28th section of the act. *In re Shepheard's settled estate*, Ch., 39 L. J. R. 173.

2. *Semble:* Where an undivided share of an estate is settled, the entirety may be dealt with as a settled estate within the act. *Ib.*

LIMITATIONS, STATUTE OF.

1. *When the statute begins to run: mercantile law amendment act*, 1856: *retrospective enactment.* — The word "return" in the 7th section of 21 Jac. 1, c. 16, means being in England at the time when the statute begins to run, although the person has never been in England before. *Purdo* v. *Bingham*, Ch., 39 L. J. R. 170.

2. The 10th section of the mercantile law amendment act (19 & 20 Vict. c. 97) is retrospective in its operation. *Ib.*

MANDAMUS.

Declining of jurisdiction. — At courts respectively holden under 5 and 6 Will. 4, c. 76, s. 18, the mayor and assessors held that certain notices of objection were insufficient, and retained the names upon the lists without inquiring into the qualifications of the persons objected to. *Held*, that there was such a declining of jurisdiction, that this court would interfere by mandamus, and would order the mayor and assessors to hold courts and hear the objections. *R.* v. *Mayor, etc., of Monmouth, and R.* v. *Mayor, etc., of Bolton*, Q. B., 39 L. J. R. 77.

MARINE INSURANCE.

1. *Valued policy, how far binding on assured: ship valued at less than actual value: right of underwriter to damages recovered by assured.* — Where a vessel assured by a valued policy is destroyed by collision, the underwriters, after paying the amount insured, are entitled to the damages recovered from the colliding vessel, although the amount insured by the policy is less than the actual value of the vessel insured. *North of England Iron Steamship Insur. Assoc.* v. *Armstrong*, Q. B., 39 L. J. R. 81.

2. Plaintiff subscribed a policy valued at 6,000*l.* on the defendants' vessel. Pending the risk this vessel was sunk by a collision. Plaintiffs paid defendents 6,000*l.*, and proceedings having been taken in the admiralty against the colliding vessel in the name of the defendants, a sum exceeding 5,000*l.* was recovered as damages. The vessel insured was really worth 9,000*l.* at the time she was lost. *Held*, that the valuation in the policy was conclusive, so that the whole of the damages recovered must be regarded as salvage, and would pass to defendants. *Ib.*

3. *Constructive total loss: form of notice of abandonment: insurable interest: disbursements.* — It is not necessary to use the word "abandoned" in a notice of abandonment; any equivalent expressions which inform the underwriters that it is the intention of the assured to give up to them the property insured, on the ground of its having been totally lost, is sufficient. *Currie & Co.* v. *The Bombay Native Ins. Co.* P. C., 39 L. J. R. 1.

6. The assured must not delay to give notice of abandonment, but sufficient time must be allowed to enable the assured to exercise their judgment whether the circumstances entitle them to abandon. *Ib.*

5. Advances made by the charterer to the master at the port of loading, to be repaid by deductions out of freight, give the charterer an insurable interest in a policy on disbursements. *Ib.*

4. The appellants chartered a vessel for a voyage, and insured the cargo against total loss. In the course of the voyage the vessel went aground, became hogged, and sustained other injuries, and surveyors recommended her to be stripped with dispatch, and steps taken to save the cargo, but no attempt was made to do so; and after several days the master, fearing bad weather, sold the vessel and cargo for the benefit of all concerned. The vessel remained for some days in the same state, and the weather proving fine, the purchasers saved a large part of the cargo. *Held*, that the appellants were not entitled to treat the cargo as having been totally lost. *Ib.*

MARRIAGE ARTICLES.

Covenant to give by will: death of object of covenant in the life-time of the covenantor. — By marriage articles, the father of the lady covenanted that if she should survive him, or die before him, leaving any child or children, he would, by will, give and devise, or otherwise well and effectually settle and assure, to trustees a "child's share" in his real and personal estate upon trust for his daughter for life, with remainder to the children of the marriage, the shares of sons to vest at 21, with remainders over. One child only of the marriage, a son, attained 21, and he died a bachelor in the life-time of the covenantor. *Held*, reversing the decision of one of the vice chancellors, that the covenantor was not bound to provide by his will against a lapse, and that the representatives of the deceased child took no interest under the covenant. *In re Brookman's Trust*, Ch., 39 L. J. R. 188.

MINING LEASE.

Dead rent: covenant to work: specific performance. — The lease of coal mines, which were capable of being worked by instroke from adjoining mines, reserved a minimum rent and royalties in the usual manner, but contained a proviso, that in case of pits being sunk the minimum rent was to be increased. It also contained a covenant on the part of the lessee to work, "uninterruptedly, efficiently and regularly, according to the best and most approved mode." *Held*, that, under the circumstances, although the most approved mode of working was by sinking pits, the lessees were not bound to sink them; that the lessees were not bound to work so as to produce royalties in excess of the minimum rent; and that this court would not grant an injunction to restrain the lessees from breaking

their covenant. *Wheatley* v. *The Westminster Brymbo Coal and Coke Company (Lim.)*, Ch., 39 L. J. R. 175.

NEGLIGENCE.

Fire spreading from combustible materials on banks of the railway.—In an action charging that by the negligence of the defendants in the management of their railway engines and banks, cut grass, etc., was heaped on the banks and ignited, and a fire occasioned, which spread along a stubble field to the plaintiff's cottage and set it on fire; it appeared that, the summer being exceptionally hot, the country in an unusually dry and combustible state, and fires in consequence happening, the hedges and grass on the banks of the railway had been trimmed, and the trimmings left on the banks for a fortnight, so as to become highly combustible; that some hours before the accident the defendants' workmen were seen burning these trimmings about half a mile from the spot where the fire originated, and working toward it; that a short time before the fire broke out these men were finishing their dinner and smoking on the bank opposite to the spot; that a train passed, and shortly afterward the fire begun; that these men (who must have been on the spot and were not called by the defendants) tried in vain to put it out; that it burned through the hedge, and, there being a high wind, ran for 500 yards diagonally across a stubble field and set fire to the plaintiff's cottage, which was separated from the field by a lane, and was distant from the nearest part of the railway about 200 yards, and from the spot where the fire originated about 500 yards. *Held* (per Bovill, C. J., and Keating, J.; dissentiate Brett, J.), that there was evidence of negligence to go to the jury. *Smith* v. *The London and South Western Rail. Co.*, C. P., 39 L. J. R. 68.

—— Contributory negligence. See *Damages*.

—— Misdelivering goods after refusal of them by consignee. See *Carriers by Railway*.

NUISANCE. See *Injunction*.

PARTITION.

Bill for, by reversioner: title to estate in possession acquired afterward: amendment.—A joint tenant, or tenant in common, in reversion or remainder, cannot maintain a suit for partition. If a plaintiff is not entitled to the relief prayed at the time of filing his bill, the defect is not cured by his acquiring a title after bill filed and amending his bill. *Evans* v. *Bagshaw*, Ch., 39 L. J. R. 145.

PATENT.

1. *Register of proprietors: amendment of erroneous entry.*—The court will, on the motion of the persons aggrieved, correct an entry in the register of proprietors of patents which purports to affect the rights of persons not parties to the deed registered. *In re Horsley & Knighton's Patent*, Ch., 39 L. J. R. 157.

2. One of two joint patentees by deed assigned his interest in the patent to a third person, and released to him all the rights of action, etc., against him of both the patentees; and the deed was set out completely on the register. *Held*, that the other joint patentee was entitled to have the entry struck out. *Ib.*

POWER OF APPOINTMENT. See *Will*.

PRACTICE.

1. In the case of an order directed to be published in church where defendant is in an extra-parochial place. *Finney* v. *Godfrey*, 162.

2. *Hearing as to cost only: solicitor: costs by way of damages: decree of foreign court.*—In a suit to compel defendant to deliver up certain deeds and execute certain conveyances, defendant having at last done what was required, and having been paid on the other hand a small part of his counter demand, *held* (notwithstanding the general rule as to suits which have been compromised), that plaintiffs were entitled to bring the suit to a hearing for the purpose of getting their costs, and decree against defendant accordingly. *Griffin* v. *Brady*, Ch., 39 L. J. R. 136.

PROBATE.

Paper simply revoking a will.—An instrument which disposes of no property, but simply declares an intention to revoke a previous will, is not a will or codicil, and is therefore not entitled to probate. *In the goods of Fraser*, P. and M., 39 L. J. R. 20.

PRIORITY.

Assignment for value of fund in court: bankruptcy: stop-order.—The assignee of a fund in court, whether in bankruptcy or otherwise, must obtain a stop-order to perfect his title; therefore, an assignee for value who obtained a stop-order, although not until after the bankruptcy of the assignor, had priority over the assignee in bankruptcy, who had omitted to obtain a stop-order. *Grainge* v. *Warner*, 6 N. R. 219, disapproved of. *Stuart* v. *Cockrell*, Ch., 39 L. J. R. 127.

PRINCIPAL AND SURETY.

Cesser of appointment: assistant overseer: collector of rates.—Defendant was sued on a bond whereby he became bound to plaintiffs as surety for A's due performance of the duties of assistant overseer of the poor for the parish of West Malling. A was appointed at a salary of 20*l.* a year, and the bond (which was not to be vitiated by a change of salary) given in 1865. Before the expiration of the first year, the vestry recommended to the board of guardians of the union in which West Malling was, that A should be appointed assistant overseer at a salary of 25*l.* a year. The guardians appointed him collector of poor rates for the parish at a poundage of 6*d.*, and submitted this to the poor-law board, who pointed out that this was not authorized by the poor-law orders of 1836, but, seeing no objection, eventually issued a fresh order in 1866, allowing the appointment on the terms proposed. No additional or different duties were imposed on A by the second appointment; he performed only the same duties after it; and the alleged breaches of duty were also afterward. *Held*, that defendant was not liable, because the second appointment was within 7 & 8 Vict. c. 101, s. 62, and therefore the first thereupon ceased. *Held*, also, that the inference from the facts was that there was a cesser of the first appointment within 59 Geo. 3, c. 12, s. 7. *Semble*, that the two offices were different and incompatible. *Guardians of the Malling Union* v. *Graham*, C. P., 39 L. J. R. 74.

REMOTENESS. See *Will*.

SECURITY FOR COSTS.

1. *Next friend of married woman: 'poor circumstances:' costs of adjourned summons.*—The court will not order the next friend of a married woman to give security for costs, unless upon a distinct allegation that he is believed to be insolvent, or unable to answer the costs of the suit; a mere statement of belief that he is in poor circumstances is not sufficient. *Beach* v. *Sleddon*, Ch., 39 L. J. R. 123.

2. Where an adjourned summons is refused the applicant will, as a general rule, have to pay the costs of the summons as well as the adjournment. *Ib.*

SLANDER OF TITLE.

Actual malice: evidence.—The widow of an intestate, to whom she had acted as executor *de son tort*, executed a bill of sale of the goods of such intestate to A, one of his creditors, for securing the debt due. After her death plaintiff became the lawful administrator of the estate of the said intestate, and as such caused the goods which had been assigned by the bill of sale to be put up for sale by auction, when defendant, who was A's agent, attended and forbade the sale taking place, saying he held a bill of sale over every thing in the house in favor of A. Defendant had received a letter from the auctioneers the day before the sale telling him that the bill of sale was

valueless, as the widow never had any title to the goods. On these facts appearing at the trial of an action against defendant for slander of title in making the statement he had so made at the sale, the judge directed a nonsuit. *Held*, that the nonsuit was right, as defendant was not liable for making such statement unless he acted maliciously, and that, notwithstanding the letter from the auctioneers, there was no evidence on which a jury could properly have found that he had so acted. *Stewart* v. *Young*, C. P., 39 L. J. R. 85.

STAMP DUTY.

1. *Exemption: friendly society: transfer of mortgage.* — A transfer of mortgage made to a friendly society is not exempt from stamp duty, under the 18 and 19 Vict. c. 63, s. 37, although such society is empowered by its rules to invest surplus funds on mortgage. *Walker* v. *Giles*, commented upon. *Trustees of the Royal Liver, Friendly Society* v. *Commissioners of Inland Revenue*, Ex., 39 L. J. R. 37.

2. *Lease "further or other valuable consideration": covenant to complete house on demised land.* — A covenant by a lessee — to whom land is demised in consideration of the rent and covenants reserved and contained in the lease— "to complete and make fit for use in every respect a messuage on the land demised, with all necessary fixtures, etc., to the satisfaction of the lessor," is "a further or other valuable consideration" within the meaning of the sixteenth section of 17 and 18 Vict. c. 83; and such lease is therefore chargeable with the duty of 35s., in addition to the *ad valorem* duty on the rent reserved. *Boulton* v. *The Commissioners of Inland Revenue*, Ex., 39 L. J. R. 51.

STAYING PROCEEDINGS.

1. *Action: traverse of plaintiff's alleged equity.* — On an interlocutory application to stay an action, plaintiff's equity must be clearly established, or he must pay the money into court; therefore, where the plaintiff's equity rested on an alleged parol agreement, which was denied by the defendant, and plaintiff declined to pay the money into court, a motion to stay the action was refused. *Greech* v. *Oram*, Ch., 39 L. J. R. 126.

2. *Claim against directors.* — The court of chancery has no jurisdiction to stay actions at law against the directors of a company being wound up by the court. *In re The New Zealand Banking Corporation*, Ch., 39 L. J. R. 128.

VOLUNTARY SETTLEMENT.

Subsequent creditor: pre-existing debts: settlement set aside though no intention to defraud. — The result of the authorities decided upon statute 13 Eliz. c. 5, is, first, that where a debt contracted antecedently to the settlement exists, a subsequent creditor has the same rights as an antecedent creditor would have against the settler; and, secondly, that whether or not the settler had any intention to defraud his creditors, a creditor having a debt existing at the date of the settlement, has a right to have the settlement set aside if the ultimate effect of it is to delay or defraud him with regard to his debt. *Freeman* v. *Pope*, Ch., 39 L. J. R. 148.

WILL.

1. *Appointment of executor: parol evidence as to persons named.* — Testator appointed his "said nephew, Joseph Grant, executor" of his will. His wife's nephew of that name had resided with him for many years, and managed his business. There was also living a nephew (a brother's son) of the like name. Both claimed probate of the will: *Held*, that parol evidence was admissible to show the relation and circumstances in which the respective parties stood to the testator, and the sense in which he habitually used the word "nephew," when referring to his wife's nephew. And the evidence showing that the wife's nephew was the person meant, probate of the will was decreed to him accordingly. *Grant* v. *Grant*, P. and M., 39 L. J. R. 17.

2. *Attestation: name of witness written by another.* — An attesting witness must himself subscribe the will. It is not essential that a witness should sign his own name, provided it is clear that his subscription is intended as an act of attestation. *In the goods of Duggins*, P. & M., 39 L. J. R. 24.

3. The name of A, an attesting witness to a will, was at his request subscribed by B, who was himself present at the execution: *Held*, that as A had not subscribed, and B's subscription was not intended as an act of attestation, the will was not duly executed. *Ib.*

4. *Of mortgagee: general devise and bequest: tenancy in common: executory limitations: legal estate in mortgaged premises.* — A mortgagee devised and bequeathed all the residue of her property as to one moiety to her two daughters, to be equally divided between them, and as to the other, to a trustee in trust for her two sons, half for each, to be paid on his attaining twenty-five. Power was given to the trustee to sell, and to maintain and advance the sons out of the income and capital, respectively, of their respective shares; and there was a clause giving a benefit of survivorship between the sons and daughters. *Held*, that the legal estate in the mortgaged lands did not pass by the will. *Martin* v. *Laverton*, Ch., 39 L. J. R. 166.

5. *Power to appoint by will only: wills act, 1 Vict. c. 26, s. 27: execution of power by a general bequest: remoteness.* — A power to appoint to any persons, by will only, is a general power of appointment within the meaning of section 27 of the wills act (1 Vict. c. 26). And accordingly, a general devise or bequest will operate as an execution of such power. But such a general testamentary power of appointment given to a tenant for life, being a married woman, is not equivalent to ownership, so that, as regards the operation of the rule against perpetuities, the interests arising under the execution of the power by the will of the tenant for life must be considered as created under the deed or will conferring the power. *In re Powell's Trusts*, Ch., 39 L. J. R. 188.

6. P. bequeathed a sum of stock to his married daughter, H., for life, with remainder to such persons as she should by will appoint. By a general bequest, not referring to the power, but held to be an exercise thereof under section 27 of the wills act, H. appointed the stock to her daughter, S. L., for life, with remainder to her said daughter's children who should attain twenty-one, or marry. *Held*, that this exercise of the power was void for remoteness. *Ib.*

WINDING UP.

1. *Proof of debt: secured creditor: amount of claim.* — The debt of a secured creditor is to be ascertained in a winding up, as it existed at the time of sending in a formal claim under rule 20 of the general order, 1862. Where a company had given a guarantee to the acceptor of a bill that it would provide funds to meet the bill at maturity, the presentation of the guarantee to the official liquidator of the company, and the demand for payment two days before the bill fell due, but after the company had been ordered to be wound up, was held (affirming the decision of the master of the rolls) not to constitute a formal demand within the above rule; and it was therefore also held that the holder of the guarantee who subsequently, but before making any further claim, realized some securities which he held in respect of the guarantee, was not entitled to prove for more than the balance of his claim after deducting the proceeds of the securities. *In re Barned's Banking Co., Forwood's Claim*, Ch., 39 L. J. R. 133.

2. *Proof against two estates: interest subsequent to proof.* — A creditor of a company in liquidation, whose debt bore interest, received, from a collateral source, dividends which, with the dividends from the estate in liquidation, amounted to 20s. in the pound upon the principal debt due at the date of the winding up. *Held*, reversing the decision at the rolls, that he was entitled to participate in further dividends in respect of his principal debt, in the same

way as if he had received nothing from the collateral source, until the whole amount due for principal and interest was discharged. *In re the Joint Stock Discount Co., ex parte the Warrant Finance Co.*, Ch., 39 L. J. R. 122.

8. *Priority of petitions: advertisement.* — Where two or more petitions are presented for winding up a company, they will have priority according to their dates of advertisement, not of presentation. *The United Ports and General Insurance Co.*, Ch., 39 L. J. R. 146.

4. *Disputed debt: action at law: petition adjourned: payment into court: costs.* — A winding up petition, based upon a disputed debt which the petitioner was simultaneously seeking to recover by an action at law, was adjourned till the debt should be established at law, but the court refused to put the company upon terms not to delay the action. *In re The Imperial Guardian Assur. Co.*, Ch., 39 L. J. R. 147.

5. The petitioner having refused an offer by the company to pay the amount claimed into court, and to pay such costs of the petition as the court should adjudge, was ordered to pay all costs of the petitioner subsequently incurred. *Ib.*

6. *Locus standi of opponent to petition.* — A petition for the winding up of a company under the companies act, 1862, may be opposed by parties having an interest in the existence of the company, although neither creditors nor contributories thereof. *In re The Bradford Nav. Co.*, Ch., 39 L. J. R. 161.

7. *Appropriation of dividends: interest on debt: appeal from chambers.* — A company on borrowing 25,000*l.* gave promissory notes and a debenture for the amount, to be paid at a certain date, and agreed to pay interest on the loan if not paid at such date. They also assigned arrears of calls to be received by trustees and paid to the lender if default were made in payment of the loan at the appointed date. The company was ordered to be wound up before such date, and the lender received arrears of calls and dividends on his proof, together exceeding the principal debt. *Held*, reversing the order of the master of the rolls, that the creditor could not be called upon to refund the surplus, but might appropriate it to the interest due. *In re The Humber Iron Works & Shipbuilding Co. Ex parte the Warrant Finance Co. No.* 2, Ch., 39 L. J. R. 185.

8. The court of appeals will only hear an appeal from an order made in chambers, when the judge who makes the order certifies that the case has been so fully argued before him, that he does not desire to hear it re-argued in court. *Ib.*

DIGEST OF U. S. SUPREME COURT DECISIONS.

(*From* 8 *Wallace*).

ACKNOWLEDGMENT OF DEEDS.

1. In aid of the certificate of acknowledgment, or proof of a deed, reference may be had to the instrument itself, or to any part of it. *Carpenter* v. *Dexter*, 513.

2. It will be presumed that a commissioner of deeds, in a particular state, whose authority to act was limited only to his county, exercised his office within the territorial limits for which he was appointed, although the only venue given to his certificate of acknowledgment be that of the "state" where he lived. *Ib.*

3. Unless the statute of a state requires evidence of official character to accompany the official act which it authorizes, none is necessary. And where one state recognizes acts done in pursuance of the laws of another state, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them. *Ib.*

ADMIRALTY.

1. Nautical rules require that, where a steamship and sailing vessel are approaching from opposite directions, or on intersecting lines, the steamship, from the moment the sailing vessel is seen, shall watch with the highest diligence her course and movements, so as to be able to adopt such timely measures of precaution as will necessarily prevent the two boats coming in contact. *The Carroll*, 302.

2. Porting the helm a point, when the light of a sailing vessel is first observed, and then waiting until a collision is imminent before doing any thing further, does not satisfy the requirements of the law. *Ib.*

3. Fault on the part of the sailing vessel at the moment preceding collision does not absolve a steamer, which has suffered herself and a sailing vessel to get in such dangerous proximity as to cause inevitable alarm and confusion, and collision as a consequence. The steamer, as having committed a far greater fault in allowing such proximity to be brought about, is chargeable with all the damages resulting from the collision. *Ib.*

4. Although the duty of vessels propelled by steam is to keep clear of those moved by wind, yet these latter must not, by changing their course instead of keeping on it, put themselves carelessly in the way of the former, and so render ineffective their movements to give the sailing vessels sufficient berth. *The Potomac*, 590.

5. The confessions of a *master*, in a case of collision, are evidence against the owner. *Ib.*

6. Although, if a vessel be sunk by collision in so deep water, or otherwise so sunk, that she cannot be raised and repaired, except at an expense equal to or greater than the sum which she would be worth when repaired, the rule cannot apply, still the mere fact that a vessel is sunk is not, of itself, sufficient to show that the loss is total, nor to justify the master and owner in abandoning her and her cargo. *The Baltimore*, 377.

BILL OF LADING.

1. May be explained by parol evidence, in so far as it is a receipt as distinguished from a contract. *The Lady Franklin*, 325.

2. An explosion of the boiler on a steam vessel is not a "peril of navigation," within the meaning of. *Propeller Mohawk*, 153.

BURDEN OF PROOF.

1. In a suit brought by the assignee of a chose in action in the federal court, on a contract assigned, the burden of proof is on the plaintiff, when the instrument and assignment are offered, under the plea of the general issue, to show affirmatively that the action could have been sustained if it had been brought by the original obligee. *Bradley* v. *Rhine's Administrator*, 393.

2. A court having fairly submitted to a jury the evidence in a case, and charged as favorably to a party as he could properly have asked, may, in the exercise of its discretion, refuse a request by that party to charge as to which side the burden of proof belongs. *Chicopee Bank* v. *Philadelphia Bank*, 641.

COMITY JUDICIAL.

1. The supreme court will not follow the adjudication of state courts upon the meaning of the statutes of their states, when the former court considers the adjudications wrong in themselves, and when in action their effect is practically, by rendering the power of enforcing obligation ineffective to impair the obligation of a contract entered into before the adjudications were made, by parties living in the state. *Butz* v. *City of Muscatine*, 575.

2. A question which is pending in one court of competent jurisdiction cannot be raised and agitated in another by adding a new party and raising a new question as to him, along with the old one, as to the former party. The old question is in the hands of the court first possessed of it, and is to be decided by such court. The new one should be by suit in any proper court, against the new party. *Memphis City* v. *Dean*, 64.

COMMON CARRIER.

1. Where insurers, to whom the owners have abandoned, take possession, at an intermediate place or port, of

goods damaged during a voyage by the fault of the carrier, and there sell them, they cannot hold the carrier liable on his engagement to deliver at the end of the voyage in good order and condition. *Propeller Mohawk*, 153.

2. Insurers so accepting at the intermediate port are liable for freight *pro rata itineris* on the goods accepted. *Ib.*

3. A common carrier of merchandise is responsible for actual negligence, even admitting his receipt to be legally sufficient to restrict his common law liability. And he is chargeable with actual negligence, unless he exercises the care and prudence of a prudent man in his own affairs. *Express Company* v. *Kountze Bros.*, 313.

CONFEDERATE MONEY.

1. A contract for the payment of treasury notes of the Confederate States, made between parties residing within those states, can be enforced in the courts of the United States; the contract having been made in the usual course of business, and not for the purpose of giving currency to the notes, or of otherwise aiding the rebellion. *Thorington* v. *Smith.*

2. Evidence may be received that a contract payable in those states, during the rebellion, in "dollars," was in fact made for the payment in confederate dollars. *Ib.*

3. The party entitled to be paid in such dollars can receive but their actual value, at the time and place of the contract, in lawful money of the United States. *Ib.*

CONSTITUTIONAL LAW.

1. The term "import," as used in that clause of the constitution which says that "no state shall levy any imposts or duties on *imports* or exports," does not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States. *Woodruff* v. *Parham*, 123.

2. A state statute which enacts that no insurance company, not incorporated under the laws of the state passing the statute, shall carry on its business within the state without previously obtaining a license for that purpose; and that it shall not receive such license until it has deposited with the treasurer of the state bonds of a specified character and amount, according to the extent of the capital employed, is not in conflict with that clause of the constitution of the United States which declares that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states;" nor with the clause which declares that congress shall have power "to regulate commerce with foreign nations, and among the several states." *Paul* v. *Virginia*, 168.

3. The issuing of a policy of insurance is not a transaction of commerce within the meaning of the latter of the two clauses, even though the parties be domiciled in different states, but is a simple contract of indemnity against loss. *Ib.*

4. The same principle applies to the case of an institution of learning. *The Washington University* v. *Rouse*, 439.

5. Congress has no power to make paper money a legal tender, or lawful money, in discharge of private debts, which exist in virtue of contracts made prior to its acts attempting to make such paper a legal tender and lawful money for payment of such debts. *Hepburn* v. *Griswold*, 603.

6. When a state has enacted that the notes of a particular bank chartered by it shall be receivable in payment of all taxes due to it, a "contract," attaching itself to the note, and running with it into the hands of any one who has it, is entered into by the state that it will so receive the notes. And a subsequent enactment, that it will not receive them, is a law impairing the obligation of contracts, and is void. *Furman* v. *Nichol*, 44.

DIRECT TAX.

A tax laid by congress on the notes of state banks, issued for currency, is not one within the meaning of that clause of the constitution which ordains that such taxes shall be apportioned in a particular way. *Veazie Bank* v. *Fenno*, 533.

"DOLLARS."

Meaning of the word under different circumstances. See *Confederate Money.*

EQUITY.

1. Where specific execution of a contract, which would work hardship when unconditionally performed, would work equity when decreed on conditions, it will be decreed conditionally. *Willard* v. *Tayloe*, 557.

2. Fluctuations in the value of property contracted for between the date of the contract and the time when execution of the contract is demanded, are not allowed to prevent a specific enforcement of the contract, where the contract, when made, was a fair one, and in its attendant circumstances unobjectionable. *Ib.*

3. Where a party, prior to filing a bill for specific performance of a contract for the sale of land had sent to the other side for examination, and in professed purpose of execution of the contract, the draft of a morigage which he was ready, on a conveyance being made, to execute, it is no defense to the bill, if the defendant have wholly refused to execute a deed, that the draft is not in such a form as respected parties and the term of years which the security had to run, as the vendor was bound to accept, especially where such vendor, in returning the draft, had not stated in what particulars he was dissatisfied with it. *Ib.*

ESTOPPEL.

A record of a judgment on the same subject matter, referred to in a finding, cannot be set up as an estoppel, when neither the record is set forth nor the finding shows on what ground the court put its decision; whether for want of proof, insufficient allegations, or on the merits of the case. *United States* v. *Lane*, 185.

EVIDENCE IN CASES GENERALLY.

1. To admit the declaration of a third person in evidence on the ground that one party to the suit had referred the other party to him, it is necessary that the reference should be for information, relating to the matters in issue. *Allen* v. *Killinger*, 480.

2. The declarations of a party himself, to whomsoever made, are competent evidence, when confined strictly to such complaints, expressions, and exclamations as furnish evidence of a present existing pain or malady, to prove his condition, ills, pains, and symptoms, whether arising from sickness, or from an injury by accident or violence. If made to a medical attendant, they are of more weight than if made to another person. *Insurance Company* v. *Moseley*, 397.

3. So is a declaration made by a deceased person, contemporaneously, or nearly so, with a main event by whose consequence it is alleged that he died, as to the cause of that event. Though generally the declarations must be contemporaneous with the event, yet, where there are connecting circumstances, they may, even when made some time afterward, form a part of the whole *res gestæ*. *Ib.*

4. Where the principal fact is the fact of bodily injury, the *res gestæ* are the statements of the cause, made by the injured party almost contemporaneously with the occurrence of the injury, and those relating to the consequences, made while the latter subsisted and were in progress. *Ib.*

5. An accidental loss or disappearance in a bank, of a bill sent to it to collect, from the bank's not taking sufficient care of letters brought to it from the mail, carries with it a presumption of negligence in the bank; and on suit against it, the burden of proof is on the bank to explain the negligence. *Chicopee Bank* v. *Philadelphia Bank*, 641.

6. Although a bill of lading, in so far as it is a contract, cannot be explained by parol, yet, being a receipt as well

as a contract, it may in the last regard be so explained, especially when used as the foundation of a suit between the original parties to it. *The Lady Franklin*, 325.

7. Where one state recognizes acts done in pursuance of the laws of another state, its courts will take judicial cognizance of those laws, so far as it may be necessary to determine the validity of the acts alleged to be in conformity with them. *Carpenter* v. *Dexter*, 513.

8. The admissions of the *master* of a vessel are evidence, in case of collision, against the owner. *The Potomac*, 590.

FEDERAL AND STATE LEGISLATION.

The mortgage of a vessel duly recorded, under an act of congress, cannot be defeated by a subsequent attachment under a state statute enacting that no mortgage of such property shall be valid as against the interests of third persons, unless possession be delivered to, and remain with, the mortgagee, or the mortgage be recorded in a manner specified, in which a mortgage, whose lien in this case was the subje t of controve sy, was not. *White's Bank* v. *Smith*, 7 Wallace, 646, affirmed. *Aldrich* v. *Ætna Company*, 491.

FRAUDULENT CONVEYANCE.

A sale of personal property, made much below its cost, by a man indebted to near or quite the extent of all he had, set aside as a fraud on creditors; it having been made within a month after the property was bought, and before it was yet paid for; made, moreover, on Saturday, while the account of stock was taken on Sunday (the parties being Jews), and the property carried off early on Monday. *Kempner* v. *Churchill*, 362.

FREIGHT. See *Common Carrier*.

HABEAS CORPUS.

1. In all cases where a circuit court of the United States has, in the exercise of its original jurisdiction, caused a prisoner to be brought before it, and has, after inquiring into the cause of detention, remanded him to the custody from which he was taken, the supreme court, in the exercise of its appellate jurisdiction, may, by the writ of *habeas corpus*, aided by the writ of *certiorari*, revise the decision of the circuit court, and, if it be found unwarranted by law, relieve the prisoner from the unlawful restraint to which he has been remanded. *Ex parte Yerger*, 85.

2. The second section of the act of March 27th, 1868, repealing so much of the act of February 5th, 1867, as authorized appeals from the circuit courts to the supreme court, does not take away or affect the appellate jurisdiction of this court by *habeas corpus* under the constitution, and the acts of congress prior to the date of the last named act. *Ib.*

INSURERS.

Accepting goods abandoned by their owners at an intermediate port, which the carriers were bound to carry to the port of destination, are liable to freight *pro rata itineris*. *Propeller Mohawk*, 153.

INTERNAL REVENUE.

Under the act of June 30th, 1864, to provide internal revenue to support the government, etc., which requires a license to persons exercising certain occupations, and fixes the limit to its duration, the parties to the bond given on the granting of the license are not bound to answer for any breach of the condition of the bond after the expiration of the license. *United States* v. *Smith*, 587.

INTERSTATE COMMERCE. See *Constitutional Law*, 2, 3.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES.

(*a*) It *has* jurisdiction,

1. To disregard and declare void an act of congress which it considers as passed in violation of the constitution. *Hepburn* v. *Griswold*, 603.

2. If the case be otherwise within its cognizance, it has jurisdiction of a judgment rendered on a voluntary submission of a case agreed on for judgment, under the provisions of the code of a state. *Aldrich* v. *Ætna Company*, 491.

3. It need not appear that the state court erred in its judgment. It is sufficient to confer jurisdiction that the question was in the case, was decided adversely to the plaintiff in error, and that the court was induced by it to make the judgment which it did. *Furman* v. *Nichols*, 44.

4. So it may have, although the citation is not signed by the judge who allowed the writ of error, provided the defendant have waived the irregularity by an appearance. *Aldrich* v. *Insurance Co.*, 491.

(*b*) It has *not* jurisdiction.

5. Under the twenty-fifth section of the judiciary act, unless the *record* show, either by express words or necessary legal intendment, that one of the questions mentioned in that act was before the state court, and was *decided* by it; and, in deciding this, neither the argument of counsel nor the opinion of the court below can be looked to for this purpose. *Gibson* v. *Chouteau*, 314.

LEGAL TENDER.

The promissory notes of the United States, declared by certain acts of congress, passed in 1862 and 1863, to be a legal tender and lawful money for the payment of private debts, are not such a tender or such money in discharge of such debts if created by contracts made before the acts were passed. *Hepburn* v. *Griswold*, 603.

MANDAMUS.

The extent to which the writ of mandamus from the federal courts can give relief against decisions in the state courts, involves a question respecting the process of the federal courts; and, that being so, it is peculiarly the province of this court to decide all questions which concern the subject. *Butz* v. *City of Muscatine*, 575.

MORTGAGE OF VESSELS.

The mortgage of a vessel, duly recorded, under an act of congress, cannot be defeated by a subsequent attachment under a state statute, enacting that no mortgage of such property shall be valid, as against the interests of third persons, unless possession be delivered to, and remain with, the mortgagee, or the mortgage be recorded in a manner specified, in which a mortgage, whose lien in this case was the subject of controversy, was not. *White's Bank* v. *Smith*, 7 Wallace, 646, affirmed. *Aldrich* v. *Ætna Company*, 491.

NATIONAL BANKS

1. The 50th section of the national bank act of June 3d, 1864 (13 Stat. at Large, 116), which provides that suits under it, in which officers or agents of the United States are parties, shall be conducted by the district attorney of the district, is in so far but directory, that it cannot be set up by stockholders to defeat a suit brought against them by a receiver, under the act, which receiver, with the approval of the treasury department, and after the matter had been submitted to the solicitor of the treasury, had employed private counsel, by whom alone suit was conducted. *Kennedy* v. *Gibson and others*, 498.

2. It is no objection to such a bill properly filed against stockholders within the jurisdiction of the court, that stockholders named in the bill and averred in it to be without the jurisdiction, are not made co-defendants. *Ib.*

3. Creditors of the bank are not proper parties to such a bill. The receiver is the proper party to bring suit, whether at law or in equity. *Ib.*

4. Suits may be brought under the 57th section of the act, by any association, as well as against it. *Ib.*

NEGOTIABLE PAPER.

1. Although a bill payable at a particular bank, be physically, and, in point of fact, in the bank, still, if the bank be wholly ignorant of its being there, as when, *ex. gr.*, a

letter, in which the bill was transmitted when brought from the post-office to the bank, has been laid down with other papers on the cashier's desk, and before being taken up or seen by the cashier has slipped through a crack in the desk, and so disappeared, the fact of the bill being thus physically present in the bank does not make a presentment. *Chicopee Bank* v. *Philadelphia Bank*, 641.

2. And this is so, although the acceptor held no funds there, did not call to pay the bill, and in fact did not mean to pay it anywhere. *Ib.*

3. In such case, therefore, the holder cannot look to prior parties, even though, by having been informed, after inquiry by him, that the bill had not been received at the collecting bank, they could have inferred that it had not been paid at maturity by the acceptor. *Ib.*

4. An accidental loss or disappearance in a bank, of a bill sent to it to collect, from the bank's not taking sufficient care of letters brought to it from the mail, carries with it a presumption of negligence in the bank, and, on a suit against it, the burden of proof is on the bank to explain the negligence. *Ib.*

5. If, through this negligence alone, it is inferable that notice of presentment, demand, and non-payment, were not given to the holder, so as to enable him to hold parties prior to him, the bank guilty of the negligence is responsible to the holder for the amount of the bill, even though the holder himself have not been so entirely thoughtful, active and vigilant as he might have been. *Ib.*

PUBLIC LANDS.

1. Where a patent for land has issued to one who protests against the survey on which it is made, and the record shows that he never accepted it, the secretary of the interior may recall it. *Maguire* v. *Tyler*, 650.

2. Where a patent is issued on a claim which has no certain limits, reserving "all valid adverse rights," a second patent to another claim, and for a portion of the same land, is valid and operative to convey the title. *Ib.*

3. Where there is a specific tract confirmed according to ascertained boundaries, the legal effect of the confirmation is to establish the right and locate the claim. But it is otherwise when the claim has no certain limits, and the confirmation is on the condition that the land is to be surveyed. *Ib.*

SOLDIER'S PAY.

The act of June 20th, 1864, increasing the pay of private soldiers in the army, cannot be construed as having the effect of increasing the allowance to officer for servants' pay. *United States* v. *Gilmore*, 330.

STATES

Many bind themselves permanently by a promise made by one legislature, and which subsequent legislatures cannot set aside, not to tax the property of particular charitable institutions, or institutions of learning; and if the institutions are organized on the faith of such promise the promise becomes a contract, whose obligation the state cannot impair. *Home of The Friendless* v. *Rouse*, and *Washington University* v. *Rouse*, 430, 439.

STATUTES, RULES OF CONSTRUING.

1. A section of one statute, not very reasonable as read in the section itself, may be read by the light of a section of an earlier statute on the same general subject; and the effect of the former largely extended thereby. *Kennedy* v. *Gibson et al.*, 498.

2. Construction of statutes, in relation to the accounts of individuals with the United States, made by the accounting officers of the treasury, especially when so long continued as to become a rule of departmental practice, are entitled to great consideration, and will, in general, be adopted by this court. *United States* v. *Gilmore*, 330.

3. But when, after such a construction of a particular class of statutes has been long continued, its application to a recent statute of the same class is prohibited by congress, and, following the spirit of hat prohibition, the accounting officers refuse to apply the disapproved construction to a still later statute of the same class, its application will not be enforced. *Ib.*

TORTS.

The government cannot be proceeded against in the court of claims, on an implied assumpsit for the torts of its officers, committed while in its service, and apparently for its benefit. The remedy is through congress. *Gibbons* v. *United States*, 269.

TRIAL BY JURY.

Where a seizure of property on land is made under the acts of July 13, 1861, or of August 6, 1861, or July 17, 1862, passed in suppression of the rebellion, the claimants are entitled to trial by jury, though the suit be in form a libel of information; and the suit can be removed into this court by writ of error alone. *Union Insurance Co.* v. *United States*, 6 Wallace, 765; and *Armstrong's Foundry*, *Ib.* 769, affirmed, *Morris' Cotton*, 507.

TRUST.

1. In May, 1835, an agreement was entered into between Price and Seymour, which provided, on the part of Price, that he should devote his time and best judgment to the selection and purchase of land to an amount not exceeding $5,000 in certain designated states and territories, or in such of them as he might find most advantageous to the interest of Seymour; that the purchases should be made during the then existing year, and that the contracts of purchase should be made, and the conveyances taken, in the name of Seymour; and on the part of Seymour that he should furnish the $5,000; that the lands purchased should be sold within five years afterward, and that of the profits made by such purchase and sale, one-half should be paid to Price, and be in full for his services and expenses. Under this agreement lands having been purchased by Price and the title taken in the name of Seymour, *Held*, I. That Seymour took the legal title in trust for the purposes specified; that is, to sell the property within the time limited, and after deducting from the proceeds the outlay, with interest and taxes, to pay over to Price one-half of the residue; and that, to this extent, Seymour was a trustee, and Price the *cestui que trust*.

II. That the trust continued after the expiration of the five years, unless Price subsequently relinquished his claim, the burden of proof, as to such relinquishment, resting with the heirs of Seymour.

III. That the principle of equitable conversion being applied to the case, and the land which was to be converted into money, being regarded and treated in equity as money, the personal representative of Price was the proper person to maintain this suit, and it was not necessary that his heirs at law should be parties. *Seymour* v. *Freer*, 202.

2. The statute of limitations has no application to an express trust, where there is no disclaimer. *Ib.*

BOOK NOTICES.

Cases Argued and Adjudged in the Supreme Court of the United States, December Terms, 1868 *and* 1869. Reported by John William Wallace. Vol. VIII. Washington: W. H. & O. H. Morrison. 1870.

With the exception of the legal-tender cases, this volume contains but little of novel or lasting interest in respect to law. In regard to style, too, we miss Mr. Wallace's peculiar graces. He seems to have taken a reef in his rhetoric since the compliments of the American Law Review in 1867. Just enough of his idiosyncracies crop out to assure us that he is not dead, but only sleeping; that the volcano is not extinct, but ready to break out on sufficient provocation. This is evinced in the case of *The Camanche*, a salvage case, not only in substance, but in name. Perhaps the name inspired Mr. Wallace

with the following touch of barbaric and unrestrained rhetoric in the statement of facts: "The *Aquila* had been anxiously expected at San Francisco with her cargo. Her foundering in an exposed and difficult part of the bay, made the loss of the monitor highly probable. The public mind, excited by the civil war then raging, and by fears of attacks by hostile cruisers on a harbor and city inadequately defended, was shocked by the shipwreck of the only sure means of protection provided by the government for both; and this feeling extended itself throughout the country." In another part of this statement, which covers seven pages, in describing the difficulty of the salvage he says: "One of the long, crooked iron ribs coming away, cut off a finger of an experienced diver. He dived no more." This is quite as significant as "That day we read no more," in Dante's episode of Francesca da Rimini. Mr. Wallace should not presume on his readers' acquaintance with the classic tongues, as he ungenerously does by the following abbreviation: "The guns, as well as the other heavy pieces, as *ex. gr.*, the pilot house," etc. Again: is not Mr. Wallace momentarily oblivious of the brevity of human existence, when, for "the facts are stated in the opinion," he writes and we have to read, in the case of *The Carroll:* "Going thus to questions of fact merely, no sufficient advantage would be gained by setting it" (the testimony) "out; more particularly since the important parts of it on both sides are so largely recapitulated in the opinion of the court, as to make sufficiently intelligible the principles of law meant to be established by the judgment." In the syllabus of *Hudson Canal Co.* v. *Pennsylvania Coal Co.*, we read: "In the case of a contract drawn technically, in form, and with obvious attention to details, a covenant cannot be implied in the absence of language tending to a conclusion that the covenant sought to be set up was intended. The fact that the non-implication of it makes the contract, in consequence of events happening subsequently to its being made, quite unilateral in its advantages, is not a sufficient ground to imply a covenant which would tend to balance advantages thus preponderating." This, we insist, requires more thought than a syllabus is entitled to. Again, we submit that the reporter is not justified, by any thing in the known or presumed history of the plaintiff in the highly respectable leading case on the legal-tender question, in stigmatizing her as "a certain Mrs. Hepburn." This is not a tender way of treating the lady. But however scant of courtesy the reporter may be toward the lady, no such fault can be found with him in regard to the counsel whose names appear in this volume. He misses no opportunity to compliment them. We are officially informed that they made elaborate, able, or learned arguments, as the case may be. This is a very comfortable habit in a reporter. If we ever want to be reported, we shall ask, as was asked in De Quincey's essay on "Murder as one of the Fine Arts," *Ubi ille est reporter?*

A Treatise on the Remedy by Ejectment and the Law of Adverse Enjoyment in the United States: Embracing in full the statutory policy of the several states in respect to the action for the Recovery of Real Property. By Ransom H. Tyler, Counselor at Law, and author of a treatise on "Infancy and Coverture." Albany: William Gould & Son. 1870.

Mr. Tyler seems to have a very erroneous idea of the meaning of the word *treatise*. The work before us, like his work on "Infancy and Coverture," is called a "treatise," when, in fact, it is little more than a digest. Here is a distinction *with* a difference, and we hope that the author will observe it in future works. But "treatise" or "digest," we believe that the book will prove of great service to the profession. It is many years since any work has been issued on either of the subjects embraced in this, and, if we remember rightly, our author is the first American writer who has made ejectment a special topic. During these years much has become obsolete, and many propositions and principles that were regarded as settled law have either been restricted, extended or entirely swept away. There was real need of a new work which should contain the law as it now exists. This work Mr. Tyler has undertaken to furnish. He has gathered together and carefully arranged both the English and American decisions. That this has required a vast deal of research and labor is evident; that the research has been careful, and the labor well done, we are inclined to believe from the examination that we have been able to make.

The volume has been swelled to what seems to us a needless size by inserting the references in the body of the work—a very pernicious plan—and by adding the statutory provisions of the several states; but it is quite possible that these will prove of value on "occasions sudden."

We cannot pass the work without expressing regret that it does not contain a better index. An index of only eighteen single column pages to a book of over nine hundred and fifty pages is *prima facie* too meager. The practitioner will experience difficulty in finding what he wants in the work. The author should bear in mind that the most valuable part of a law book is its index. If that be deficient, the work is comparatively useless, for few men can afford to waste time in running through a legal work to find what they require.

Reports of Cases at Law and in Chancery argued and determined in the Supreme Court of Illinois. By Norman L. Freeman, Reporter. Volume XLVII. Printed for the Reporter. Springfield, 1870.

This volume contains cases decided at the January, June and September terms, 1868. Ordinarily we should regard this as rather tardy reporting, but, in Mr. Freeman's case, we do not see how he could well hasten his labors. The state of Illinois has somewhere on its statute books a very foolish and vexatious law, requiring the reporter to report *every* opinion of the supreme court. This was perhaps not so objectionable ten or fifteen years ago, when all the cases decided in the year would hardly fill an ordinary volume, but now, when, by reason of the rapid increase in population, business, and, as a sequence, litigation, the cases submitted during the year are sufficient to fill four large volumes, the requirement becomes burdensome both to the reporter and to the profession. In connection with this, take the fact that the reporter is required to attend terms and conferences, occupying at least a third of a year, and leaving but eight months in which to prepare copy, read proofs, make indexes, etc., and it will become apparent that the office of reporter of the state of Illinois is not a *sinecure*.

Mr. Freeman suggests, in his preface, the propriety of a law vesting in the judges of the court the discretion to determine what ought and what ought not to be reported, and says that this would probably reduce the number of volumes of reports to two a year. It is to be hoped that the legislature will adopt this suggestion, especially now that the state is, as we believe, about to make some needed improvements in its judiciary affairs, by adopting the new constitution.

Of the manner in which Mr. Freeman has performed his work we can speak in the highest terms. We remember no reports that have come to our table that show greater evidence of legal knowledge, talent, skill and industry. We regard him as particularly happy in his manner of making the head notes or abstracts of cases. There are several methods of making a head note. One is, to give a simple, distinct, short statement of the legal principles involved in the decision. This is the most perfect and satisfactory abstract, but one which, to be successfully made, requires great skill in the reporter, since a reporter commanding a concise and perspicuous expression will give in three lines what a reporter of less skill would require a quarter of a page to state. Another form, and one which requires the least skill on the part of a reporter, is that which gives a brief digest of the facts, with the hold-

ing of the court thereon. Mr. Freeman has, as a rule, followed the first of these forms, and has acquitted himself with skill. But, after all, the most noticeable feature in the volume before us, is the exhaustive and admirable index. It would have delighted Swift, who made indexes a sort of hobby.

Mr. Freeman has adopted the plan of publishing his own reports, which enables him to supply the profession at a considerably reduced price from what they have been in the habit of paying. This is a good thing for the Illinois lawyers, and should receive their cordial support.

TERMS OF THE SUPREME COURT FOR JUNE.

2d Monday, Circuit and Oyer and Terminer, Dutchess, Tappen.
2d Monday, Circuit and Oyer and Terminer, Westchester, Barnard.
2d Monday, Circuit and Oyer and Terminer, Jefferson, Morgan.
2d Monday, Circuit and Oyer and Terminer, Broome, Murray.
2d Monday, Circuit and Oyer and Terminer, Cattaraugus, Marvin.
2d Tuesday, General Term, 2d Department, Poughkeepsie, Joseph F. Barnard, Gilbert and Tappen.
2d Tuesday, Special Term, Schuyler, Boardman.
3d Monday, Circuit and Oyer and Terminer, Putnam, Barnard.
3d Tuesday, Circuit and Oyer and Terminer, Canton, Potter.
3d Tuesday, Special Term, Onondaga, Morgan.
3d Tuesday, Special Term, Chenango, Balcom.
3d Tuesday, Special Term, Erie, Barker.
4th Tuesday, Circuit and Oyer and Terminer, Sandy Hill, Potter.
Last Monday, Special Term, Monroe, J. C. Smith.
Last Tuesday, Special Term, Albany, Peckham.

LEGAL NEWS.

Western papers attribute the McFarland verdict to insanity — in the jury.

Eighteen hundred and forty-three divorce suits are pending in Indiana courts.

The annual cost of the judiciary in Mississippi, under the new system, is estimated at $200,000.

The health of Chief Justice Chase is said to be failing so rapidly as to render probable his retirement from the bench.

Madame Krietzoff is the name of the Russian female lawyer who has just entered upon the practice of the law at St. Petersburg.

Judge Bradley, of the United States supreme court, was the recipient of a complimentary dinner from the members of the Galveston bar on the 19th ult.

Ex-Judge John H. Reagan, of Texas, says that the present laws of Texas are good, and the judges generally do their duty, but the juries are too lenient.

An Otsego county lawyer, who some months since was put off the cars on the Central railroad because he refused to give up his ticket before a seat was provided for him, has sued the company for damages.

Judge Humphreys, of the supreme court, District of Columbia, has required Mr. Bradley to enter into bonds to keep the peace toward Judge Fisher in the sum of $5,000.

Marcelino Martinez, a lawyer, who held a prominent position under Maximilian, died on the 16th ult., in San Francisco, where, since the latter's downfall, he had been eking out a precarious living by teaching.

Judge Irwin, for many years judge of the United States district court for the western district of Pennsylvania — including Williamsport — died in Pittsburg, a few days ago, aged 88 years. He was appointed by Gen. Jackson.

There is a man in Harrisburg who has had a case at every court of quarter sessions (either as prosecutor or prosecuted), except two, since 1824, extending over a period of forty-six years, and aggregating one hundred and eighty-two cases.

A middle-aged man was publicly punished with twenty lashes, by order of a court, in London, Ontario, a few days ago. The official flagellator wore a mask. Delaware will be pleased to learn this. It was the first case of whipping in Canada, under an act passed in 1869.

The United States circuit court, at St. Louis, has decided the case of *Hollis* v. *Lieut.-Gen. Sheridan and Major-General Page*, for false imprisonment and illegal confiscation of property, in favor of the defendants. The case will be carried to the United States supreme court.

Gen. John F. Appleton, who was recently appointed and confirmed as judge of the United States court for the eastern district of Texas, is quite ill in California, of consumption. He is the eldest son of Chief Justice Appleton, of Maine, and is a young man of sound judgment, high attainments, noble character and fine ability.

The value of confederate money is in question in a Chicago court, some citizens of Richmond, Va., having bought certain real estate in Chicago and paid therefor $8,000 in confederate scrip. The question is whether, since that paper was recognized as a legal tender in Virginia at the time of the transfer, the bargain was valid.

A Savannah jury brought in a sealed verdict a few days ago, the envelope bearing the indorsement: "The business of court could be expedited by the attorneys being prepared before the cases are called, and not having to study them during the progress of the trial, by which the jury, witnesses and judge are all put to inconvenience."

The Mordaunt divorce case, which has created a scandal in England almost equal to the McFarland trial in this country, is at last closed, not because the lawyers were tired out, or the capacities of the witnesses exhausted, but for the reason that the continued insanity of the lady incapacitates her from making a legal reply, and further proceedings are necessarily dropped.

The innumerable heirs of Anneke Jans are still bothering the Trinity church people. The last move of their attorneys is to serve a capias on the wardens of Trinity church to appear in the United States circuit court, and answer a complaint against them by these heirs. The action has created quite a flurry among the magnates of Trinity, and the question of their right to hold the property will soon be brought to an issue.

After a verdict had been rendered in a late trial in Austin county, Texas, the judge addressed the jury in this way: "By your verdict you have said the accused is guilty of no crime. Your verdict being contrary to law, contrary to the evidence, and contrary to the charge of the court, the court disapproves of your action in the strongest possible manner. It is by such verdicts as this upon the part of petit jurors that Texas has been brought into disrepute among the other states of this Union."

A curious will case has just been, temporarily at least, adjusted in Chicago. The testament was that of one Andreas Eckner. This document was drawn up by a Teutonic justice of the peace, who testified that when the will was executed the testator was so far gone that he could no more than aswer "yaw" to each question that was asked him. The justice further deposed that, to the best of his knowledge and belief, the said Eckner was "starved to death," possibly by impatient heirs in a hurry to realize. However, the case being given to the jury, they found "the instrument to be the last will and testament of the deceased."

NEW YORK STATUTES AT LARGE.*

CHAP. 424.

AN ACT in relation to statistics of the poor.

PASSED April 27, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. All the provisions of sections seventy-five, seventy-six, seventy-seven, and seventy-eight of chapter twenty, title one, part one, revised statutes of the state of New York, as amended by chapter two hundred and fourteen, laws of eighteen hundred and forty-two, and chapter one hundred, laws of eighteen hundred and forty-nine, relating to reports by superintendents of the poor of the several counties of the state to the secretary of state, and the penalties for the neglect of duties under said acts, are hereby extended to and made applicable to the commissioners of public charities and correction for the city and county of New York, the superintendent of the almshouse of the county of Albany, the keeper of the poor-house of the county of Putnam, and the superintendents of the poor who are appointed by the boards of supervisors of the counties of Fulton, Herkimer, and Jefferson, the commissioners of the almshouse elected in the cities of Newburgh and Poughkeepsie, and all poor officers elected or appointed in other cities of the state under special acts of the legislature.

§ 2. The commissioners of the almshouse of the cities of Newburgh and Poughkeepsie, and the poor officers of other cities chosen under special acts of the legislature, shall annually, on the first day of December, report to the superintendent of the poor of their respective counties such statistics as, from time to time, may be required to be reported in the other cities and towns of this state, under the general laws of the state.

§ 3. The superintendents of the poor elected or appointed to the several counties of the state, the superintendent in the almshouse of the county of Albany, the keeper of the poor house of the county of Putnam, and the commissioners of public charities and correction of the city and county of New York, are hereby required to make annual reports for their respective counties to the secretary of state, on or before the tenth day of January of each year (covering the year ending November thirty), upon the statistics of the poor required to be made by the acts hereby amended.

§ 4. The secretary of the state shall annually, on or before the first day of March, report to the legislature the results of the information obtained in pursuance of this act.

§ 5. The superintendents of the poor in counties in which there are no poor-houses, or in which the distinction between town and county poor has been revived, are hereby directed and required to procure from supervisors and overseers of the poor in the several towns in such counties the statistics necessary to enable them to make the annual report required by this act.

§ 6. The secretary of state shall, from time to time, furnish the officials named in the first and second sections of this act with the necessary forms, blanks, and instructions required in making up reports upon the statistics of the poor.

§ 7. The secretary of state is hereby authorized and directed to cause this act, together with all the general and special poor laws now in force in this state, to be compiled and published in pamphlet form, with such notes and explanations, forms and instructions adapted to the several systems of supporting the poor, as in his opinion may be necessary, and that he cause the same, when published, to be distributed to superintendents and overseers of the poor and keepers of poor-houses in this state, also to town and city clerks, county clerks, and clerks of boards of supervisors in this state.

CHAP. 461.

AN ACT to amend an act entitled "An act to more particularly define the duties of overseers of highways, and their appointment, in conformity with the provisions of chapter five hundred and twenty-two of the laws of eighteen hundred and sixty-five," passed May ninth, eighteen hundred and sixty-eight.

PASSED April 28, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Sections four and five of chapter seven hundred and ninety-one of the laws of eighteen hundred and sixty-eight, passed May ninth, eighteen hundred and sixty-eight, are hereby amended so as to read as follows:

§ 4. Section forty-seven of article third, title one of chapter sixteen of the first part of the revised statutes, is hereby amended so as to read as follows:

§ 47. Every overseer of highway shall, on or before the first day of October in each year, make out and deliver to the supervisor of his town a list of all resident landholders residing in his district who have not worked out their highway assessment or commuted for the same, with the number of days not worked or commuted for by each resident of his district, charging for each day in such list at the rate of one dollar and fifty cents per day; and also a list of all the lands of non-residents and of persons unknown, which were assessed on his warrant by the commissioner of highways, or added by him according to law, on which the labor assessed has not been performed or commuted for, and the number of days' labor unpaid by each, charging for the same at the rate of one dollar and fifty cents per day; which list shall be accompanied by the affidavit of the overseer, duly certified, that he has given the notice required by the thirty-second, thirty-third, and thirty-fourth sections of this title, and that the labor for which such residents and such land is returned has not been performed or commuted.

§ 5. Section fifty of chapter sixteen of the revised statutes, mentioned in the preceding section, is hereby amended so as to read as follows:

§ 50. It shall be the duty of each board of supervisors at their annual meeting in each year to cause the amount of such arrearages for highway labor returned to them severally, as provided in the preceding section, estimating each day's labor at one dollar and fifty cents a day, to be levied on the lands of all residents and non-residents returned as aforesaid, as returned by the assessors of the several towns, and to be collected in the same manner that the contingent charges of the county are levied and collected, and to order the same when collected to be paid over to the commissioners of highways of the towns respectively, to be by them applied to the construction, repair, and improvement of the roads and bridges in the district in which the labor was originally assessed.

§ 2. This act shall take effect immediately.

CHAP. 552.

AN ACT in relation to towns having a public debt.

PASSED May 2, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Whenever a town has a public debt, consisting of bonds or other evidences of debt issued on the credit of said town, it shall be the duty of the supervisor thereof, and he is hereby directed and required, to make a report to the board of supervisors of the county at the next annual session thereof after the passage of this act, and at every annual session thereafter, of the amount of the public debt of his said town.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

§ 2. The said report shall be in tabular form, specifying the different acts under which the bonds or debts were issued, with the rate of interest thereon, the amount unpaid at the time of the election of such supervisor, and the amount of debt paid at the date of his said report, and coming due during his term of office.

§ 3. The report so made to the board of supervisors shall be published in the annual report of the proceedings of said board.

§ 4. It shall also be the duty of such supervisor, and he is also directed and required, at the expiration of his term of office, at the annual town meeting for the election of town officers, to make and present thereto a duplicate copy of his report of the public town debt so made to the said board of supervisors, including and adding thereto the amount of bonds issued, and the amounts and interest paid, since the date of said report up to the day and date of his term of office, duly attested before a justice of the peace of his said town, and which said report shall be filed in the town clerk's office of the town, subject to the inspection, when required, of any elector thereof.

§ 5. All such bonds, and coupons thereof, paid, shall be canceled and burned by the town auditors of the town, at a meeting thereof to be held for that purpose within ten days previous to the annual town meeting; and a record thereof shall be filed, signed by the said board, in the office of the clerk of said town.

§ 6. Any supervisor or other officer neglecting or refusing to perform any duty imposed by this act shall be deemed guilty of a misdemeanor, and shall forfeit, upon conviction, the sum of two hundred and fifty dollars for such offense, and be imprisoned not exceeding sixty days.

CHAP. 717.

AN ACT to authorize the sale of real estate in which any widow is or shall be entitled to dower, in satisfaction and discharge thereof.

PASSED May 6, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In any action now pending, or which shall hereafter be brought, in the supreme court of the state of New York, or in any county court of any county in this state, by any widow, to recover her dower or right of dower in any real estate, or to procure the admeasurement thereof, the plaintiff in such action may file, in the office of the clerk of the court in which such action is or shall be pending, a consent in writing signed by her, the execution of which shall be acknowledged or proved in the manner now required by law to entitle a deed to be recorded, and in such consent may consent to accept a gross sum of money in full satisfaction and discharge of her dower and right of dower in such real estate, to be estimated on the net proceeds of a sale thereof, to be adjudged by the court, and may therein consent that the court may ascertain the amount of such gross sum of money in the manner authorized by the fifth section of this act. If the court in which such action is or shall be pending shall be satisfied that a portion of such real estate cannot, under the laws of this state now existing, be admeasured and laid off as the dower of such widow in the whole of such real estate without material injury to the interests of the parties in interest, or to the interests of some of them, and if the consent mentioned in this section shall have been filed as aforesaid, then, and in that case, such court shall have the power, and it is hereby authorized, in any such action, to adjudge and decree that such real estate be sold at public auction by the sheriff of the county in which such real estate is, or by a referee to be appointed by such court for that purpose, and such sale shall be made in the same manner, and notice thereof be published for the same length of time, as now provided by law in regard to the sales of real estate adjudged in an action to foreclose a mortgage.

§ 2. The court in any such action shall also have authority to direct that all taxes, assessments and water rates which are liens upon the real estate so adjudged to be sold at the time of the sale thereof, be paid out of the proceeds of such sale, and to direct that the sheriff or referee making the sale, with and out of such proceeds of sale, redeem such real estate from all sales thereof for unpaid taxes, assessments or water rates, and the plaintiff in any such action, if a sale of real estate shall be adjudged therein, shall be entitled to recover her costs and disbursements of such action, to be paid out of the proceeds of such sale.

§ 3. The court, in any action in which the sale of any real estate shall be adjudged, as hereinbefore authorized, shall also therein adjudge and decree that all the parties to such action shall, upon such sale being made, be barred of and from all the estate, right, title and interest whatsoever, which they and each of them had in such real estate at the time of such sale.

§ 4. If the right of dower of any widow in any real estate which shall be adjudged to be sold, pursuant to this act, shall be subject to any prior lien or incumbrance by mortgage or judgment, the court in any such action shall, in its discretion, have power to adjudge that the sale of such real estate be made subject to such lien or incumbrance, or it shall have power in its discretion to direct the sheriff or referee to pay such lien or incumbrance out of the proceeds of the sale thereof.

§ 5. The sheriff or referee who shall sell any real estate adjudged to be sold pursuant to this act shall file his report of sale therein, stating the amount for which he sold the real estate, and the amounts which, pursuant to the directions of the court, he shall have paid out of the proceeds of sale, and the purposes for which such payments were made, and the net amount of proceeds of the sale remaining after such payments, and, on such report being confirmed, the court shall ascertain, by reference or otherwise, what gross sum of money is equal to the then value of the plaintiff's dower in such net proceeds of sale, the same to be estimated according to the then value of an annuity at six per cent upon the principal sum during the probable life of the plaintiff, according to the tables commonly called the Portsmouth or Northampton tables, and such gross sum of money having been thus ascertained, the court shall thereupon order and direct the sheriff or referee who made the sale to pay to the plaintiff, or to her attorney in such action, out of the said net proceeds of sale, the said gross sum of money so ascertained, and such payment shall be in full satisfaction and discharge of the dower of such plaintiff in the whole of the proceeds of such sale, and the balance of such proceeds of sale shall be brought into court, and by it directed to be paid to the parties entitled thereto. The plaintiff, if required by any other party to the action, shall, at the expense of such party, on receiving such gross sum of money, execute and deliver to such party a release of the real estate so sold from her dower and right of dower therein.

§ 6. If, in such action or proceeding, the consent mentioned in the first section of this act shall have been filed, and a sale of estate shall not be ordered as herein provided, and the lands to be admeasured shall be vacant or unimproved lots, the commissioners, if the widow shall so elect, shall admeasure and set off to her for herself, her heirs and assigns forever, as her absolute property, a portion and share of such lands, quality and quantity relatively considered by them according to the value of her interest and estate in dower in gross, and which in value shall be deemed, upon the principles of law applicable to annuities, a reasonable satisfaction for such estate or interest in such lands, designating the share and portion by metes and bounds, and they may employ a surveyor with necessary assistants to aid them therein, which lands, when so allotted to said widow, shall be held by her in fee simple as her absolute property, but in full satisfaction of her dower and interest in such lands.

§ 7. This act shall take effect immediately.

The Albany Law Journal.

Albany, June 18, 1870.

RUFUS A. LOCKWOOD.

During the term of the supreme court of the United States, in December, 1855, a stranger occupied the same seat in the court room day after day, until his presence became almost a feature of the place; and even the impassive Taney realized there was a new fixed object within his visual horizon. His general appearance might have been catalogued as follows: height, above medium; figure, large and ungainly; movements, awkward; complexion, sallow and tobacco-smoked; eyes, dark and deep, with dilating pupils edged with yellow — cat-eyes in the dark; hair, dark brown, sprinked with gray; head, feet and hands large — the left hand web-fingered; features, not irregular, but without play or mobility, with a fixed expression of weariness; dress, careless, almost slovenly; age, fifty years, bearing the burden of four score.

Each day, from the opening to the adjournment of the court, he gave to all its proceedings — to its mere routine, to the driest and most technical argument, to the most absurd speech (and speeches were made there that would not have been tolerated in the twelfth district court, Pratt, J.), and to the most finished and cogent reasoning — the same constant, apathetic attention. The last day of the term was reached, and the court was about to adjourn, when the stranger arose, and, addressing the court with a trepidation of voice and manner that his will barely mastered, said he had traveled six thousand miles to argue a case that stood next upon the calendar; the counsel for the other side was present, and anxious that the case should be heard; if it went over to the next term, it would involve an inconvenience to counsel and expense to the parties, that would amount almost to a denial of justice: and under the circumstances, he felt privileged to ask the court to sit one day longer.

After a brief consultation the judges acceded to the request; and it was announced that, on the following day, the court would hear the arguments in the case of *Field* v. *Seabury*.

More than the usual number of spectators were present on the following day; and there was something more than curiosity to hear this lawyer, who had often been heard of, but never before heard in that court. The consciousness of this curiosity and expectation embarrassed him in the opening of his speech, but his mind fairly in motion soon worked itself free, and his phlegmatic temperament glowed to its core with flameless heat. For two hours he held the undivided attention of the court in an argument that was pure law. He had that precision of statement, skill, and nicety in the handling of legal terms, which modulate the very tones of the voice, and by which lawyers instinctively measure a lawyer — that readiness which reveals an intellectual training that has become second nature — that self-contained confidence that is based on the broadest preparation — that logical arrangement which gives the assurance, that back of every proposition is a solid column to support it if attacked — and that strength and symmetry of expression which carry the conviction, that behind utterance there is a fullness of knowledge that floods every sentence with meaning, and an unconscious reserve of power which gives to every word a vital force.

Long before he had concluded, it was known to all present that the stranger was Rufus A. Lockwood, of San Francisco; and he was that day, in the estimation of at least one of the judges who heard him, the equal of the best lawyer in the United States.

Though this was his first (and only) appearance in the United States supreme court, his brief had been before the court in the case of the Mariposa Land Grant (Fremont's), had gained the case, and been closely followed in the opinion. In examining that brief, Caleb Cushing — then attorney-general — exclaimed, in admiration of its legal learning and research, "Who is this man Lockwood?"

Who was he, and why was he not as well known to the profession and public as Choate, Evarts, O'Conor, Grimes, Benjamin, Reverdy Johnson, Stanton, Ewing, or Cushing himself?

The story of his life would answer this question; and if it could be fully told, with the long, dark struggle between the insanity in his blood and the spirit it almost "o'er-crowed," would be as full of tragic interest as that of Œdipus or Medea.

He was born in 1811, in Stamford, Connecticut, and his true name was Jonathan A. Jessup. At eighteen he was a student in Yale College, in the junior class, distinguished among his fellows for his proficiency in Latin and pure mathematics, and for his familiar acquaintance with English classics. In the midst of the term, for some reason known only to himself, without the consent of his friends, he left college, and enlisted as a sailor on a United States man-of-war. In his first cruise, he saw one of his messmates tied up and flogged for a trivial fault. Outraged by the injustice of the punishment, and shocked by its brutality, he determined to desert; and succeeded in doing so when his vessel returned to New York after a short voyage to the Bahamas. He changed his name to Rufus A. Lockwood, taking his mother's family name; worked his way to Buffalo on the Erie canal, and took passage on one of the first schooners that made the voyage of the lakes, to Chicago.

Chicago then (1830) was a frontier village, the solitude of the prairies on one side almost as unbroken as that of the lake on the other. Lockwood arrived there bareheaded, without money or friends. A farmer from the interior accidentally became acquainted with him, and believing there was material in him for a country school-master, took him in his farm wagon to his home at Romney, Tippecanoe county, Indiana. Romney was too small a place for the eye of the geographer, and had no existence on the map; but it maintained its store, blacksmith shop, tavern, and "grocery" in the clearing; its only public edifice the log building that answered the double purpose of a school house in the week, and on Sundays a church for any traveling preacher that happened in the neighborhood. For about a year Lockwood taught alternate terms at

Romney and Rob Roy, a similar village in an adjoining county; devoting his time out of school to the study of medicine. A friend writes: "For some time every thing went well, but some unpleasantness arose between him and his Rob Roy patrons, and the warrior habit which so distinguished him in later life brought on a sharp collision. Without hesitation, he struck out for Romney one of the coldest days in winter, with the snow a foot deep. In crossing 'the eight-mile prairie' he lost his way, and never was nearer his end until he went down in the *Central America*. He reached my father's about ten o'clock at night, with his hands and feet so badly frozen, that, though every remedy was resorted to, he was disabled for the rest of the winter. As soon as he was able to walk, he commenced a school. We had, at that time, a debating society in Romney that was attended by all the 'natives.' Lockwood did not seem to have the least capacity for extemporaneous speaking; but every Saturday night he was regularly on hand, with a half-hour's speech thoroughly committed, and delivered without reference to manuscript. Some of these efforts gave promise of his maturest powers. You remember his solemn manner, his deep, sepulchral tones, and the force and energy with which he pressed his strong points. They are all associated, in my mind, with the debates at the old log school house."

About this time he determined to study law, and borrowing a copy of Blackstone, almost literally committed its text. His country school of from seven to twenty pupils did not afford a very promising outlook, and he was induced to go to Crawfordsville. That place, now the flourishing seat of Wabash college, did not then contain material for two schools, and the field was already occupied by one. Lockwood opened in opposition; got into a newspaper quarrel with his competitor; studied law by night; got married without a dollar in the world; was admitted to practice by the circuit court, and went to Thorntown, a new place in Boone county, to establish himself in his profession. He did not wait long for a client; he was sued by his landlord, and made his first appearance as a lawyer in his own case. He pleaded an unpaid tuition bill as a set-off, but judgment was given against him. He was unable to give an appeal bond, and the bed he and his wife slept on was sold by the constable for less than $10. No incidents of his life seem to have made a deeper impression on him than the flogging of his messmate and the constable's sale of his bed. He referred to the first with a shudder, as if the scene were still before his eyes, in the last year of his life. The last burned into his soul a dread and horror of debt; he never forgave its author, and, in the course of his professional life, found an opportunity to take a keen revenge.

Many years after, speaking of his Thorntown experience, he said: "I never knew how my wife lived. I know I lived on potatoes roasted in the ashes." He buried himself in study — sought forgetfulness in study, as men do in drink. In his second case he was, fortunately, not his own client — fortunately lost it, and appealed to the supreme court. Never was a case involving so small an amount more thoroughly prepared. He briefed it as though thousands were pending. In after years he often referred to the embarrassment he experienced at his first appearance at the supreme court. Morbidly sensitive; his uncouth appearance and coarse, ill-fitting clothes a burden to him; oppressed by a deep sense of poverty and friendlessness — he shrank from contact of men of the world as one long immured in darkness is pained by the light. He had not the courage to state to the court that he was present for examination as an attorney, and was only relieved from this difficulty by the accidental presence of the judge of his circuit, who made the necessary motion. Lockwood's appearance, of course, attracted attention; and the manner in which he passed his examination, with the exhaustive argument he made in the case he had carried up (*Poulk et al.* v. *Slocum*, 3d Blackford, 421), made him known to the court and bar as a man of mark. Even his landlady noted the changed manner toward him, and translated him from a lumber-room in the attic to the floor of his peers.

His new position, however, brought him no new clients at Thorntown. He knew none of the arts by which success is conciliated. He was never the next friend of the clerk, the favorite of the sheriff, the intimate of the judge, familiar with jurors, nor the confidant of witnesses. He realized his disadvantage in the small encounters of social intercourse, and avoided them. He became moody, reserved, abstracted, studious. Never seeking business, what little there was in his sparsely settled country did not seek him. His deep love and ardent study of the law as a science, were rather bars than aids to his immediate success; and his poverty was unrelieved. He was refused credit for a trifling amount at the village store; he wrote the name of the owner in his black-book, and went back to potatoes in the ashes, with salt for a luxury. His home was never a happy one. He knew "the law was a jealous mistress," and in his heart it had no rivals. He was still under five-and-twenty; but he never was young. His life was always a struggle. He would make no terms with Fortune — it was an enemy to be conquered. In all his professional career he never seemed so entirely himself, as when he felt that court and jury were against him, and must be overcome by sheer force of intellect and will.

Albert S. White, of Lafayette, Indiana, had become acquainted with Lockwood at Indianapolis, and in the year following (1836) offered him a partnership. The offer was accepted, and he removed to Lafayette. His opportunity at length came.

Soon after the presidential election of 1836, a homicide was committed at Lafayette that caused the most intense excitement. Mr. J. H. W. Frank — a very young man, the junior editor of a democratic paper — had won a small wager from Mr. John Woods, a prominent merchant, on the vote of the city of New York. Frank called for settlement, and was accused by Woods of being in possession of the returns at the time the bet was made. A quarrel and rencounter ensued, in which Frank killed Woods by stabbing him with a pocket-knife. Woods was a man of high social position, and his party regarded him as a martyr whose blood was to be avenged.

White and Lockwood and John Pettit were engaged for the defense. White and Pettit prudently, perhaps, insisted that the safer course was to delay the

trial, get the prisoner released on bail, and forfeit the bond. Lockwood urged a speedy trial — that it was better Frank should take his chance at once of suffering the penalty of the law, than to be a wanderer over the earth, liable to be hunted down any hour of his life. Frank coincided with this view; and Pettit and White, though continuing to counsel with Lockwood, took no further part in the active management of the defense. The case was continued one term, on motion of the state, and Lockwood had ample time for preparation. He realized that, in the event of conviction, the blood of the accused would be upon his hands. It would not answer to reduce the crime to manslaughter: Frank preferred suicide to the penitentiary, and his lawyer applauded the choice. Those who knew counsel and prisoner could not tell which felt he had the greater stake in the result.

When the case came on for trial, Edward A. Hannegan was employed to assist Lockwood, and Henry S. Lane and Isaac Naylor appeared with W. P. Bryant for the prosecution. It was, perhaps, the most remarkable criminal trial that has ever occurred in Indiana. Of the counsel engaged in it, White, Hannegan, Pettit and Lane afterwards represented that state in the United States senate.

A trial for murder is essentially dramatic, with the added awful interest of a human life at stake. In the trial of Frank, the legal parties were strongly cast. Lane was an impetuous speaker, moving straight as a cannon ball to his mark. In his younger days — and he was young then — his speech was a stream of fire. Hannegan, as an orator, was not unlike Colonel Baker: inferior to him in sustained power, he was his equal in vivid imagination, and his superior in emotion, tenderness, and pathos. Naylor was a plausible man, who won the confidence of jurors, and magnetized them into the impression that he was, by turns, the candid friend, the impartial judge, a disinterested witness, a fellow-juror bound by his oath — any thing but an advocate. Bryant (afterward United States district judge) was cool and watchful; instant to see, and call attention to, any loose joint in the armor of his adversary.

Fox said of one of his own speeches, "If it reads well, it is a poor speech." In reading Lockwood's speech on this trial, it seems, with the exception of the law argument, declamatory and overwrought; but no perusal can give an adequate conception of its living effect. It was level with the occasion; fervid with the excitement of the hour. The orator fairly met and turned back the tide of popular passion, by the greater passion of his single breast. At times, his delivery swelled to the fury of the storm; at others, sank to the plaintive moaning of the autumnal wind. His invective was terrible. He poured the gall of years of bitterness into his denunciation of the "society" that demanded, and the clique that had contributed money to secure, a conviction. His statement of the law was clear and exhaustive, raising the distinctions between murder, manslaughter, excusable and justifiable homicide, with metaphysical stability, and mathematical precision. In shaping the testimony, he seemed to make his own case; and in applying the law to the facts, was severe as logic. The speech lasted nine hours, and one who heard it said, "It was the best jury-speech ever made on this continent — or any other."

Frank was acquitted. The case was for Lockwood more than Erskine's "nonsuit of cow-beef:" it was his supremest triumph, bringing him, at twenty-six, from obscurity and neglect into the full blaze of popular attention and applause.

White was soon afterward elected to congress, the partnership was dissolved, and Lockwood entered upon an extensive practice.

There was nothing in the history of litigation in Indiana like the unsettled land titles, and the conflict between old court and new court which made Kentucky the battle ground of legal giants; but thirty years ago she had a strong bar, and, with Blackford, Dewey, and Sullivan on the bench, as able a supreme court as ever adorned the jurisprudence of any state of the Union. The habit of following a circuit makes a different, and, in many respects, a better lawyer, than a city practice. The circuit lawyer in a new country should be well versed in every branch of his profession. There is no chance for a division of labor. He must be ready for the "occasion sudden;" for he will often learn for the first time the leading facts of his case while it is on trial. He will seldom have access to any but the most meagre libraries, and he must carry his books in his brain. With a supreme court above him that passes no mistakes, and a backwoods jury before him that would be wearied and disgusted with a display of technical learning, and would "tolerate no nonsense," he must be so grounded in elementary law as to be able to try his case closely without his books, and adhere to the *lex scripta* while arguing to the jury as a man rather than as a lawyer. In the early days of Indiana, lawyers in good practice would ride hundreds of miles on horseback. In the small country towns the people would flock to the court-house as to a show, and in every important case the whole neighborhood would take sides. There was not often any assumption of dignity in judicial manners and bearing. Sometimes the court would adjourn to allow the bar, jury and witnesses to go to a horse-race, where "his honor" would preside with the same impartiality that distinguished his rulings on Kent and Blackstone. On one occasion, a judge whose decisions usually stood fire, is reported to have said to a lawyer who afterward acquired a national reputation, "Ned, you can go to the jury, but those horses are to start in thirty minutes, and I advise you to be brief." Ned was brief, and the judge remembered it in his charge. In the evenings, judge and lawyers would meet at the village tavern in a social game of old sledge, and discuss with the same freedom, a false play, and any mistake that had been committed, or absurdity that had been uttered in the court-room. It was a rough school, but thorough, and those who passed through it fairly, learned their degrees. In addition to this training, Lockwood was always a close student of books. He read nothing superficially. He analyzed, made his own syllabus for, and commonplaced every case he ever had occasion to examine.

One who knew him well, and was, at one time, his partner, writes: "Some subjects in connection with Lockwood suggest themselves at the moment, upon

which I would enlarge if I had leisure: I allude to his strong sense of natural justice; to his conservatism; to his indefatigable pursuit of details; to his hatred of shams; to his contempt for the narrowness of parties and partisans. How he loved his profession! How he identified himself with his clients! How proud in his successes, and how gloomy in his reverses! I think I never knew a man of finer impulses.

"The finest tones of his eloquence were due to his reverence for sacred things — the corporal oath, the conscience and religion: a reverence not paraded for effect, but unconsciously permeating his speech, and giving him, with juries, a surpassing power. He seemed almost morbidly attached to the study of such cases upon wills, as turned upon the distinction, shadowy and vague, between sanity and insanity. His own mind was an instructive instance of the painful narrowness of this line of demarkation — the boundary between the fine frenzy of the poet and the dark frenzy of the lunatic."

For a few years his professional business was large; but, at that time, every man in the "West" was a speculator, and in the revulsion that followed the flush times, he found himself involved in debt beyond his immediate ability to pay. In the spring of 1842 he deposited what money he could raise in bank, for the benefit of his creditors, reserving only a few hundred dollars; placed his son at a Catholic school in Vincennes, and disappeared. He had communicated his intentions and plans to no one, and it was not known, even to his own family, until long afterward, that he had gone to the city of Mexico. For some months he had devoted himself to the study of Spanish and the civil law; but it would have been as rational to have expected to make a fortune teaching Mexican children their mother tongue as in the practice of his profession. He was simply flying from his demon. He had no acquaintances in Mexico; it is not probable that he made any. To add to his helplessness, not long after his arrival, he was attacked with inflammatory rheumatism, and saw his small means melt away, until he had barely enough left to pay a caravan passage to Vera Cruz. He set out for that place before he had fully recovered, and arrived there with $2 in his pocket, which he immediately staked at *monte*. He won, and pressed his luck until he had won $50; paid his passage to New Orleans, and went from there to Natchitoches, where he had a cousin living. He resumed the name of Jessup, and again applied himself to the study of the civil law and the Louisiana code. After spending a year at Natchitoches in study and occasional practice, he returned to New Orleans, and applied for admission into the higher state courts. He had successfully passed his examination, and was about to take the attorney's oath, when he accidentally saw in the court-room a man of whom he could expect, and from whom he would receive, no favors — a man he had humiliated with his most merciless ridicule, and tortured with his cruelest sarcasm — the man who had sold his bed under execution; from the shadow of whose memory he was fleeing. Dreading an exposure of his changed name, he instantly quitted the room. A few days afterward, Sam. Judah, a distinguished lawyer from Indiana, met him on the street, wearing a straw hat, "negro shoes," and clothing to match. He wanted to borrow $20 to redeem his trunk. Judah had but ten with him. "It is of no consequence," replied Lockwood, declining the ten, and went on and on, until a recruiting station attracted his attention. Fairly at bay with fate, he saw the words, "Twenty Dollars Bounty" — hesitated a moment — then enlisted as a common soldier in the United States army; took his bounty and paid the bill at his lodgings, and was sent to join his regiment in the Red River (Arkansas) country.

After a few months' trial, he liked the land, as little as the naval service of his country.

His friend Hannegan was at that time in the United States Senate; and learning of Lockwood's enlistment, obtained from President Tyler an order for his discharge, which he sent him, with $100, and an earnest entreaty to go home to his family. Lockwood afterward repaid this gift by a present of $10,000. After an absence of nearly three years, he returned to Lafayette, found his wild lands sufficiently advanced in value to relieve him from debt, and resumed his profession.

No man on his circuit — few men anywhere — equaled him in his power of abstraction and prolonged concentration. He held a subject as in a vice, until he had mastered it. In the preparation of his cases, he knew no weariness; and if his faculties began to flag on trial, he stimulated them to their utmost by the use of brandy, opium, and even tincture of cantharides. He sometimes erred, from over-preparation; from the excessive refinement and subtilty of his distinctions, and the metaphysical cast of his mind. His arguments on legal propositions were apt to run into disquisitions upon general principles. He would hunt a principle down until he resolved it into an abstraction. He erred oftener from an absorbing interest that indentified him with his client — or, rather, made himself the real party in the case — from the violence of his personal feelings, the bitterness of his prejudices, and his undisguised contempt for a judgment that did not see as he saw, and rest in his conclusions. He could not leave his likes and hatreds at the door of the court room, without divesting himself of personality. The successful lawyer should conduct the trial of his cause as the coolest gambler watches his game, unmoved by the magnitude of the stake. He may be excited, but must never be carried away by his own vehemence; and in the very torrent, tempest, and whirlwind of his passion, must watch the play of his own feelings, and measure the effect his most righteous indignation and noble anger will have upon the minds he seeks to convince.

These faults were all illustrated in the trial of a case, the result of which was the immediate occasion of his coming to California. In 1848-9 he was employed to contest a death-bed will, where the testator, being childless, had bequeated his property to his wife's relatives, who were comparatively affluent, to the exclusion of his own, who were poor. One of the principal legatees was —— Holloway (ex-commissioner of patents), who had, at some time previous, refused to pay a fee charged him by Lockwood, on the ground it was exorbitant. Lockwood sued for it, recovered judgment for the full amount, and remitted the judg-

ment, with the assurance that he would take his pay in some other manner. In the case of *Hill* v. *Holloway*, he saw an opportunity to make his promise good, and he entered upon it with all the interest inspired by a favorite intellectual pursuit, and the ardor of vindictive hatred.

At the trial, he was so intent upon attributing improper influences and raising the presumption of fraud, he failed to bring out the fact, which it is possible might have been established to the satisfaction of the jury, whose sympathies were strongly against the will, and which would have been fatal, that the testator affixed his signature (the name was illegible), *in articulo mortis*, and that he was dead before the subscribing witnesses had signed. His argument took up three days; he regarded it as the ablest effort of his life; but it failed of its purpose, as what three-day argument does not? While the jury was out, Lockwood sat, as usual after a hard contest, moody and abstracted, fighting the battle over again in his own mind, and seeing perhaps but too clearly where it had been lost, if it were lost. When the jury came in, and the verdict against him was read, he arose, struck the table with his clenched fist, and swore he would never try another case in that court.

He never did.

His friend, Mr. E. L. Beard, was making preparation to go to California, and Lockwood proposed to join him. He thought he could do well by shipping a lot of liquors from New York in small bottles, and peddling them to miners! Beard had determined to go through Mexico to Mazatlan; Lockwood, not wishing to renew his acquaintance with the Mexicans, took passage around the Horn. Before parting, the friends provided themselves each with a bugle of the same tones, that they might hear and answer each other's calls, if they should at any time get lost in the Wilderness of California. Beard had been in California some months, and was living at the Mission of San Jose, when, one day, he heard the familiar sound of Lockwood's bugle. Answering the call, he soon met Lockwood — covered with mud, gun on shoulder, knife and pistols in belt, bugle in hand — like a modern Don Quixote going to summon the surrender of a castle; with a sailor companion, loaded down with bundles, for a Sancho Panza.

Lockwood had suffered severely from scurvy during the voyage. On arriving at San Francisco, he started for the Mission, landing in a whale boat with one boatman; got lost; had been in the swamp all night; had taken short cuts through sloughs and bayous; was chilled, famished, and very ill. On reaching the house, he insisted that he must be bled. The only physician in the neighborhood assured him that bleeding would be certain death. Lockwood maintained his opinion; and as the only way to demonstrate its correctness was by experiment, he tried it — bled himself until the doctor admitted the experiment was a fair one; and confounded his antagonist, and science, by getting better, and eventually well.

Before leaving New York, he had been induced to abandon his contemplated traveling bar, and on the voyage had applied himself to the study of medicine. He had quarreled with the law, and thought of going back to his first love; but his hatred of sciolism made him unwilling to try experiments upon any life but his own, though his success in medicine, where he was his own first patient, was more flattering than in the law, where he was his own first client.

He soon came up to San Francisco, and for six months was clerk in a law-office, where he not only furnished the law, but swept the office, made the fires, and in all respects complied with his agreement to "make himself generally useful." He received his wages every evening; every night found him in a gambling saloon; every morning penniless. His legal services were appreciated in the office, though he was spared no humiliation; and, at the end of his term, he was patronized with the offer of a partnership, if he would stay a year. "I have fulfilled my contract to the letter," he replied, "and you have paid me as you agreed, but I would not remain another hour ——" The close of the speech would not look well in print.

He entered into a law partnership with —— and ——, which lasted until there was one division of profits. In the allotment to Lockwood there was $500 of state scrip, which he agreed to sell to one of his partners at a price named. When he brought in the warrants next morning, their value had declined, at least, in his partner's estimation, and Lockwood tore them up and left the office.

For a month or two he worked as a day laborer — shoveling sand, coaling steamers, and doing any thing that came to hand. While he was thus engaged an old acquaintance sought him out, to get him to try an important law-suit, involving title to real estate in the city. Lockwood at first refused to go; said he was earning an honest living, and did not want to be disturbed. His friend persisted, and, at length, banteringly offered to double his daily wages if he would go to work on his case. This proposition struck Lockwood favorably, and he acceded to it, stipulating that he should be paid every day, and that at no time afterward should any other fee be offered him, directly or indirectly; "for," said he, "I want none of my partners' earnings, and they shall have none of mine." He tried the case successfully; the profit involved was of great value; but he held his client to his contract, and his daily wages was his only fee.

After the term of his "partnership" expired he opened an office alone, and was soon after employed as counsel by Palmer, Cook & Co., and through that connection was introduced to a general and lucrative practice.

Mr. Palmer was at San Jose in the winter of 1851, during the session of the legislature at that place, anxious to secure the best possible legal services for his firm, and particularly for a test-case that involved the "water-lot titles, government reserves," etc. One evening General McD —— and Judge H —— were in his room, and it occurred to him that he would take their opinion as to who was the best land-lawyer in San Francisco. Handing each a slip torn from the margin of a newspaper, he asked them to write the name of the man entitled to that pre-eminence, in their judgment. He was surprised to find the same name written by each, and more surprised that it was a name — Lockwood — of which he had never heard. He returned to San Francisco the fol-

lowing day, to find this strange lawyer, who, in the trial of a single case, had impressed two of the finest legal minds in the state with a sense of his superiority. The interview and its result will be given, as nearly as they can be recalled, in Mr. Palmer's words:

"I found Lockwood in an unfurnished office, apparently absorbed in a black-letter looking law book. I introduced myself, and told him the case in which I wished to employ him. There was no need to go into details, as the case was well known by its title, having been freely discussed by the newspapers. Lockwood, scarcely looking up from his book, said, 'I don't think you have got any case.' Piqued by his abruptness, I answered, 'When you have given the matter as much attention as I have, perhaps you will be of a different opinion.' 'If you will come to-morrow morning,' he replied, 'I will give you a final answer.' When I went back he was in the same position. It did not seem to me that he had moved, or turned a leaf of the volume before him. Without addressing a word directly to me, except to acknowledge my presence, he said, as if reading aloud to himself, 'a conveyance that is void is void forever.'

"Not relishing that application of the law, and nettled by his manner, I remarked that the counsel for the other side would probably be able to find that principle without his assistance. Without heeding my interruption, he went on, in the same measured manner, 'But the sovereign power, by a sovereign act, may give validity to *the terms* of a conveyance which is void.'

"I saw his meaning and its importance as by a flash of lightning, and, applying it to the case, exclaimed, 'Then an act of the legislature may refer to a void deed for a descripton of lands; and it is the law which conveys the title, not the deed?'

"'Precisely. I will take your case, and win it.'

"From the moment he announced his position, I felt that he would win it; but when the case was coming on for trial, I was amazed and terrified by the quantity of brandy he drank. I remonstrated to no purpose. Outside the court-room he became dull and stolid; within, on trial, he was luminous, ready upon every proposition; and I was constantly asking myself, 'How long can he hold out?' The case was on trial several days; four lawyers, as able as any in the state, were on the other side; and I do not remember a single instance in which Lockwood was taken at a disadvantage, either in argument, authority, or repartee. I recall at the moment one passage between him and Isaac E. Holmes. Lockwood had quoted law to the effect, I think, that, under certain conditions, an easement might be extinguished by a change of the fee. Holmes interrupted him — 'Do you state that as law, Mr. Lockwood?'

"'Yes,' replied Lockwood, his manner for the moment slow, almost to drawling, 'I state it as law: and I have tried and gained an important case upon that principle.'

"'That case has not been reported, I fancy. It is not in the books, is it? It is Hoosier law, I presume.'

"'No, sir; the case is not in the books which the gentleman has read. It was tried before an Indiana court, at an Indiana bar — a court and bar on which the gentleman's transcendent abilities would reflect no credit.'

"He held out, made his words good, and won the case. He was immediately retained by Palmer, Cook & Co. as their general counsel; and though paid large fees, his legal services were considered cheap. Of course, he was not always successful (the lawyer has had a small practice who never lost a case), but he was always ready. I never knew him to ask a continuance. A starved lion were scarcely fiercer than he after a defeat. When he was at bay, some one was apt to get hurt. As an instance of his crushing manner: once, when a witness, whose answers had been unsatisfactory, if not untrue, and whom he had cross-examined at great length, was about to leave the stand, Lockwood detained him 'One question more;' finished the sentence he was writing, looked up, and transfixed him with the question, 'Would you believe yourself under oath?'

"Our patience was often taxed by his humors; but you know one can grant every thing to the eccentricities of genius, who would concede nothing to the caprices of a fool."

His large professional gains only fed his passion for gambling. Again at war with himself and the world, he determined, in the summer of '53, to break off his associations, and go to Australia. Some of his clients subsidized the master of the vessel on which he had taken passage to remain in port a week after Lockwood had gone on board, to see if he would not change his mind. When it was evident he would not, one of them visited him to inquire if he had any money. "Yes," he answered, taking a quarter eagle from his pocket and throwing it overboard; "but I will sail free." His friend, Mr. Beard, however, had placed some clothing and money in the hands of the captain, with orders to smuggle them into Lockwood's room "when his fit was over."

Arrived at Sydney, he set out to walk to Melbourne — about seven hundred miles — through wide stretches of uninhabited bush; over spurs of mountains, where there was not so much as a bridle-path; a journey so lonely, wild, and desolate, that no other white man ever voluntarily made it alone and on foot.

He had always had a great admiration for English law reports, and a high opinion of English courts. He loved the old common-law system of pleading; the distinction between law and equity proceedings; and had little respect for the code of "law made easy," with its one form of civil action and unlimited liberty to amend. He thought that in an English court he would get into a purer atmosphere of law — where cases would not be argued by the newspapers, and prejudged by the public that makes and unmakes courts. He was not destined, however, to have any such experience; for a law of the colony, or a rule of court, prohibited any one not a subject of the queen from practicing law until after a residence of seven years in Australia.

He remained in Australia nearly two years. At one time he was bookkeeper to a mercantile house; at another, clerk in a law office, from which he was discharged for refusing to copy a paragraph into a brief, which he said was not law; and for some months he was employed in the lonely, but not uncongenial

occupation of herding sheep. After his return, speaking of his trip to Australia, he said: "I know you thought I was crazy, but I was not. It was the sanest act of my life. I felt that I must do some great penance for my sins and follies. I wanted to put a gulf between me and the past."

On the return voyage, he was one day incensed by some real or fancied impertinence of a waiter at the dinner table. After waiting a moment in vain for the captain to reprove the servant, he exclaimed: "Captain, I will never eat another mouthful on your ship." The next day he was not seen in the cabin, and a lady passenger, who had heard his singular threat, went to his state room and told him she would bring him something to eat from her own stores, in which neither the ship nor captain had any interest. "Madam," he answered, "my words were I would not eat on this ship." Fortunately, they put into Honolulu before he was literally starved, and he took passage on another vessel.

Soon after he arrived in San Francisco, he was offered a very large fee, and a contingent fortune, to appear for the "Peter Smith titles." It was a temptation, for he was very poor, and wanted money; wanted still more the *eclat* of a great law-suit, and thirsted for its excitement; but, on a collateral case, he had once given an opinion against the validity of the Peter Smith sales, and, from a sense of professional honor, declined the employment, and refused to re-examine the question.

After his "great penance," his character grew more subdued, his aims more rational, his life more steadfast. He no longer sought excitement and forgetfulness in dissipation and gambling. He had always clung to the idea of immortality — but rather as a hope than a faith; and there was not a scar on his soul of which he was not painfully conscious. His tired heart wanted rest, and he was beginning to seek it — where so many other restless spirits have sought — under the shadow of authority in the teachings of Rome. Not for him, though, was ever the undisturbed peace of the faithful; and when the devil in his blood arose, who can tell the agony of his soul's conflict?

He returned from Washington, after the argument of *Field* v. *Seabury*, in the spring of 1856. In the fall of '57, he was again preparing to go East on professional business. To one of his friends who tried to dissuade him from going, he said: "I will stay, if you insist; but I feel that I shall go mad if I do."

He sailed as he had intended. At Aspinwall he connected with the ill-fated *Central America*, on her last voyage. During the storm he took his turn with other passengers at the pumps, until his strength was exhausted. Coming up to rest, he was met by one of the officers, and ordered back to work.

"Sir," he answered, "I will work no more."

His work was done. He went into his state room, closed the door, and was never seen again. In a short time the wreck went down.

Justice F. H. Mickle, of Crawford county, is the oldest justice of the peace in Indiana. He has held the office for forty years.

LAW AND LAWYERS IN LITERATURE.*

XXII.

EMERSON.

In the essay on Eloquence, which forms a chapter of Ralph Waldo Emerson's new volume entitled "Society and Solitude" — a book full of wisdom expressed in a most honeyed style — are a few remarks on lawyers: "There is a petty lawyer's fluency, which is sufficiently impressive to him who is devoid of that talent, though it be, in so many cases, nothing more than a facility of expressing with accuracy and speed what everybody thinks and says more slowly, without new information or precision of thought, but the same thing, neither less nor more."

"In a court of justice the audience are impartial; they really wish to sift the statements, and know what the truth is. And in the examination of witnesses there usually leap out, quite unexpectedly, three or four stubborn words or phrases, which are the pith and fate of the business, which sink into the ear of all parties, and stick there, and determine the cause. All the rest is repetition and qualifying; and the court and the country have really come together to arrive at these three or four memorable expressions, which betrayed the mind and meaning of somebody."

"I remember, long ago, being attracted by the distinction of the counsel and the local importance of the cause, into the court room. The prisoner's lawyers were the strongest and cunningest lawyers in the commonwealth. They drove the attorney for the state from corner to corner, taking his reasons from under him, and reducing him to silence, but not to submission. When hard pressed, he revenged himself in turn on the judge, by requiring the court to define what salvage was. The court, thus pushed, tried words, and said every thing it could think of to fill the time, supposing cases, and describing duties of insurers, captains, pilots and miscellaneous sea-officers, that are, or might be — like a schoolmaster puzzled by a hard sum, who reads the context with emphasis. But all this flood not serving the cuttle-fish to get away in, the horrible shark of the district attorney being still there, grimly awaiting with his 'the court must define' — the poor court pleaded its inferiority. The superior court must establish the law for this, and it read away piteously the decisions of the supreme court, but read to those who had no pity. The judge was forced at last to rule something, and the lawyers saved their rogue under the fog of a definition. The parts were so well cast and discriminated, that it was an interesting game to watch. The government was well enough represented. It was stupid, but it had a strong will and possession, and stood on that to the last. The judge had a task beyond his preparation, yet his position remained real; he was there to represent a great reality — the justice of states, which we could well enough see beetling over his head, and which his trifling talk nowise affected, and did not impede, since he was entirely well-meaning."

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

"The statement of the fact, however, sinks before the statement of the law, which requires immeasurably higher powers, and is a rarest gift, being in all great masters one and the same thing, in lawyers, nothing technical, but always some piece of common sense, alike interesting to laymen as to clerks. Lord Mansfield's merit is the merit of common sense. It is the same quality we admire in Aristotle, Montaigne, Cervantes, or in Samuel Johnson, or Franklin. Its application to law seems quite accidental. Each of Mansfield's famous decisions contains a level sentence or two, which hit the mark. His sentences are not always finished to the eye, but are finished to the mind. The sentences are involved, but a solid proposition is set forth, a true distinction is drawn. They come from and they go to the sound human understanding; and I read without surprise that the black letter lawyers of the day sneered at his 'equitable decisions,' as if they were not also learned. This, indeed, is what speech is for — to make the statement," etc.

BOILEAU,

educated to the law, excuses his desertion to literature, in his first Satire:

"Shall I hereafter act another part,
Phœbus abandon for Bartholu's art?
Turn o'er the Institutes, thumb Littleton,
And draggling at my tail a dirty gown,
Pick up for every cause a double crown?
But at the very thought I start, and find
The Bar and I shall ne'er be of a mind.
Can I in such a barbarous country bawl,
And rend with venal lungs the guilty hall;
Where innocence does daily pay the cost,
And in the labyrinth of law is lost;
Where wrong by tricks and quirks prevails o'er right,
And black is by due form of law made white;
Garvin outnoised by *Graham* yields the prize,
And Ciceros are formed o'er mutton pies?
E'er I a thought like this can entertain,
Frost shall at midsummer congeal the Seine;
His Holiness shall turn a Protestant,
Beecher wear lawn, and *Tyng* the younger cant."

The translation which I quote has dashes in place of the proper names, and I have ventured to supply the names which I think the poet must have intended.

In the eighth satire the following occurs:

"No eagle does upon his peerage sue,
And strive some meaner eagle to undo;
No fox was e'er suborned by spite or pay,
To swear his brother fox's life away;
Nor any hind, for impotence at rut,
Did e'er the stag into the Arches put,
Where a grave dean the congress might ordain,
And with that burlesque word his sentence stain.
They do no dreadful *quo warranto* fear,
Nor courts of sessions or assize are there,
No common pleas, queen's bench or chancery bar;
But happier they, by nature's charter free,
Secure and safe, in mutual peace agree,
And know no other law but equity."

"What would he think, upon a lord mayor's day,
Should he the pomp and pageantry survey,
Or view the judges, and their solemn train,
March with grave decency to kill a man?
What would he think of us, should he appear
In turn, amongst the crowds, at Westminster,
And there the hellish din and jargon hear,
Where *Spencer* and his pack, with deep mouth'd notes,
Drown Billingsgate and all its oyster boats?
There see the judges, serjeants, barristers,
Attorneys, counsellors, solicitors,
Criers and clerks, and all the savage crew,
Which wretched man at his own charge undo?"

In his epistle to the Abbot des Roches the poet says:

"Dost think, thou champion of thy church's rights,
That justice follows if the law invites?
Would'st thou thy proud rebellious monks chastise?
Believe me, 'tis a dangerous enterprise.
Can Ausanet, tho' feed, secure the cause,
Convince the judges and compel the laws?
Tho' just thy suit, ne'er think it will succeed.
In vain the law directs, and lawyers plead.
Don't imitate the fools whom lust of gold
Provokes, and makes 'em in a process bold;
Don't at thy cost the greedy bench enrich,
Nor let litigious hopes thy mind bewitch;
For he who in a suit his weapon draws,
Is often beggar'd, tho' he gain his cause.
But who, the lawyers say, would lose his right?
The law has no respect for muck or might.
At Caen they preach this doctrine, where the son
The father follows, and is soon undone.
At Mons betimes the sire this lesson reads,
The son's soon taught, and son the sire succeeds.
But thou on this side of the Oise wert bred,
And wilt not with their follies fill thy head;
Nor wilt thou, like some hot incumbents, squeeze
The clowns, nor sue a peasant for a piece.
Nor e'er the law has ta'en its costly course,
Make bawling Mazier and Corbin hoarse.
No, no — but if thou e'er should'st long to fee
A lawyer, pr'ythee, first consult with me,
And if I can't these wicked thoughts disperse,
Read this old tale, which now I tell in verse:

"It happen'd in a former wrangling age,
An author writes (no matter for the page),
Two travelers, for breakfast ready found
A fat stray oyster lying on the ground.
Says one, 'tis mine, the other says the same,
And hot they grew, and hunger fann'd the flame.
Who should come by, while they debating stand,
But Justice, with the balance in her hand.
To her they both applied. She heard the cause,
And found them bent to leave it to the laws.
She weighed the matter, and to end it well,
Opened the fish, and gave to each a shell,
'Thus,' having swallowed it at once, she cried,
'We judge the cause, and thus the goods divide.
What, but for fools, would law and lawyers do?
'Twas a good oyster, gentlemen, adieu.'"

In the first epistle to the king, Boileau speaks of—

"The costly quarrels of the wrangling bar,
More fatal than the bloody feud of war."

The following translation of a Latin epigram by this poet closes the list of his contributions to my subject:

"Upon a young lawyer, the son of a country beadle:

"While the fierce beadle's brat does loudly bawl,
How silent are the mob, how still the hall!
Yet think not that his rhetoric's revered,
The son is harmless, but the father's feared."

PETRONIUS ARBITER.

I find that this author has a good deal to say about law and lawyers. "Cerberus, forensis erat causidicus," has been thus translated:

"Sure Cerberus a lawyer first must be,
Whose clam'rous mouth would open for a fee;
But, since whene'er he wrangl'd, still he had
Three specious reasons for the noise he made,
To please his client, to inform the court,
And to gain riches for his own support;
Therefore he's doom'd in hell three heads to bear,
And in his mouth three howling tongues to wear;
That the loud eloquence he once could boast
To his own interest, but his client's cost,
Might now be turn'd to dreadful howls and yelps,
The snarling language of illiterate whelps;
And tho' on earth no other bribe but gold
Would make the pleader for his client scold,
Yet now in hell a greasy sop must be,
Instead of coin, the growling puppy's fee."

In his first satire, one of the characters having had his coat stolen, is advised to resort to law to recover it:

"Law bears the name, but money has the power;
The cause is bad whene'er the client's poor.
Those strict-life'd men that seem above our world,
Are oft too modest to resist our gold,
So judgment, like our other wares, is sold;
And the grave knight, that nods upon the laws,
Wak'd by a bribe, smiles, and approves the cause."

But he is afraid of the law, and is "clear for buying it, though we know it to be our own, and rather recover the treasure with a little money than embroil ourselves in an uncertain suit."

MANDEVILLE,

in the "Fable of the Bees," has these Hudibrastic lines on lawyers, in reference to the subject of the registration of voters:

"The lawyers, of whose art the basis
Was raising feuds and splitting cases,
Oppos'd all Registers, that cheats
Might make more work with dipt estates;
As 'twere unlawful that one's own
Without a law-suit should be known!
They put off hearings wilfully,
To finger the refreshing fee;
And to defend a wicked cause
Examin'd and survey'd the laws,
As burglars shops and houses do,
To see where best they may break through."

Further on he says:

"Justice herself, fam'd for fair dealing,
By blindness had not lost her feeling:
Her left hand, which the scales should hold,
Had often dropt 'em, bribed with gold;
And though she seem'd impartial,
Where punishment was corporal,
Pretended to a reg'lar course,
In murder, and all crimes of force;
Though some first pillory'd for cheating,
Were hang'd in hemp of their own beating;
Yet it was thought, the sword she bore
Check'd but the desp'rate and the poor;
That, urg'd by mere necessity,
Were ty'd up to the wretched tree,
For crimes which not deserv'd that fate,
But to secure the rich and great."
* * * * * *
"But Jove, with indignation mov'd,
At last in anger swore, he'd rid
The brawling hive of fraud; and did."
* * * * * *
"The bar was silent from that day;
For now the willing debtors pay
Ev'n what's by creditors forgot;
Who quitted them that had it not.
Those that were in the wrong, stood mute,
And dropt the patch'd, vexatious suit;
On which since nothing else can thrive,
Than lawyers in an honest hive,
All except those that got enough,
With ink-horns by their sides troop'd off."

In his sixth dialogue, this author says: "The study of the law is very crabbed and very tedious; but the profession of it is as gainful, and has great honours annexed to it: the consequence of this is, that few come to be eminent in it but men of tolerable parts and great application. And whoever is a good lawyer, and not noted for dishonesty, is always fit to be a judge, as soon as he is old and grave enough. To be a lord chancellor, indeed, requires higher talents; and he ought not only to be a good lawyer and an honest man, but likewise a person of general knowledge and great penetration. But this is but one man; and considering what I have said of the law, and the power which ambition and the love of gain have upon mankind, it is morally impossible, that, in the common course of things among the practitioners in chancery, there should not at all times be one or other fit for the seals."

BAXTER,

In his Christian Directory, giving directions to lawyers about their duty to God, says: "Be not counselors or advocates against God, that is, against justice, truth, or innocency. A bad cause would have no patrons if there were no bad or ignorant lawyers. It is a dear-bought fee which is got by sinning; especially by such a willful, aggravated sin as the deliberate pleading for iniquity, or opposing of the truth. Whatever you say or do against truth, and innocency, and justice, you do it against God himself. And is it not a sad case, that among professing Christians there is no cause so bad but can find an advocate for a fee? I speak not against just counsel to a man that has a bad cause (to tell him it is bad and persuade him to disown it); nor do I speak against you for pleading against excessive penalties or damages; for so far your cause is good, though the main cause of your client was bad; but he that speaketh or counselleth another for the defense of sin, or the wronging of the innocent, or the defrauding another of his right, and will open his mouth to the injury of the just, for a little money, or for a friend, must try whether that money or friend will save him from the vengeance of the Universal Judge (unless faith and true repentance, which will cause confession and restitution, do prevent it). To deal freely with you counselors, it is a matter that they who are strangers to your profession can scarce put any fair construction upon, that the worst cause, for a little money, should find an advocate among you! This driveth the standers by upon this harsh dilemma — to think that either your understandings or your consciences are very bad. If, indeed, you so little know a good cause from a bad, then it must needs tempt men to think you very unskilled in your profession. But when almost every cause, even the worst, that comes to the bar, shall have some of you for it, and some against it; and in the palpablest causes you are some on one side and some on the other; the strange difference of your judgments doth seem to betray your weakness. But if you know the causes to be bad which you defend, and to be good which you oppose, it more evidently betrays a deplorable conscience. I speak not of your innocent or excusable mistakes in cases of great difficuty, nor yet of excusing a cause bad in the main from unjust aggravations; but when money will hire you to plead for injustice against your own knowledge, and to use your will to defraud the righteous, and spoil his cause, or vex him with delays for the advantage of your unrighteous client; I would not have your conscience for all your gains, nor your account to make for all the world."

I must admit, it is to be feared that lawyers are too much like other men; no better than clergymen, for instance, either in judgment or conscience. If there is any efficacy in a particular creed, the vast majority of clergymen must be damned for not being wise enough to believe it; and observation teaches us that they are subject to pecuniary influences, for which I do not say they are to be blamed. We live not in a "Saints' Rest," but in a sinful world, and Baxter is not set to scold Matthew Hale.

BISHOP COLLYER,

In his moral essays, has the following dialogue:

"*Philotimus.* Pray, what is your opinion of those lawyers who appear in a foul cause?

Philalethes. I think if they know it they misbehave themselves, and have much to answer for. What can be more unaccountable than to solicit against justice, and lend the credit of our character to an ill business? To throw in dilatory pleas and false suggestions — to perplex the argument or entangle the witness? To make a mercenary noise against right or reason? To misapply precedents and statutes, and draw the laws into a conspiracy, to endeavor to surprise the judge and mislead the jury? To employ learning, and

lungs, and elocution to such purposes as these, is to disgrace the bar and mismanage to a high degree.

Philot. Must the counsel start at every dark appearance, and the client be dismissed at the first information? that is hard: a cause which has an ill face at first, clears up sometimes in the court, and brightens strangely upon the proceedings. This observation prevailed with Sir Matthew Hale to discharge his scruples and practice with more freedom.

Philal. I grant this reverend judge relaxed a little, and gave his conscience more reason you mention. When his business lay at the bar, he made no difficulty to venture through suspicion and dislike; he thought it no fault to bring the matter to an issue and try the strength of either party. But when he once found it work foul and shrink under the test, he would engage no further; nor ever encourage the keeping on the dispute.

Philot. What then — must a man turn away his clients and baulk his profession?

Philal. It is no part of a lawyer's profession to promote injustice, or help one man to that which belongs to another. The laws are made to secure property, to put an end to contests, and help those to right that suffer wrong. They were never designed to entangle matters, to perpetuate quarrels, to enrich any set of men at the damage of the community. To engage in an ill cause, when I am conscious it is so, is, in plain English, to encourage a litigious humour, to countenance a knave; it is to do my best to dissezie an honest man of his birthright, and wrest his money or his land from him. If the privilege of practice, if the pretense of taking a fee, will justify us in this liberty, why may not the consideration of money bear us out in other remarkable instances? Why may we not be hired for any other mischief? Why may not a physician take a fee of one man to poison another?"

"THE LESSON OF THE McFARLAND CASE."

Dear Sir: The article on this subject in your number for the 21st of May reminds me of a similar case, which would also go to show the necessity of some law to punish infidelity to the marriage vow.

Phebe Ann F—— was the daughter of poor parents, living in the interior of New Jersey. At the age of eighteen she came to the city of New York to earn her livelihood. She was modest, virtuous, and ignorant, but in robust health. She, in the process of time, obtained a situation as waiter in a restaurant near the Fulton market, where the vendors in the market and their assistants were in the habit of getting their meals.

There she became acquainted with a butcher-boy of about her own age, whom, in a short time, she married; that is, she thought she was married, but whether she was or not could not be ascertained. All that she could tell about it was, that she went with the fellow to a man who, he said, was a Methodist clergyman, by whom the ceremony was performed. She got no certificate of her marriage from the clergyman, and could not tell his name, or even the street in which he lived.

She and the butcher boy lived together as man and wife for several months — she retaining her place in the eating-house, until so far advanced in pregnancy as to be obliged to give it up. They then took board in the neighborhood. Shortly before the time of her expected confinement, she went to New Jersey on a visit to her mother. After an absence of two or three weeks, she returned to town, and went to her old boarding place, expecting to find her husband there.

But on her arrival she found that during her absence he had left the house, had given up his room there, and had removed all the things they had there, including her clothing, and had left no word where he had removed to.

She went to look for him, and knowing that at that time of the day he would be found at the slaughter-house, she went there. She found him, talking with a young woman, who wore, at the moment, what she recognized as her best dress, one that she had bought with her own earnings before the marriage. After waiting until he got through talking to the other woman, she accosted him, reported her return to town, asked where he had removed to, which he refused to tell, and then asked him for some money, which he declined to give her, and shook her off rather rudely.

On her way back to her old boarding-house she bought some arsenic, some flour and sugar, and, on her arrival home she borrowed of the family a tin pan, in which she said she wanted to make a cake for her husband. After making it she borrowed a cooking utensil and baked it. The next morning a young woman was seen talking with this butcher-boy in the market, and was seen to hand him a cake. His companions joked him about it, and he broke the cake, dividing it among them, and ate some of it himself.

They were all soon taken sick, and the suspicion of poison was immediately awakened. He was the only one that died from the effects. The others, after longer or shorter illness, recovered. He lingered several hours, but refused to tell who it was that gave him the cake, saying it had served him right.

The police, however, pursued the inquiry for the woman, and they found he had three wives, so that when Phebe Ann was arrested and taken before the magistrate, she found herself in company with two other wives of his. She admitted to the officer, who had arrested her, that she had done it; the other women were discharged, and she was tried for the murder.

I was assigned by the court to defend her. During the interval between her arrest and trial she gave birth to a dead child in the prison. When the trial came on, she was just recovering from her illness. She was very pale, not particularly good looking, nor very intellectual, but with a sad though calm look.

I had very little intercourse with her, but learned all the facts of her case from the coroner's minutes, and from her old father. I did not set up the defense of insanity; I simply fought the battle on the case presented by the prosecution. I excluded the evidence of her confession, because she had not been duly cautioned before making it, and I went to the jury on the ground of want of sufficient evidence of indentity. The case was a very weak one on the part of the defense; but the jury were absent only a few minutes and returned with a verdict of not guilty.

This was some thirty years ago, and I have never seen or heard of her since.

After the jury were discharged, I asked one of them on what ground they had acquitted her? He answered, "It served him right!"

It would seem that the sex of the prisoner makes no difference in these cases. But in order to prevent this private vengeance, must not the law provide some adequate remedy? J. W. EDMONDS.

CURRENT TOPICS.

We are glad to learn that the Bar Association, recently formed in New York, has laid the foundation of a good law library, at its rooms, No. 18 West Twenty-eighth street, near Broadway. Besides the most valuable elementary treatises, it has purchased the United States courts reports, and the principal reports of the courts of the several states. An order has also been sent to London for the purchase of all the English, Scotch and Irish reports from the Year Books down. This library will be open at all hours of the day, and up to a reasonable hour at night.

The staid benchers and barristers of the Inner Temple, and the high judiciary of England, have recently shown their respect for royalty at the expense of their stomachs. The English papers tell us that, after a grand dinner given the other day by that society, and which was attended by the Prince of Wales, the lord chancellor, the lord chief justice, and other nobles and notables, the whole company retired to the withdrawing room, and smoked with great solemnity, in compliment to the Prince of Wales, who has a *penchant* for that sort of thing.

A new divorce bill has been reported in the Massachusetts senate, providing that there shall hereafter be no divorce from bed and board, and that, in addition to the present causes for divorce, decrees may be made for extreme cruelty, utter desertion, gross and confirmed habits of intoxication contracted after marriage, or cruel and abusive treatment, by either of the parties. The bill is a wise one and ought to be passed. It would be very difficult to advance any sound reasons in favor of the laws for divorce *a menso et thoro* which now exist.

Francis Kernan having declined to serve as commissioner to revise the statutes, Governor Hoffman has appointed in his place Nelson J. Waterbury, of New York. David A. Wells, Lucius Robinson and Edwin W. Dodge have also been appointed commissioners to revise the laws relative to the assessment and collection of taxes, under a resolution of the last session of the legislature. The selection of Mr. Wells is particularly fortunate. He has for years made the subject of taxation a special study, and is peculiarly fitted to devise a scheme of taxation adjusted to "our burden and our strength."

Considerable consternation has been created in Michigan by the decision of the supreme court pronouncing the general railroad law, passed at the last session of the legislature, unconstitutional. Judge GRAVES delivered a dissenting opinion, ably reviewing the constitutional powers of the legislature, and maintaining the validity of the law. As several towns have issued bonds under the law, which have been purchased by innocent parties, Gov. Baldwin has issued a proclamation convening the legislature for the purpose of preparing an amendment to the constitution to be submitted to the people.

The commission to codify the laws of the United States, appointed about four years ago, expired by limitation within the past year. Very little was accomplished by that commission, except what was done by Judge JAMES, of Ohio, who was continually occupied, and by Judge JOHNSON, who labored while his health permitted. Congress was rather inclined to let the commission die, but, upon the suggestion of the importance of the work proposed, created a new commission, and the president has paid Judge JAMES the compliment of selecting him as one of the new commission, and has appointed as his colleagues Benj. Vaughan Abbott, of New York, and Victor C. Barringer, of North Carolina.

A motion, excluding the punishment of death from the new penal code about to be adopted in North Germany, was withdrawn on May 23, in the North German parliament. Herr Bismarck, in opposing the motion, said that the federal governments had made considerable sacrifices to insure the adoption of the new code, and that if the death penalty were abolished the unity of the law would be destroyed, and two classes of German citizens be established. The *North German Correspondence* points out that the new code is in many respects superior to the existing laws of Prussia. Its general tendency is to lighten punishment. Should the new code be introduced, "the sum total of the sentences of imprisonment passed in Prussia alone would be annually decreased by thousands of years."

If all French justice be like that administered in the case of workman *Chultz* v. *The Princess de la Moskowa*, the Gallic courts merit the same high reputation as those of England. Chultz, it appears, in pulling down the Hotel Lafitte, the property of the Princess Moskowa, found a marble statue plastered up in a wall, and, under the French law of "treasure trove," claimed half the value of the "find." To this the princess demurred, insisting that the statue had, prior to 1814, formed part of the decoration of the palace, but was then plastered up to keep it from falling into the hands of the allies, at that time about to enter Paris. The court decided in favor of the workman, ordered the statue to be sold, and the proceeds to be equally divided between the parties litigant — the princess to pay the costs.

Daniel McFarland, who was recently acquitted of the murder of Richardson, may be as "mad as a March hare" for ought we know, but there is a wonderful "method in his madness." He now turns up in Morgan county, Indiana, and moves the court for

a new trial of the suit in which his former wife obtained the decree of divorce, on the grounds, first, that no proof of publication was ever filed in the case; second, that the defendant never had notice of the pending suit; and third, that he will be able to show that Mrs. Calhoun committed perjury, as a witness in the case.

The English courts have recently dismissed the Mordaunt divorce case, on the ground that the defendant, being insane, could not plead; and now that McFarland has succeeded in establishing his insanity, we should be glad to see this rule of law applied to his case.

It is a rather singular fact that no provision is made by the law of this state, whereby one injured on a highway or bridge, through the neglect of town officers to keep the same in repair, can recover compensation for his injuries. The law makes it the duty of commissioners of highways to repair and keep in order roads and bridges, but it is a matter of grave doubt, under the decisions, whether the duty is of such a nature as to render them liable, in any event, to a civil action for a neglect of it. They are certainly not liable, where it is not shown that they have the requisite funds to repair. And even where they have such funds, it has been intimated, by the highest legal authorities in the state, that no liability attached. That towns are not liable, civilly, for injuries received by reason of the ruinous condition of their highways has been settled beyond question. The wayfarer is, therefore, left to run his own risks, and trust in Providence. It would be well if our legislators, who have such an "insane impulse" to "make laws," would make a law whereby towns should be held to a strict accountability, both civilly and criminally, for the condition of their highways.

The house of representatives have refused to concur in the senate's amendment to the appropriation bill, increasing the salary of the United States judiciary. The majority against the amendment was so large that a conference of the committees of the two houses will not be likely to effect a compromise, and the salaries will remain as at present. We regret this action of the house, as we were hopeful that the time had come when, at least, the judges of the supreme court would receive something like an adequate compensation. We should be glad to see the salary of the chief justice raised to $20,000, and that of the associates to $17,000. The ability and industry which those positions require would enable any lawyer possessing them to make at least that sum in the ordinary practice of the law in one of our larger cities. It seems to us a little anoma lous that while such men as Charles A. Dana, Horace Greeley, George W. Curtis, Theodore Tilton, and other editors of newspapers, receive salaries of from ten to fifteen thousand dollars per year from private corporations, forty millions of people can only pay half that sum to the judges of the highest and most important tribunal in the country.

A case came before Judge ALLISON, of the Philadelphia court of quarter sessions, on the 11th inst., which raised an interesting question relative to the effect to be given to the statutes of the state of New York. One Rodan was charged with having committed adultery and bigamy. It appeared, on the trial, that he had been married some years ago in New York; that about a year ago he left his wife, and, in company with one Mary Tully, went to Philadelphia, where they have since continued to reside. Meanwhile, Rodan's wife had procured a divorce in New York on the ground of adultery. Subsequent to the decree of divorce, Rodan married the woman with whom he had absconded. The court was in doubt whether or not it could give effect to the New York statute, which declares that where a divorce is obtained on the ground of adultery, the guilty party shall not marry during the life-time of the other party. The crime of adultery is not indictable or punishable in the state of Pennsylvania, unless the offense is committed within its jurisdiction, and there was no evidence in the case of the crime of adultery having been committed in that state. The court reserved its decision.

The arguments put forth in the house of lords against the bill allowing a man to marry his deceased wife's sister, have very much of the "ridiculous" about them on this side of the Atlantic. Like the frog in the ode, the lords said "such very silly things in such a solemn way." Here is the gist of the arguments, *pro* and *con*, advanced on the motion for a second reading: The Duke of Marlborough supported the bill. — Lord Lansdowne did so on social grounds. — The Bishop of Ely opposed it on scriptural grounds; it would only produce discomfort. — Lord Kimberley combated the arguments used against the bill. — The Bishop of Ripon supported the bill; the word of God not having forbidden the marriage, but tacitly permitting it. — The Bishop of Lincoln contended that scripture forbade it. — Lord Westbury urged that the present law, as grounded in a misapprehension or delusion, should be expunged from the statute-book. — The Bishop of Peterborough censured Lord Westbury's levity, and regarded the bill as fraught with social evils. — Lord Lifford regarded the existing law as founded in an inconsistent and unfortunate legislation. — The Duke of Argyll opposed the bill, and was not convinced that the public generally supported it. — The Earl of Harrowby condemned it as opposed to the whole voice of Christendom. — The lord chancellor earnestly opposed the bill as wrong, and as in conflict with the spirit of the nation. — Earl Granville supported it as wise, expedient, and just. On a division, the bill was rejected by a majority of 76 to 74.

The imperial court of Paris has just made a decision which we commend as a precedent in this country. An Englishman, by the name of Thompson, having cast his horoscope over the financial heavens, discovered, as he supposed, infallible auguries of a rapid rise in certain stocks. Thereupon he ordered a broker to buy for him some £14,000,000 of the stocks, and expended the larger part of his fortune in paying the advances or margin. His horoscope, however, had betrayed him. The stocks fell instead of rising, his margin was exhausted, and a considerable balance would be required to make the broker good. For

this balance suit was brought. In answer, the defendant pleaded that his speculations had been purely and simply gambling, and the broker knew it. On the part of the broker it was represented that Mr. Thompson had given himself out as a banker—as the agent of foreign capitalists—and that his operations must be considered genuine. But the court, after investigating the facts, said it appeared that Mr. Thompson had taken out no license, either as a banker or trader, had lived in very modest style, had no office and no clerks, and only his own limited capital to dispose of—all of which the plaintiff knew, or, on making inquiry, might have learned. It followed that the speculations of such a man, carried on to an enormous figure, and settled, not by the delivery or receipt of securities, but by payment of differences, "were in reality only bets on a rise or a fall, which were condemned by the law and by morality, and could not be made the subject of a law-suit." The suit was dismissed, and the broker ordered to pay the costs.

At a recent meeting of the English Law Amendment Society, an interesting discussion took place on the evils of unlimited liability of masters and railway companies in case of accidents. It was insisted that as the English law now stands the penalty falls upon persons who are not morally to blame. It was said that a man who had saved 10,000*l.* might set up a brougham, and might be mulcted of his whole fortune by the carelessness of his servant in driving over a merchant, making 2,000*l.* a year. Under the criminal law the master was only liable either for his own acts or for those done by his orders. It was thought that the principle of the civil law in the matter was unjust, and therefore impolitic. Even on the ground of policy the liability should, at any rate, be limited. In the case of employers, it might be enacted that no action should be brought against a master without joing the servant as a co-defendant. On the question of railway accidents, it was thought that the companies ought to be entitled to charge on their tickets an insurance for a certain amount, and to promote insurances for larger amounts, and that the damages in case of injury should be limited to 200*l.*, or, perhaps, five hundred times the amount of the fare paid. This would be fine sufficiently substantial to insure as much care as the present system called for. It was further recommended that the amount of the damages should be assessed by some properly constituted and responsible tribunal, which should have power, if need be, to adjourn a case, in order to ascertain if the injury were likely to be permanent. Several speakers commented on the fact that there was a class who preyed on railway companies through the facilities offered by the law as it stands.

OBITER DICTA.

Marriage articles—cradles, rattles, nursing bottles, etc.

Cause for divorce—where a woman *crows* over her husband. Western states please take notice.

A young lawyer at Eatontown, N. Y., in the midst of a brilliant outburst of eloquence, was interrupted by a shrill voice, which yelled: "Stop! you lie. Stop! you lie!" Young Legality smootned his ruffled feathers when the sheriff announced that it was only a parrot in an adjoining room.

A Michigan judge, who occupied the bench some years since, always used the same formula and pronounced the same sentence, no matter what the offense. The following sentence of a man convicted of willful perjury will illustrate: "You have been convicted of *parjury*, prisoner. This is a grave offense; but I consider that this is a new country, and we must have *some parjury* among the difficulties of settling a new country. So I shall only give you thirty days in the county jail."

The duties of a parish parson must formerly have been both arduous and responsible, as appears from the case of *Yielding* v. *Fay* (Cro. Eliz. 569), cited in 16 N. Y. R. 163. This was an action brought against the defendant as parson of the parish of Quarleys, in Southampton, to recover damages for his omission to keep a bull and a boar, alleging that he was bound by custom to keep those animals for the use of the parishioners. The court held that it was *a good and reasonable custom*, and that every inhabitant prejudiced by the omission might maintain an action.

Judge Pratt, of Hillsdale county, Mich., on one occasion, sentenced a prisoner as follows:

Judge. Stand up, prisoner, at the bar. Prisoner, how old are you?

Prisoner. Fifty-three years, five months, and twenty days.

Judge (after some calculations). Prisoner, I sentence you to hard labor in the state prison for sixteen years, six months, and ten days. This brings you to seventy years, beyond which my jurisdiction don't extend. Sheriff, remove the prisoner!

A recent number of *Lippincott's Magazine* has an article entitled "Guesses and Queries," from which we extract the following anecdote: "In a case in which Jeffrey and Cockburn were engaged as barristers, a question arose as to the sanity of one of the parties concerned. 'Is the defendant, in your opinion, perfectly sane?' said Jeffrey, interrogating one of the witnesses, a plain, stupid-looking countryman. The witness gazed in bewilderment at the questioner, but gave no answer. It was clear that he did not understand the question. Jeffrey repeated it, uttering the words, 'Do you think the defendant capable of managing his own affairs?' Still in vain; the witness only stared the harder. 'I ask you again,' said Jeffrey, still with his clear English enunciation, 'do you consider the man perfectly rational?' No answer yet, the witness only staring vacantly at the little figure of his interrogator, and exclaiming, 'Eh?' 'Let me take him,' said Cockburn. Then, assuming the broadest Scotch tone, and turning to the obtuse witness, 'Hae ye your mull wi' ye?' 'Ow, ay,' said the man, stretching out his snuff-box. 'Noo, hoo lang hae ye kent Jam Sampson?' said Cockburn, taking a pinch. 'Ever since he was a babby.' 'And d'ye think, noo, atween you and me, that there's any thing intil the cratur?' 'I would na lippen (trust) him wi' a bull-calf,' was the instant and brilliant rejoinder Cockburn could certainly use the tools needed in a Scotch jury trial better than Lord Jeffrey, though inferior to him as a judge or advocate."

TERMS OF THE SUPREME COURT FOR JUNE.

3d Monday, Circuit and Oyer and Terminer, Putnam, Barnard.
3d Tuesday, Circuit and Oyer and Terminer, Canton, Potter.
3d Tuesday, Special Term, Onondaga, Morgan.
3d Tuesday, Special Term, Chenango, Balcom.
3d Tuesday, Special Term, Erie, Barker.
4th Tuesday, Circuit and Oyer and Terminer, Sandy Hill, Potter.
Last Monday, Special Term, Monroe, J. C. Smith.
Last Tuesday, Special Term, Albany, Peckham.

COURT OF APPEALS ABSTRACT.*

ACTION.

For professional services, see *Bar to Action.*

1. By a statute authorizing the defendant (a corporation) to take land, and to erect dams abutting on land of others, it was provided that where there was any disagreement between the company and the owner, as to the amount to be paid therefor, "*it should be lawful* for the parties to appoint three persons impartially to estimate and determine the price to be paid for the same;" * * * "but, if a majority of the persons appointed should not, within thirty days after receiving notice of their appointment, file a report of their estimate, either party may apply to the court for a venire to the sheriff to summon a jury. A dam having been erected by the defendants, abutting on the plaintiff's land, and a small strip of the land being taken by them, and the parties, not being able to agree upon the compensation, entered into an agreement, in writing, appointing three persons to determine the amount to be paid the plaintiff. After several hearings before these persons, attended by the counsel and witnesses of both parties, the defendant served upon them, and upon the plaintiff, a written notice, revoking the powers of the referees. The referees failing and refusing to proceed, in consequence of such revocation, their fees were paid by the plaintiff. In an action brought by him against the defendants, for the amount so paid, and, also, witness and counsel fees paid by him, on said hearings: *Held* (WOODRUFF, MASON and LOTT, JJ., dissenting), that he could recover them. *Miller* v. *The President of Junction Canal Co.*

2. Whether or not the defendants had any power to revoke such appointment or submission, it was too late for them to deny its existence in this action, after they had not only previously asserted it, but by such asssertion effected their object, and rendered the plaintiff's disbursements useless. *Ib.*

AGENT. See *Payment.*

ALIENABLE INTEREST. See *Vested Interest.*

ANSWER.—Order striking out not appealable to court of appeals. See *Appealable Order.*

APPEALABLE ORDER.

1. An order of the general term, reversing an order at special term, striking out an answer, is not appealable to this court. It was not previous to 1869, and the amendment of that year, authorizing an appeal from an order striking out an answer, is not applicable. *Taber* v. *Gardner.*

2. It has been settled by repeated adjudication that the last clause of subdivision four of section eleven of the code merely regulates the hearing of appeals, and in no way enlarges the right of appeal, or extends the jurisdiction of this court. *Ib.*

ATTACHMENT.

Where a debtor is the owner of securities, pledged at a bank as collateral to loans, and the sheriff, with an attachment against such debtor, served it upon the bank, with a notice that "all property, effects, rights, debts, and credits of the said debtor in their possession or under their control would be liable to said attachment, and particularly that he attached the bank account, and debt due from the bank to the debtor;" and subsequently, on a sale of such securities by the bank, a surplus resulted after paying their loan,—*Held*, that, under this levy of the attachment, the sheriff could not hold such surplus against a receiver appointed in supplementary proceedings on another judgment against the debtor, the sheriff's specification, in his notice to the bank, not sufficiently showing the property levied upon. (DANIELS and JAMES, JJ., *contra.*) *Clarke* v. *Goodridge.*

ATTORNEYS AND COUNSELORS—Cannot be allowed fees for acting professionally for estate of which they are executors. See *Executors.*

BAR TO ACTION.

1. A judgment in justices' court in favor of a surgeon for professional services is a bar to any action by the defendant against him for malpractice in performing such services. *Gates* v. *Preston.*

2. And this is equally so, although the recovery in the justices' court was upon confession without trial, and although the surgeon's suit and judgment thereon were subsequent to the commencement of the action for malpractice, and were interposed as a defense to it by supplemental answer. *Ib.*

3. Accordingly, where an action having been commenced, and being at issue against a surgeon to recover $5,000 damages for malpractice in setting an arm, he sues the plaintiff in justices' court for the same professional services, the alleged unskillfulness and negligence in which constitute the malpractice complained of, and judgment was obtained before the justice by the surgeon for six dollars and fifty-eight cents, without answer, upon a written consent to its entry,—*Held*, that such judgment was a complete bar to the action for malpractice; and having been pleaded as such by supplemental answer, a demurrer thereto was properly overruled. *Ib.*

BOND OF INDEMNITY.

1. The defendant, in consideration of the conveyance to him by one P. of a farm, executed and delivered to the latter a bond in the penalty of $15,000, conditioned that the same should be void, if the defendant should (among other things) pay a certain promissory note given by P. to the plaintiff, and should indemnify and save harmless the said P. against the note, otherwise to remain in full force and virtue. The plaintiff, after judgment against P. on the note and execution thereon returned unsatisfied, having brought this action against the defendant, claiming a liability, under condition of the bond,—*Held* (GROVER, J., *contra*), he could not recover. The covenant made by the defendant is to pay P. the penalty of the bond; not a promise, even to P., to pay the plaintiff's note. It is, upon condition of his payment of this note, and the performance of the other acts mentioned in the condition of the bond, that he *may* avoid it; but he *may* allow it to remain in full force. *Qurk* v. *Ridge.*

2. The bond was, besides, merely one of indemnity to P. to save *him* harmless from the note, and not a promise to him for the benefit of the plaintiff. *Ib.*

3. *Semble*, that no action, on contract, will lie upon a mere naked condition. MASON, J. *Ib.*

BURGLARY. See *Criminal Law.*

CAUSE OF ACTION.

1. An equitable cause of action to remove as a cloud upon the plaintiff's title a deed given by mistake by a third party to the defendant, under which, having fraudulently obtained possession by connivance with the plaintiff's tenant, he claims to hold as owner, and a claim to recover the possession of the premises, may be united in the same action and asserted in the same complaint. *Lattin* v. *McCarty.*

2. Accordingly, where the complaint alleged that the defendant, having at one time held a contract from C. for the conveyance of certain premises, which contract he afterward assigned to S., and that S., erroneously supposing he had obtained from the defendant a deed instead of a mere assignment of a contract, mortgaged the property to F., who foreclosed, and bidding it in, conveyed to the plaintiff; and that S., in the mean time, having, for the purpose of completing his supposed title, paid up the contract to C., took a deed from the latter to the de-

* To appear in 2 Hand's Court of Appeals (N. Y.) Reports.

fendant and put it on record; and that the defendant, learning of the existence of this deed, having bribed the plaintiff's tenant to give him possession, claims title under that deed against the plaintiff, and withholds possession,—*Held*, that upon such allegations a prayer for the recovery of the possession, and that the defendant be required to quit-claim to the plaintiff, or be forever enjoined and barred from setting up or asserting his pretended title under the deed from C., were properly united, and that both kinds of relief might be obtained in the same action. *Ib.*

3. *Phillips* v. *Gorham* (17 N. Y., 270), commented upon and followed. *Ib.*

CLOUD ON TITLE. See *Cause of Action.*

CONSIDERATION.

Several persons organized the defendant, as a cemetery association, under the act (chap. 133 of the laws of 1847) authorizing the incorporation of rural cemeteries, and made themselves its trustees for the first year; one of their number being at the time the owner of 120 acres of land. This land was purchased from him by the association, at the actual price of about $20,000; but, by agreement between the trustees, a consideration was inserted in the deed of $500,000, and for the balance over the $20,000, to wit, $480,000, bonds were issued by the association, which were distributed among the trustees. These were subsequently surrendered, and new bonds, not negotiable in form, of smaller amounts each but the same in the aggregate, were substituted in their place. Several years after, the plaintiff found one of these bonds among the papers of his testator, who was not one of the original trustees, and it did not appear how he became the holder. The plaintiff applied to the association, and received from them another bond in place of the one so found, which he surrendered up. Interest upon the substituted bond had been paid by the defendant some years. In an action brought to recover the amount payable in the bond,—*Held*, that it was void, both from an entire want of consideration for the original bond, for which it was substituted, and on account of the fraud in the original issue of the bonds by the original trustees to themselves. *Held*, further, that there being no proof as to how the plaintiff's testator became the holder of the bond found among his papers, and it not being negotiable in form, the plaintiff stood in no better position than the trustee to whom the original bond was issued; nor did he gain any additional rights by procuring from the present managers of the defendant a new bond of a different form, in the place of the one delivered up. *Campbell* v. *Cypress Hill Cemetery.*

CONSTITUTIONAL LAW. See *Taxation.*

CONTRACT.

1. The defendant contracted to sell certain lands, owned by him in Pennsylvania, to the plaintiff and one J., for the sum of $75,000, payable in sixty days, $15,000 in cash and the balance in five equal annual payments; and, by a separate instrument, it was agreed that, if the plaintiff and J. should make a sale, they were to have $5,000 each, and each one-third of all over $75,000; and they were to have the same if the defendant should make the sale. Within the sixty days the defendant sold to one R. for $90,000, $20,000 down and the balance in five years; and thereupon the defendant made a new agreement with the plaintiff and J., that he should have $67,000 of the purchase-money, they $4,000 each, and the balance be equally divided between the three.

R. paid $20,000, took a deed, and gave a bond and mortgage for the remaining $70,000, and warrant of attorney to enter judgment on the bond, and issue execution in case of default. The defendant paid to the plaintiff and J. $4,000 each, and paid interest on $5,000 to each as long as R. paid interest on the bond and mortgage to him. R. having at length made default, the defendant issued execution, under which the lands were publicly sold, and were bid off by defendant for $10,300; and having perfected title, he subsequently sold them to one B. for $70,000. Twenty thousand dollars of this having been paid the defendant, the plaintiff brought this action, and subsequently, B., having paid the defendant the balance of the $70,000, by a supplemental complaint, claimed to recover of the defendant the sum of $5,000 and interest from the date of the sale to B. *Held* (GROVER, MURRAY and DANIELS, JJ., *contra*), that the defendant must be regarded as having acted as a *quasi* trustee for the plaintiff to the extent of one-third of the surplus over $75,000, in bidding off the lands on the sale of R.'s interest, and in the subsequent sale to B.; and having received in all the sum of $15,000 [more than the $67,000 he was to receive under his last contract with the plaintiff and J., and the $8,000 paid them, he was bound in equity, under that contract, to account and pay over to the plaintiff one-third of that surplus. *Renman* v. *Slocum.*

2. *Held*, further, that the action having been commenced after the sale to B., but before the defendant had actually received the sum in the aggregate, which he was entitled to receive before any division of surplus, was nevertheless not prematurely brought, but could have been originally maintained for the purpose of establishing the trust and declaring the plaintiff's rights, and the supplemental complaint, setting up the receipt of the whole $70,000 from B. by the plaintiff, subsequent to the commencement of the action, and thereupon claiming the immediate recovery of the $5,000 and interest, was properly allowed. *Ib.*

3. *Held*, further, that J., the co-contractor of the plaintiff, was not a necessary party to the action. *Ib.*

CORPORATION, CITIZEN OF STATE CREATING IT. See *Jurisdiction.*

CRIMINAL LAW. See *Evidence.*

1. Upon a writ of error, in criminal cases, the review, both in this and the supreme court, is confined to questions of law arising upon exceptions taken upon the trial, and errors appearing upon the record. The evidence constitutes no part of the record, and must be disregarded, except for the purpose of determining the materiality of exceptions. *The People* v. *Thompson.*

2. Mistakes of the court upon the trial, or of the jury in giving their verdict, are no grounds for a motion in arrest of judgment, which can only be based upon some defect in the record. *Ib.*

3. Accordingly, where upon the trial of an indictment for murder in the first degree, the prisoner, upon being found guilty of murder in the second degree, moved in arrest of judgment, on the grounds that there was no evidence justifying a conviction for the offense; and, also, that a conviction for murder in the second degree could not be sustained under the indictment,—*Held*, 1. That, under an indictment for murder in the first degree, a conviction of murder in the second degree may be upheld; 2. That although it appear upon the evidence, the whole of which was inserted in the bill of exceptions, that the commission of that crime was not proved, in the absence of any proper exception this was no ground of reversal on writ of error; and 3. That the motion in arrest, not being based upon any defect in the record, was properly denied. *Ib.*

4. *Keef* v. *People* (40 N. Y., 348), followed. *Ib.*

5. One convicted of and sentenced for the crime of burglary in the third degree is thereby rendered incompetent as a witness in any cause, civil or criminal, although at the time of such conviction and sentence he was under sixteen years of age, and under the statutes (chap. 100, laws of 1840, chap. 24, laws of 1850) sent to the house of refuge and not to state prison. *The People* v. *Park.*

6. The definition of felony as contained in the revised statutes (2 R. S. 701, § 30) must be construed as relating to

the punishment prescribed for the crime, without reference to any personal exemption of the criminal. (LOTT, GROVER and DANIELS, JJ., *contra.*)

DEED, CONDITION IN.

Where one receives a conveyance of land to himself from a mortgagor, in which conveyance is a stipulation that he, as party of the second part, will pay off and discharge the mortgage, as a part of the consideration of the premises, he is personally liable to the holder of the mortgage for the amount due thereon, although the deed is not signed or subscribed at all by him; and although it was in fact taken, and, by a written agreement made at the time, appears to have been taken, merely as security for an indebtedness owing to him by the firm of which the mortgagor is a member. *Richard* v. *Sanderson.*

EJECTMENT.

1. One who claims as one of six children, the heirs of the owner of a rent charge, with a condition of re-entry, upon premises leased in fee, subject to such rent charge and condition of re-entry, may, upon non-payment of the rent, maintain an action of ejectment to recover one undivided sixth part of the demised premises. *Cruger* v. *McLaury.*

2. Such action may be commenced without a common law demand of the rent having been first made, or a fifteen days' notice of intention to re-enter under the act of 1846 having been served. *Ib.*

3. *Hosford* v. *Ballard* (39 N. Y. 147); and *Van Rensselaer* v. *Dennison* (35 N. Y. 393), referred to and approved. *Ib.*

4. Accordingly where J. K., in 1789, leased in fee to the defendant's grantor the premises in question, reserving rent, with a condition of re-entry in case of non-payment, and died in 1810 intestate, leaving the plaintiff (his daughter), and five other children, his heirs at law, *Held*, unanimously, that she could recover of the defendant in ejectment, on non-payment of the rent, one undivided sixth part of the premises leased, and that the commencement of the action was a sufficient substitute for actual entry or the common law demand of rent. *Ib.*

EVIDENCE.

1. In an action for causing death in the streets of a city, charged to have been by the negligence of the defendant's servants, evidence that the fatal injury was occasioned by a runaway span of horses and wagon, owned by the defendant,—*Held*, sufficient to authorize a jury to find persons in charge of such horses and wagon to be his servants, although engaged at the time in a business which appeared to be that of another person, whose name, as carrying on such business, was painted upon the wagon. (GROVER and LOTT, JJ., *contra.*) *Morris* v. *Kohler.*

2. Statements made by the prisoner, under oath, at a coroner's inquest upon the body, are admissible against him upon his trial for the murder, although he knew, at the time he was sworn, that it was suspected the deceased was poisoned, and that he himself would probably be arrested for the crime, and was informed by the coroner that rumors implicated him, and that he had a right to refuse to testify. *Teachout* v. *The People.*

3. *McMahon* v. *People* (15 N. Y. 384), distinguished. *Ib.*

4. *Hendrickson* v. *People* (10 N. Y. 13), followed. *Ib.*

EXECUTORS.

1. A decree in an action by one executor against his co-executor, requiring the latter to place the securities and papers in his possession, belonging to the estate, in the custody of a bank; and that both he and the plaintiff deposit all moneys thereafter collected therein, to be drawn out only on their joint check, is not authorized by the fact, that the defendant maintains exclusive manual possession of the securities belonging to the estate, and refuses to deliver over any portion thereof to the custody of his co-executor, in the absence of any proof that the interests of the beneficiaries under the will are jeopardized by such exclusive possession. *Burt* v. *Burt.*

2. The defendant being, as one of the executors, properly in possession, all that the plaintiff, as co-executor, can justly require is, that when any step in the settlement or administration of the estate is to be taken, which required the presence of the securities, or any part of them, either to indorse upon a bond or mortgage payments thereon, or surrender up the same if paid in full, or for any proper purpose, then they should be produced. *Ib.*

3. If the defendant refused, at the proper time, to apply the assets to the payment of the debts, the plaintiff could apply to the surrogate; and, if there was mismanagement or misappropriation, or conduct endangering the interests of creditors or legatees, application could be made to the surrogate at any time. *Ib.*

4. *Wood* v. *Brown* (34 N. Y. 337), distinguished and limited. *Ib.*

5. An executor cannot receive from the estate any greater compensation than the statute commissions, for his own services, however meritorious or extraordinary they may be. *Collier* v. *Munn.*

6. One of the executors of a will, therefore, who is an attorney and counselor at law, cannot be allowed any fees whatever from the estate, for professionally defending and conducting an action brought against the estate, although requested by his co-executors to appear in such action and undertake such defense, with a promise of compensation, and although the legatees and next of kin united in such request. Accordingly, where C., a counselor at law, who was one of the executors of M., was requested by his co-excutors, who promised compensation from the estate, to defend an action of ejectment brought against a grantee of the testator, with warranty, who had given notice to the executors to defend, and the legatees and devisees had also united in a request to C. to undertake such defense, and C. thereupon undertook the case, tried it at circuit, argued it at general term and at the court of appeals, and, after a second trial, negotiated an advantageous settlement of the litigation. *Held*, that the surrogate, on the settlement of the executor's accounts, properly refused to allow any thing to C. for such legal services. (JAMES, MURRAY and LOTT, JJ.) *contra.*) *Ib.*

FELONY. See *Criminal Law.*

FRAUD. See *Consideration;* see, also, *Statute of Limitation.*

INDICTMENT. See *Criminal Law.*

JURISDICTION.

1. Where the defendant, citizen of another state, regularly, and strictly in accordance with the act of congress of 1789, known as the "judiciary act," files his petition in the state court for the removal of the cause to the United States circuit court, and a sufficient bond, which is offered for the approval of the state court, the state court is *ipso facto* ousted of jurisdiction; and whether an order for removal is granted or denied by the state court, all further proceedings therein are *coram non judice* and void. *Stevens* v. *The Phœnix Insurance Co.*

2. And where, in a case within the act, after such petition has been filed and bond offered, the state court refuses to order the removal, the defendant answers, the cause is tried, and judgment is entered up against the defendant, such judgment will be reversed by this court, as without jurisdiction. *Ib.*

3. It has long been settled, that a corporation is a citizen of the state creating it, within the meaning of the judiciary act of congress. Such corporation does not lose that citizenship by appointing an attorney in another state, in compliance with its statutes, upon whom process may be served, and doing business in such state, under a certificate of officers thereof, authorizing it to transact business therein subject to visitatorial powers. *Ib.*

4. Accordingly, a fire insurance company, organized under the laws of the state of Connecticut, and having its principal office therein, but doing business in this state, under our statute, is, on being sued in our courts, entitled to a removal of the cause to the United States court. *Ib.*

LEVY.

1. Where the sheriff has collected moneys on an execution issued upon a judgment in favor of B., he has no right, as against the assignee of B., to levy upon such moneys in his hands by virtue of, or upon his own motion, to apply them to the payment of an execution against B. received by him, although he has no notice of the assignment, And, if he make such application, he will, nevertheless, be compelled to account to such assignee for the full amount of such moneys. *Baker* v. *Kenworthy.*

2. *Muscott* v. *Woolworth* (14 How. 477), approved. *Ib.*

3. *It seems*, that the sheriff could not levy on the money, under the revised statutes, until actually paid over by him to B., and that he could not apply it to the payment of the execution against B., except upon order under section 294 of the code. MURRAY, J. *Ib.*

MALPRACTICE. See *Bar to Action.*

MEASURE OF DAMAGE. See *Stockholder's Contract.*

MORTGAGE. See *Deed, condition in.*

NEGLIGENCE. See *Evidence.*

NEW TRIAL.

1. The special term have a right to hear and grant a motion for a new trial upon a case made, although a judgment has already been entered upon the verdict. (GROVER, MASON, DANIELS and MURRAY, JJ.) (JAMES, J., *contra.*) *Folger* v. *Fitzhugh.*

2. An appeal to this court, from an order of the general term of the supreme court, affirming an order of the special term granting a new trial upon a case made after verdict, on the ground that it is against evidence, though such order is granted after judgment, will be dismissed. (JAMES, J., dissenting.) *Ib.*

PARTIES TO ACTION. See *Contract.*

PAYMENT.

1. Where, upon the conditional sale of a chattel, it is agreed, that the vendee is to have possession, and to pay the price within a time fixed, if, after the purchase-money has become due and remains unpaid, the vendee is still permitted to retain possession, and the vendor receives part payment, this is an assent by the latter to delay, and a waiver of any forfeiture, and a recognition of the right of the vendee to acquire title by payment of the residue of the purchase-money, which right would continue until a request by the vendor for such payment, and a refusal of the vendee. *Hutchings* v. *Munger.*

2. A tender, under such circumstances, of the amount due, itself discharged all lien or claim of title to the property by the vendor. *Ib.*

3. *It seems*, an agent to collect the purchase price of a chattel has no power to extend the time of payment of the balance, upon receiving part payment. *Ib.*

PENDING ACTION.

1. An action is *pending* in a court, though judgment has been recovered therein, as long as such judgment remains unsatisfied. *Wegman* v. *Childs.*

2. *Sherman* v. *Felt* (2 Comst. R., 186); *Suydam* v. *Holden* (Seld's Notes, Appeals No. 4, 16), and *Howell* v. *Bowers* (2 Cromp., Meec., and Ross., 261), referred to and approved. *Ib.*

3. Accordingly, under the constitution of 1846, providing that "all suits and proceedings originally commenced and then *pending* in the court of common pleas, on the first Monday of July, 1847, shall become vested in the supreme court, hereby established" (Art. 14, sec. 5); an execution upon a judgment recovered in the court of common pleas on the 28th September, 1846, is properly issued in the supreme court, and supplementary proceedings properly instituted, and a receiver properly appointed in that court. *Ib.*

4. Where the finding of the referee or the court has no evidence to support it, an exception thereto raises a question of law, which will be considered in this court. *Ib.*

PLEADINGS.

1. A motion for judgment for the plaintiff, on the ground of the frivolousness and falsity of the answer, must be denied, irrespective of the sufficiency of the answer, where the complaint does not state facts sufficient to constitute a cause of action. *Van Alstyne* v. *Freday.*

2. A commissioner of highways has no general authority, as such commissioner, to borrow money, or to give promissory notes binding upon his successors in office. *Ib.*

3. Accordingly, where the complaint against the present commissioners of highways of a town merely alleges that G., the predecessor of the defendants as commissioner of highways, had become justly indebted to the plaintiff in a sum named, for money lent and advanced to him, as such commissioner, and that the plaintiff took from him a promissory note therefor, which is set out in full; upon a motion by the plaintiff for judgment upon such complaint, on the ground of the frivolousness of the answer thereto, put in by the defendants; *Held*, that the insufficiency of the complaint to show a cause of action was a conclusive objection to the granting of such motion. (HUNT, Ch. J., and MURRAY, J., *contra.*) *Ib.*

PROMISSORY NOTE. See *Bond of Indemnity.*

RENT. See *Ejectment.*

RES AJUDICATA. See *Bar to Action.*

SERVANT—PROOF THAT ONE IS, IN ACTION FOR NEGLIGENCE. See *Evidence.*

SHELLEY'S CASE. See *Vested Interest.*

SHERIFF. See *Levy.*

STATUTE OF LIMITATION.

1. Under the revised statutes, a party had six years after his discovery of a fraud upon him, in which to bring his suit in equity, although there was a concurrent remedy at law. MASON, J. *Foot* v. *Farrington.*

2. But the code has restricted the rule, dating the time of limitation from the discovery of the fraud, to cases *solely* cognizable in equity; and, under it an action for fraud must be commenced within six years from the commission of the fraud, irrespective of the time of its discovery by the aggrieved party. *Ib.*

3. Accordingly, where, in May, 1854, the plaintiff's assignor, in buying out his partner (the defendant), agreed to pay him the amount of capital put in by him, and his share of the profits, after deducting what was charged against him on the books, and by the fraud of the latter, who was the book-keeper of the concern, a considerable sum charged against him on the books was suppressed, and, consequently, he was, to that amount, overpaid, which fact was not discovered until some years after; in an action brought by the plaintiff on the 4th of March, 1861, to have an accounting of the partnership affairs of her assignor and the defendant, and that the latter be decreed to repay to her the amount so fraudulently received by him,—*Held*, that the action for an accounting would not lie, and, as to the fraud, it was too late. *Ib.*

STOCKHOLDER'S CONTRACTS.

1. Where the defendants, stockbrokers, at the request of the plaintiff, and for him, but in their own names and with their own funds, purchased certain stocks, he depositing with them a "margin" of ten per cent, which

was to be "kept good," and they "carrying" the stocks for him,—*Held* (GROVER and WOODRUFF, JJ., *contra*), that the legal relation created between the parties by this transaction was necessarily that of pledgor and pledgees, the stock purchased being the property of the plaintiff, and, in effect, pledged to the defendants as security for the repayment of the advances made by them in the purchase; and that a sale of such stock by them, except upon judical proceedings, or after a demand upon him for the repayment of such advances and commissions, and a reasonable personal notice to him of their intention to make such sale, in case of default in payment, specifying the time and place of sale, is a wrongful *conversion* by them of the property of the plaintiff. *Markham* v. *Jaudon*.

2. *Held*, further, that in an action by the plaintiff against them for such conversion, evidence of a usage, that stocks so held might be sold without notice by the broker, whenever, by the fall of the stock in the market, the "margin" or ten per cent deposit was exhausted, was inadmissible, such usage being in direct variance with the settled rule of law applicable to the case. *Ib.*

3. *Held*, further, that the proper rule of damages in such an action, was the highest market price of the property between the time of the conversion and the trial. (GROVER and WOODRUFF, JJ., *contra*.) *Ib.*

TAXATION.

1. By an act of the legislature, passed in 1859, it was provided that the common council of the city of Brooklyn might, upon an application of a majority of the owners of land in the district proposed to be assessed by the act, apply to the supreme court, at special term, for the appointment of three commissioners, who were authorized to contract with the Long Island Railroad company, or its assigns, to close the entrances of their tunnel in Atlantic street, Brooklyn; to pave the street at its proper grade; to lay rails upon the surface of the street and run horse-cars from the foot of Atlantic street to the city line; to relinquish and surrender their right to use steam within the city limits. In compensation for this, the commissioners were authorized to assess certain property within the vicinity specified in the act, not to exceed $125,000 (and expenses not to exceed $5,000), which the railroad company were to receive in full for such change. *Litchfield* v. *Vernon*.

2. Commissioners having been appointed upon a petition of the common council to the court, verified by the mayor of the city, stating that a majority of the owners had petitioned under the act, by a further act passed in 1860, they (the commissioners) were directed to assign to the railroad company, or its assigns, the assessment list, on condition that the latter agreed to accept such assignment in lieu of the moneys to be paid them under the contract, and agreed to discontinue the use of steam in the city, close up the tunnel and lay the railway; and the railway company, or its assigns, were authorized to receive from the persons or owners assessed the sum assessed, and to appoint a collector to collect sums unpaid. *Ib.*

3. The act of 1859 was entitled "An act to provide for the closing of the entrance of the tunnel of the Long Island Railroad Company in Atlantic street, in the city of Brooklyn, and restoring the street to its proper grade, and for the relinquishment by said company of its right to use steam power within the said city." The title of the act of 1860 was entitled "An act in relation to the collection, payment and application of certain assessments in the city of Brooklyn." *Ib.*

4. The assignee of the railroad company, the work having been done and the assessment made, appointed the plaintiff collector of the assessment, who, by a further act of the legislature, passed in 1863, was empowered to sue the persons assessed for amounts unpaid. *Ib.*

5. The plaintiff, having brought this action against the defendant as one of the owners assessed, to recover the amount of his assessment,—*Held*, that the act of 1859 was constitutional and valid, as an exercise of the taxing power, and not of eminent domain. *Ib.*

6. It is the settled law of this state that the power of taxation, and of apportionment of taxation, are vested in the legislature, and are identical and inseparable; that there is no constitutional restraint upon the exercise of this power; and that it includes the right and power of determining what portion of a public burden shall be borne by any individual or class of individuals. MASON, J. *Ib.*

7. It is within the power of the legislature to impose a tax upon a locality for any purpose deemed by it proper, and this power is not restricted by the constitution. GROVER, J. *Ib.*

8. *Held*, further, that the title to such act embraces but one subject, which was expressed in the title, and is not therefore void within section sixteen of article third of the constitution. It is sufficient that the title express the subject, and not the provisions of the act, or the details by which its purpose is to be accomplished. (JAMES, J., *contra*.) *Ib.*

9. *Held*, further, that it being provided by the original act imposing the assessment as a tax, that it should be enforced in the same manner as county taxes, as to which parties assessed are personally liable, the act of 1863, authorizing the plaintiff to sue and to enforce such personal liability, was valid. *Ib.*

10. *Held*, further, that the application to the common council, of a majority of the owners in the district affected being indispensable to the validity of all subsequent proceedings under the act, and the burden being upon the plaintiff to show that such majority had applied, the petition of the common council, verified by the mayor, to the supreme court, was no evidence thereof in this action, and the finding of the court below that such majority had applied to the common council was, therefore, wholly unsupported by the proofs, and error, for which the judgment in favor of the plaintiff must be reversed. (HUNT, Ch. J., and MASON, J., *contra*.) *Ib.*

TENDER. See *Payment*.

TRUSTEE, REMOVAL OF.

1. The supreme court have power, upon petition, to remove as trustee one upon whom, by the terms of a will naming him executor, as such executor, an express trust is conferred; and this, although he has not at the time completed his duties as executor. *Quackenbos* v. *Southwick*.

2. The removal of such a trustee is proper, where the relations between him and his co-trustee are such, that they will not probably co-operate in carrying out the trusts beneficially to those interested, and a majority of the beneficiaries ask for such removal. And it is not essential how such relations originated, or whether the trustee, whose removal is sought, caused them by his own misconduct or not. *Ib.*

TRUSTEE.

1. Where a trustee to sell, or one having a power of sale in trust, bids in the property at the sale for himself, the transaction is not void but voidable at the election of the beneficiary (when *sui juris*), and the latter may, if he choose, hold the trustee to the consequences of his act. *Boerum* v. *Schenck*.

2. And where there is no legal incapacity in the *cestui que trust*, and he has full knowledge of all the facts, and is free from undue influence arising out of the relation of the parties, a clear and unequivocal affirmance of the sale may conclude him. *Ib.*

3. Ordinarily, the acceptance of the proceeds of such sale by the beneficiary with full knowledge would be such an affirmance. But, as between the immediate parties, the act is open to explanation, and where such pro-

ceeds are received under protest, and with an express reservation of the right to controvert the validity of the sale, it does not estop or preclude a subsequent proceeding by the beneficiary to disaffirm and obtain a resale. (GROVER and DANIELS, JJ., *contra.*) *Ib.*

4. Where one of several beneficiaries has previously brought an action against the trustee to set aside the sale, and judgment has gone against him therein, such judgment is a complete bar, as to him; and although upon a resale, ordered in a suit by the other beneficiaries, under the power of sale, the entire property, and not their undivided interest therein, must be resold, yet the trustees will be entitled to that portion of the avails which would have otherwise belonged to that beneficiary, were it not for the former judgment against him. *Ib.*

5. J. S. by his will appointed his son, C. S., executor, and empowered and directed him to sell certain lands, and with the proceeds to pay certain legacies, and if there should be a surplus, to divide it equally among his children. The testator left the executor, C. S., and another son, and four daughters, three of them *femes covert*, and the fourth unmarried and imbecile. C. S., in 1848, made a sale at public auction under the power, but was himself the purchaser through a third party. In 1846 he rendered his account of the estate to the surrogate; there was paid over by the surrogate to the other son and to the three married daughters their shares of the surplus proceeds arising on such sale, they all, however, objecting to the sale, and reserving, in their receipts for the money they gave to the surrogate, the right to contest the sale. *Ib.*

6. In 1847, C. S. died, leaving two children, the defendants. Previous to 1852, the other son and the imbecile daughter died without children, both intestate and unmarried. An action had been brought in 1849 by a married daughter L. and her husband, against the present defendants to annul the sale, in which judgment was rendered dismissing the complaint. *Ib.*

7. In the present action, commenced more than ten years after the sale, by the three surviving sisters against the defendants as the heirs of C. S., praying that it be set aside and a resale of the property under the power be had,—*Held*, that the lapse of time was not, even in equity, any objection to granting the relief, and further (GROVER and DANIELS, JJ., *contra*), that the receipt from the surrogate of the apparent surplus proceeds of the original sale, even by those *sui juris*, being under protest and with a reservation of their right to contest the sale, did not estop them in the present action; but that the daughter L., plaintiff with her husband in the former suit for the same relief, was barred by the judgment therein, as to the interest she then had, but not as to those since acquired by her as one of the heirs of her deceased sister and unmarried brother. *Held*, therefore, that a resale should be had; and that of the proceeds, the plaintiffs, except L., should be paid each one-fourth, as children of the testator, and also as heirs of the deceased sister and unmarried brother, after deducting the amounts received by them, respectively, from the surrogate under the previous sale; and that the share of the daughter L., except that portion coming to her as one of the heirs of the deceased sister and unmarried brother, should belong to the defendants, and that the defendants should receive the remaining fourth of such proceeds and the amounts deducted from the other shares, as paid by their father C. S., on the previous sale. *Ib.*

VESTED INTEREST.

1. Since the abrogation of the rule in Shelly's case, and the enactments in the revised statutes of New York, a grant "to A for life, and after his decease to his heirs and their assigns forever," gives to the children of the latter a *vested* interest in the land, although liable to open and let in after-born children of A, and liable also (in respect of the interest of any child) to be wholly defeated by his death before his father. (GROVER, DANIELS and HUNT, JJ., dissenting.) *Moore* v. *Littel.*

2. Such an interest, whether vested or contingent, is alienable during the life of A (the tenant for life), and passed by deed or mortgage, subject only to open or be defeated in like manner as before. (GROVER, J., dissenting.) *Ib.*

WITNESS. See *Criminal Law.*

FORTHCOMING BOOKS.—Messrs. Little, Brown & Co., of Boston, have in press a new work on "The laws of the Domestic Relation," embracing husband and wife, guardian and ward, parent and child, infancy, and master and servant, by James Schouler. Messrs. Baker, Voorhies, & Co., of New York, will shortly issue the tenth edition of Voorhies' New York Annotated Code. The whole work has been carefully revised by the editor of the former editions, Mr. John Townshend, and will include all amendments and decisions down to 1870. It is the best annotation of the Code extant, and a new edition will prove acceptable. The second volume of Wait's Digest is nearly printed and stereotyped, and will be ready for delivery in the course of two weeks. The seventh volume of Judge EDMONDS' "New York Statutes at Large" is in press, and will be issued by Messrs. Weed, Parsons & Co. the 15th of next month. All general statutes passed since 1866 will be included. Mr. John D. Parsons, Jr., Albany, will publish, on the 1st of July, "A Treatise on the Validity of Verbal Agreements," by Montgomery H. Throop, of New York. Messrs. Little & Co. will issue 55 Barbour, in the course of a few days.

AN ENGLISH OPINION OF THE LAW JOURNAL.—The May Number of "The Law Magazine and Law Review"—the oldest and ablest law periodical in Europe—has the following notice of the ALBANY LAW JOURNAL:

"We have before us the numbers of this Journal from the beginning of the present year. We are glad to welcome this transatlantic publication as one of very great promise. It is well printed on good paper, has plenty of legal information and is well edited. One of its pleasantest features is that it contains a mixture of the purely legal with what we may venture to call the literary legal. It is a compound in other respects of one of our legal newspapers and a legal magazine. It is rare in legal newspapers to have such a variety of *readable* matter. Here, for example, are the titles of some of the lighter articles: 'Law and Lawyers in Literature,' a series of articles on which topic has gone on since the commencement; 'On the Study of Forensic Eloquence,' well written and interesting articles; 'Bar Stories, Old and New;' 'How some Men have got on at the Bar;' 'Methods and Objects of Law Reading.' The legal reporting seems carefully done, and, altogether, the JOURNAL is a credit to the legal profession of the United States, and will be found of interest in this country. It certainly ought to find a place in the libraries of our inns of court."

LEGAL NEWS.

Twenty-six graduates of Columbia college have lately been admitted to the bar.

A court for the trial of minor offenses against the United States is talked of in New York city.

September first has been fixed upon as the time for Fisk and Gould to file an answer in the suit of the representatives of the English bondholders.

Hon. William M. Evarts, of New York city, is to deliver the annual address before the Harvard Law Association on the 8th of October next.

Sargent S. Prentiss, Jr., son of the lamented Prentiss of early Mississippi history, was recently admitted to the bar at Natchez.

Hon. L. S. Foster, speaker of the Connecticut house of representatives, has been elected judge of the supreme court of the state.

Morris L. Chester, a colored man, formerly a resident of Harrisburgh, Pa., but more recently of Liberia, has been admitted to the English bar.

Judge Field, assistant attorney-general of the United States, has offered his resignation, and will return to the practice of law in Boston.

It is said that "General" O'Neil is about to bring suit against the government, claiming $100,000 damages, for arresting him on foreign territory without authority.

Judge Deady, of Oregon, has decided that a marriage celebrated at sea, or within the jurisdiction of another state, between persons leaving that state for the purpose, is a fraudulent evasion of the laws of Oregon, and therefore null and void.

A widow in Boston, who was under age, recently signed papers giving up her child to another, and Chief Justice Chapman has decided that the writings have no legal force, she having no legal right merely as a mother and a widow. Exceptions were taken, and the case goes to the full bench.

At a recent meeting of the Medico-Legal Society, in New York city, Dr. James O'Dea read a paper on the plea of insanity in criminal cases, contending that persons if found insane should be sent to a lunatic asylum, that medical experts be called by the court, and not by the prisoner's counsel.

The United States district court, in session at New York, has decided that Theophilus C. Callicott must remain in the Albany penitentiary until the fine of ten thousand dollars, imposed when he was sentenced, shall have been paid. The court consisted of Judges Nelson and Benedict. The case came up on a motion for an arrest of judgment and a removal of the fine. Mr. Callicott was sentenced for two years, and his term has about expired.

Judge Bradley, of the United States court, has decided that Mrs. Myra Clark Gaines, of New Orleans, is entitled, under the decision of the supreme court of the United States, to the possession of the lands under control of the city at the time of filing her bills. The result is quite a disappointment to Mrs. Gaines, and a great triumph for the city of New Orleans, as it only adjudges the right and title for certain vacant squares. The large claim to property sold to the city in 1836, the principal basis of Mrs. Gaines' demands, is still in dispute.

Hon. Jacob Brinkerhoff, of the supreme court of Ohio, declines to be a candidate for re-election, giving as a reason that he finds "by a saddening experience that the salary is a compensation wholly inadequate for the no inconsiderable personal expenses, the heavy responsibility, the exhausting, never-ending and still-beginning labor, and the deprivation of the comforts and associations of home, which the position necessarily involves." A Cleveland paper says that his most noted act, perhaps, was his opinion on the Oberlin-Wellington negro rescue cases, in which, with Judge Sutliff, he held that the fugitive slave law was unconstitutional. A majority of the court ruled otherwise, but the people overruled the court.

A brilliant dinner party assembled at Delmonico's in New York city, on the evening of the 8th inst., at the invitation of Mr. Clarence Seward and Mr. Vanderpoel, in honor of the elevation of Judge Folger and Judge Rapallo to the court of appeals bench. The gentlemen present represented both parties in politics, and included some of the most influential leaders on each side. Mr. Charles O'Conor, Mr. Stoughton, Mr. Barlow, Judge Blatchford and others who occupy distinguished positions in the legal profession were present, and Mr. Samuel Tilden and Mr. Marshall O. Roberts were among the numerous gentlemen who are well known in political and social life. The entertainment could not fail to be exceedingly gratifying to the judges in whose honor it was given. Mr. Clarence Seward proposed the healths of the two chief guests in a few happy and kindly remarks, and beyond this no speeches were made.

NEW YORK STATUTES AT LARGE.*

CHAP. 476.

AN ACT to amend chapter four hundred and sixty-six of fire insurance laws, passed June twenty-fifth, eighteen hundred and fifty-three, as amended to January first, eighteen hundred and sixty-nine, in relation to increasing capital stock.

PASSED April 28, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The nineteenth section of the act entitled "An act to provide for the incorporation of fire insurance companies," passed June twenty-fifth, eighteen hundred and fifty-three, with amendments and additions to January first, eighteen hundred and sixty-nine, is hereby amended by adding at the end of said section nineteen the following:

"And whenever any company formed under this law shall have accumulated and be in possession of a fund, in addition to the amount of its capital stock, and all actual outstanding liabilities, in excess of one-half of the amount of all premiums on risks not terminated, such company may increase its capital stock from such fund, and distribute said increase pro rata to the stockholders of such company: provided, always, that such increase shall be equal to at least twenty-five per cent of the original capital stock of said company, and shall have been approved by the superintendent of the insurance department, and authorized by at least three-fourths of the board of directors of said company, and provided also, that any company may hereafter make and declare a dividend as provided by the provisions of the general insurance act."

§ 2. This act shall take effect immediately.

CHAP. 706.

AN ACT to amend chapter eight hundred and four of the laws of eighteen hundred and sixty-eight, entitled "An act for the disposition of the surplus moneys arising upon sales, pursuant to part three, chapter eight, title fifteen of the revised statutes, entitled 'Of the foreclosure of mortgages by advertisements.'"

PASSED May 6, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section two of chapter eight hundred and four of the laws of eighteen hundred and sixty-eight, entitled "An act for the disposition of the surplus moneys arising upon sales, pursuant to part three, chapter eight, title fifteen of the revised statutes, entitled 'Of the foreclosure of mortgages by advertisement,'" is hereby amended so as to read as follows:

§ 2. Any attorney at law or other person, who, after the passage of this act, shall hold or make any sale of premises in pursuance of said title, and who shall receive any surplus moneys thereon, shall pay over the same, within ten days from the time of the receipt thereof by him, to the county clerk of the county in which said premises, or any part thereof, are situated. Any attorney at law or other person, who, at the time of the passage of this act, has in his possession any such surplus moneys undisposed of, may pay over the same to the clerk of the county in which the premises sold, or any part thereof, are situated.

§ 2. All surplus moneys that have been paid over to any county clerk, in pursuance of the second clause of the said section of the aforesaid act, and all surplus moneys that shall be paid over to any county clerk, in pursuance of the said section as amended by this act, shall be subject to the provisions of the other sections of the said act.

§ 3. This act shall take effect immediately.

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

The Albany Law Journal.

Albany, June 25, 1870.

CRIMINAL LAW AT HOME AND ABROAD.*

The volumes before us, taking them in their full series, give a comprehensive and exact view of the criminal jurisprudence of Europe. By the first — the *Neue Pitaval* — we have presented to us, under the editorship of several eminent civilians, a body of criminal reports running over a long course of years; and though the style is more ambiguous, and the treatment more graphic, than is usual with similar publications among ourselves, yet the technical as well as the material portions of each case are given with a precision which becomes men accustomed to deal as experts in the practice of law. The second work — *Die Opfer Mangelhafter Justiz*, or "Victims of Defective Justice" — is of a more popular character, but exhibits throughout the marks of a mind familiar with both the practice and the theory of the criminal jurisprudence of Germany. Taking the two works together, they give a survey of European criminal law on which it is impossible to gaze without being struck with the contrasts presented by a corresponding view of the law as it obtains among ourselves.

The first point that strikes us, at the opening of each particular case, is the care and skill which have been employed in the preliminary preparation of the evidence. Our American practice, in this respect, is mischievously loose. It is rarely that there is any attempt to guard the precincts within which a crime has been committed. Visitors, interested or disinterested, are permitted to flow in and out, effacing by accident, if not disarranging by design, the marks which would point to the guilty agent. It is as if Pompeii, when excavated, were opened to crowds of whomsoever might choose to pour in; "relics" of all kinds carried off, inscriptions of all kinds disfigured; disarrangements of all kinds perpetrated, and often articles dropped and signs left which, after a short lapse of time, would lead the casual observer to doubt what century had inaugurated or what range of civilization had produced the confused phenomena on which he gazed. The consequence is that what may be technically called "indicatory" evidence is by us left to the mercy of chance or the still worse influence of malevolent design; and the prosecuting officer, no matter how skillful he may be, often goes to trial bereft of one of the main sources of information from which a rightful conclusion can be drawn. In Germany, on the other hand, and, in most instances in France, whenever a crime is committed, a hermetical cover, as it were, is securely placed over the scene of guilt. Careful surveys of the house or ground are at once taken; all articles likely to elucidate the event are sequestered, after their original situation has been carefully noted, under judicial control; and the most effective means employed, to reproduce on the trial the facts as they existed when the discovery of guilt was made, In this respect, at least, "justice" is less "defective" in Germany than it has unfortunately been permitted to become among ourselves.

But this contrast is not that to which the perusal of these volumes mainly invites. It is impossible to open them without seeing, as if invoked before us, two great spirits — one of the civil, the other of the common law—lowering on each other as if in hostility, defiantly marked as they are with their utterly antagonistic systems of treating persons under trial for crime. The common law says: "You shall not make that prisoner's prior character a charge against him on the trial; you shall not examine him personally as to his guilt." The civil law says: "I will do both." Now, because this struggle is one involving some of the most important interests of justice and humanity — because it is one in which our American practice, after having been for generations loyal to the principles of the common law, is making a dangerous approximation to those of its opponent — a study of the volumes before us, in connection with this issue, will be found of great public use. Our American courts, as will presently be more fully shown, are viewing each day with greater lenity the attempts of prosecutors to introduce the defendant's general bad character as evidence against him in chief. Several of our American legislatures have lately declared that a defendant is to be a competent witness on his own trial; and though the prosecution may not call him against his own consent, yet, as will hereafter be seen, this is a consent which few prisoners on trial will be morally able to withhold. At such a juncture, therefore, it is well for us to pause to consider what is the practical exposition of these positions that the civil law unfolds. And for this purpose, no works could be more effective than the volumes we now review. Of one thing we may be sure. If they exhibit the civil law as in this respect cruel, reckless, and tyrannical, it is not because their authors bear it ill-will. These rank not only as among its experts, but among its votaries. Whatever charges the books may unconsciously make, therefore, come from witnesses who at least view it with no unfriendly eye.

Let us then approach the question more closely; and for this purpose let us select two of the trials before us in which the proceedings are given in the greatest detail. The first is that of Alm (as reported by Dr. Loffler), who was charged in Berlin, in December, 1849, with the murder of his wife. It appeared that a little after midnight, on the 24th of December, he sent his eldest daughter, Johanna, a child of seven years, to a neighbor, named Blau, begging him to come at once to Alm's apartment. After some delay, Blau arrived, and found Alm's wife stretched lifeless on the floor of the workshop which adjoined the family chamber. She was dressed fully in a black garment; a cord was drawn tightly round her neck, and her hair was in wild disorder. In her belt was found two scraps of paper, which were signed by her name, which declared that her death

* Der Neue Pitaval. Eine Sammlung der interessantesten Criminalgeschichten aller Länder aus älterer und neuerer Zeit. Regründet von Criminaldirector Dr. I. C. Hitzig und Dr. W. Häring. (W. Alexis.) Fortgesetzt von Dr. A. Volkert. Neue Series. Leipzig. 1865–1870.

Die Opfer Mangelhafter Justiz. Gallerie der interessantesten Justizmorde aller Völker und Zeiten, von Dr. Karl Löffler, früherem Redacteur der Berliner Gerichts-Zeitung. Rütter, etc. III. Bände. Jena: Hermann Costenoble, 1868–1870.

was by her own hands, and was induced by her conviction that she was the victim of a mortal disease which would make her life burdensome to others and miserable to herself. There was no doubt that she was in very infirm health, and had for several days been suffering with nervous fever. There was no doubt, also, that her husband, though a skillful workman, was frequently drunk, and was very careless in providing for his family.

It was in evidence that in the afternoon and evening of his wife's death, he was wandering from tavern to tavern, drinking to intoxication, and that he had frequently treated his wife with great rudeness, if not violence. Under these circumstances he was arrested and put on trial for the homicide.

The evidence, irrespective of his own examination, was very conflicting. His two eldest children, Johanna, seven years of age, and Maria, four, when taken charge of and interrogated by the police, declared, first, that their mother had tried to kill her youngest child, and then had killed herself; but afterward they stated that their father had come in late at night, and had dragged their mother from her bed, and taken her into the workshop, and there murdered her. This they recanted, but subsequently re-asserted on the trial, though when examined separately their statements conflicted on several material points. It was a very significant point in this connection that the deceased, when in bed that afternoon and evening, was dressed, according to the testimony of several witnesses, in a colored gown, which she wore as a night-dress. After her death, however, at the time of Blau's arrival, she was neatly attired in a black dress, which appears to have been her best. That she should herself have made this change at midnight was consistent with the hypothesis of suicide. That her husband in his drunken condition could have done it, without great resistance on her part, which would have exhibited itself at least in the dress, seemed impossible. And yet, if the inculpating statements of the children were to be believed, the change must have been made by the husband.

Medical evidence was taken on both sides as to the nature of the wounds; and the question was finally referred to a committee of eminent surgeons. There was much conflict in their testimony, but the preponderance of authority was that it was possible, if not probable, that the wounds were self-inflicted.

There was no evidence of cries of any kind being heard by the neighbors, several of whom were in the same building and were stirring late at night.

The handwriting of the notes found on the person of the deceased was the subject of close inspection. Could they have been traced to the prisoner they would have left his guilt without question; and there were one or two experts produced who swore, on comparison of hands, that the writing was his. The great weight of testimony, however, in this section of the case, was to the contrary; and this opinion was strengthened by the test adopted on the trial, of compelling the defendant to write, on dictation, the words of the alleged declaration. On inspection of this paper, the official experts declared the two handwritings to be utterly distinct.

So stood the case apart from the prisoner's own examination. As an illustration of the way in which, on a case which in a common-law court would result only in an acquittal, a defendant's examination can be so conducted as to force him into the attitude of a criminal, we give copious extracts from the report before us:

Judge. Prisoner, stand up. What is your name?

Prisoner. Joachim Friedrich Wilhelm Alm.

Judge. Your age and religion?

Pris. I am forty years, and of the Evangelical (Lutheran) confession.

Judge. Have you been previously arrested?

Pris. Three times; the first when I was attacked with convulsions in the street; the second, on account of a disturbance in the streets; and third, for giving an unfair receipt to a journeyman.

* * * * * * *

Judge. What was the condition of your wife when you went out (on the afternoon of the homicide)?

Pris. She was in bed, and had on a colored dress.

Judge. Why was she in bed?

Pris. She was sick. I know not with what; the doctor told me she had a hot fever, and that I must put wet bandages to her head.

Judge. Did your wife say any thing to you when you left the house?

Pris. My wife talked a good deal before I left the house. She wanted me to go to her aunt, the widow Witt, who had lately visited her, and had wept, which had given my wife much trouble. She gave me six groschen, and told me to go out and amuse myself, as I had been working hard during the day.

Judge. That is not very likely, for your wife lay sick in bed, and if you were absent for a long time she would be left alone in her helpless condition with the children. It is hard to believe that she should have asked this.

The judge then proceeded to examine the prisoner in great detail, the plan being to question him, as is usual in German trials, on every point on which the prosecutor was subsequently to adduce testimony; and thus not only to bring his general veracity directly in issue, but to draw him out on a variety of topics connected with the *res gestæ*, as to which the most accurate memory and the greatest presence of mind would find it difficult to give uniformly prompt and accurate replies. In the case before us this is done at great length, and with the minutest circumstantiality. Our space allows us only to give one or two extracts:

Judge. Had you no conversation with the waiteress at Thomes' inn about your wife? [The waiteress was on hand to be presently examined on this point.]

Pris. It may have been so; I may have told her that my wife was sick.

Judge. But you told her that your wife could not live, and had asked you to look out for another

Pris. That is not so. I may have said my wife could not live.

Judge. But you said also that your wife would die that night.

Pris. How could this be so, as my wife the previous day was better?

Judge. Is it your custom to take frequent drams? [On this point also several witnesses were to be called.]

Pris. No. Formerly, perhaps, I could take more than lately, when I have had so much grief and trouble.

Judge. It must strike every one as very odd that you should be ranging about beer-houses and inns for hours when your wife, with her infant children, was in her bed at home, sick and helpless. . . . . In your preliminary examination you expressed yourself differently as to your conduct on reaching the house. You then said that you were not at first convinced of your wife's death, and were first assured of it by Blau, who showed you the cord round her neck. Here is a direct contradiction on an essential point.

Pris. The first statement could not have been correctly written down, for my daughter was the first who told me about the cord. . . . .

Judge. Did you closely examine the cord?

Pris. No. I tried immediately to untie it, but failed. The cord was then cut, and I did not see it again.

Judge. It is hard to explain how, in a matter of such extreme importance to yourself, that you should be so careless as not to trouble yourself as to the circumstances which had the closest relation to your wife's death.

Pris. I was so overwhelmed that I could think of nothing —

Judge. Was the cord cut on the same side with the knot?

Pris. I do not know; I took no notice of this.

Judge. I must again point out to you how remarkable it appears that on such important points you should intentionally avoid a distinct answer.

Pris. Such an event is so stupefying that it is impossible to remember all the particular circumstances; and besides, I had been drinking.

Judge. Did not your wife love her children?

Pris. Yes, she was very kind to them.

Judge. Here is a contradiction; for if she loved them, would she, by suicide, have withdrawn from them her motherly care and protection?

Pris. But our troubles were very great. In eight years she had six children, and business was bad. I had the whole household work, the scouring and washing, as she was sick; and hence I could earn so much the less. All these things may have led her to the step —

Judge. Did you make no attempt at the time yourself to read the notes found in your wife's belt? [They had been partially read to him by Blau.]

Pris. No, I did not see them again.

Judge. This is wholly inexplicable. You come home, find your wife the victim of violence, discover writings which must explain the mystery, and instead of eagerly seeking to understand their contents, you are so careless and heartless that you will not give even a look to this last bequest of your wife. I do not believe that there is another who in your place would have so acted. [The prisoner again pleaded for this his stupefaction and intoxication. The writings were then produced in court.]

Judge. Do you know this paper and this handwriting?

Pris. These may be the papers that Blau found. The handwriting appears that of my wife; and yet again not so, for it seems to me as if she would have written differently.

Judge. I ask you to notice that the contents of these papers are very peculiar. They contain more than once the assurance, "My husband is innocent." Then, again, they are signed, "Louise Alm, formerly Bottcher;" though it would scarcely be expected that your wife, if she had written these lines just before her death, would have thought of such formalities. Then, again, in one place the name *Alm* is written with a Latin A, in another with a German A; and then the statement, "This I have myself written," is, at the least, very unusual. The prosecuting attorney has made these circumstances the ground of a powerful argument that the lines were written, not by your wife, but by yourself. What do you reply?

Pris. I have nothing to say, except that I knew from my daughter's statement that they were written by my wife.

Judge. How did you and your wife agree?

Pris. We got along very well together.

Judge. But witnesses tell us that you treated her badly.

Pris. This is not true; it could only be said by bad men.

Judge. Every witness who has been examined (at the preliminary hearing) knows the importance of the issue, and the severity of the punishment involved. It is not to be presumed that any one will perjure himself in such case. The witnesses will soon be called; and you had better consider this before you contradict that which will presently be proved against you.

We give but a very few of the numerous points as to which the prisoner was examined; and those we have selected are those in which the judge and the prisoner were brought into the closest collision. The examination, taking it in its various phases, lasted several days; and it incidentally appeared that, at the time of his examination in chief, the defendant was much emaciated by his long and painful imprisonment. He was ultimately convicted, and sentenced to imprisonment for life, and shortly after sentence died in prison. Not long after his death his innocence was demonstrated. His children, as they grew older, declared that their mother's death was by her own hands, and that their childish statements to the contrary had resulted from fear, and from their constant conversations with the police, under whose charge they had been placed.

Now, of course, the question now before us is not as to the guilt or innocence of the particular defendant, and certainly not as to his general character. He may have been, and m
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extracts we have given, from the protracted examination to which the defendant was exposed, show that this system has in it inherent and fatal defects. We have no reason to impeach the honesty or the impartiality of the judge who presided. He appears to have exercised the highest criminal functions in Berlin for a number of years; and certainly on the trial immense pains were taken to collect the highest and most varied scientific testimony on the points as to which experts were required No doubt the judge went into that, as in all other trials, with the conviction that it was his duty to probe the defendant's conscience to the uttermost, to force from him an explanation of every inculpatory circumstance, and lead him to a due abasement and confession when such circumstances could not be explained. But how unequal a contest was this! On the one side is a high official, calm in the consequence of exalted station, trained by long experience to master in advance all the details of a case, and then to force a prisoner to express himself as to each of these details, and surrounded by the usual pomp and power of judicial authority to overawe or silence. On the other hand, is a prisoner whose liberty or whose life is at stake, whose physical frame is exhausted by imprisonment, and whose nervous system is unstrung by long morbid introspection; a solitary man, friendless, generally uneducated, and rarely, under the best circumstances, capable of threading a labyrinth so intricate as that into which he is now led; a man with desperate stakes to play, and with, therefore, tremendous temptations, even when innocent, to escape some immediate dilemma by a falsification, which he has not the foresight to see will be presently turned against him to his destruction; a man whose position is that of a poor, silly, fluttering bird, who finds himself gradually inclosed in the meshes of a net he can neither break nor elude. Now, all this exists without supposing either brutality or bitterness on the part of the court. So far as the German trials are concerned — as they are exhibited not merely in Dr. Loffler's work, but in the long series of volumes which constitute the *Neue Pitaval* — very little of these qualities is observed. The judges who conduct the examinations are not brutal, as was Lord Jeffreys. They attempt no sudden, dramatic surprises on the prisoner, as is the fashion of the French judges, whom we shall presently consider. They are not malevolent; there is none of that cold malice mingled with great and calm ability, such as Sir R. Bethell, for instance, may be supposed to have displayed when acting as crown's

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trials we have had an opportunity of observing is as follows: the judge takes the various preliminary examinations in his hand, and then proceeds to question the defendant on each fact that these examinations disclose. After the defendant is thus drawn on to express himself on every point to which the testimony can be made to reach, then, and not till then, are the witnesses examined in chief. If it were an examination for an official promotion, the process could not be more cool or exhaustive; nor could greater care be taken to inspect the replies, and to upset them if incorrect. The difference is this, that here the party examined is on trial for liberty or life, and that he is examined, not as to the renditions of science, but as to multitudes of impressions as to the past, concerning which no human memory can be complete. The ordeal is one from which no defendant who is not consummately cool and capable can escape unscathed.

(*To be continued.*)

JOHN C. SPENCER.*

IV.

In the year 1816, while Mr. Spencer was discharging the duties of district attorney, he was elected a representative in congress from the 21st congressional district of the state, by the Clintonian party.

For several years there existed an order of the Tammany society in the city of New York, whose badge of distinction was a portion of the tail of a deer, worn in their hats. These persons were distinguished for their high social and political position, their eminent abilities, and their hatred to Mr. Clinton. From this order a powerful combination originated, known in history as the bucktail party. Absorbing all the elements which rivalry, jealousy, and antagonistic ambition had rendered hostile to him, it soon aspired to the control of the state, and its aspirations were at times realized.

The war which it waged against De Witt Clinton has seldom been equaled in the annals of political history; it exhibited all the intolerance of party strife, and the facility with which parties in our country are created. An eminent French writer has said that "in the United States there is no religious animosity, because all religion is respected, and no sect is predominant; there is no jealousy of rank, because the people is every thing, and none can contest its authority; there is no public misery to serve as a means of agitation, because the physical position of the country opens so wide a field to industry that man is enabled to accomplish the most surprising undertakings on his own native resources. Nevertheless, ambitious men are interested in the creation of parties, since it is difficult to eject a person from authority upon the mere ground that his place is coveted by others. The skill of the actors in the political world lies, therefore, in the art of creating parties. A political aspirant in the United States begins by discriminating his own interest, and by calculating upon those interests which may be collected around and

* From advance sheets of "Bench and Bar," a work in preparation by L. B. Proctor, of Dansville, N. Y.

amalgamated with it; he then contrives to discover some doctrine or principle which may suit the purpose of this new association, and he adopts it in order to bring out his party, and to secure its popularity."

The popularity of Mr. Clinton had placed him in the way of many ambitious men, and, since it was difficult to eject him from place, a party was created for that purpose. Nothing, however, so surely indicates his great popularity as the strong combinations created for his overthrow, and the singular power with which he so successfully resisted these combinations.

In the contest between the Clintonian and bucktail party, Mr. Spencer espoused the cause of the former; his name and career is thus so blended with that of De Witt Clinton that it is impossible to consider one apart from the other. The former aided in electing Governor Tompkins vice-president of the United States, while occupying the executive chair of the state; and he sanctioned the policy which placed John Taylor in the chair made vacant by the election of Mr. Tompkins to the vice-presidency.

Notwithstanding the existence of the bucktail party, the friends of Mr. Clinton nominated him for governor in the fall of 1816; and, as we have seen, Mr. Spencer received the nomination for member of congress. They were both elected. In the year 1819, while yet in congress, the Clintonian members of the legislature nominated Mr. Spencer for United States senator from this state. Col. Samuel Young and Rufus King were his opponents. He received sixty-four votes; Col. Young fifty-seven. The remaining votes were cast for Mr. King, who was elected. The strength which Mr. Spencer exhibited in this contest shows the political popularity which, at that early period of his life, he had attained.

Although one of the youngest members of the house, being only twenty-eight years of age, he occupied a conspicuous position, and was soon regarded as the leader of New York representatives in congress. In the autumn succeeding the senatorial struggle, while yet in congress, he was nominated and elected to the assembly. On the fourth day of January, 1820, he took his seat in the state legislature.

As soon as the assembly was convened, Mr. Spencer's name was announced as a candidate for speaker. By the joint strength of the Clintonians and federalists, he was elected. His address delivered to the assembly on assuming the speaker's chair was impressive, firm, and statesmanlike. In the discharge of his duties as presiding officer of a body composed of such eminent men as was the New York legislature at this time, he occupied a difficult and delicate position. Slenderly provided with those flexible and plastic qualities which constitute the consummate politician, yet, as a presiding officer, he commanded respect, and even admiration. He possessed much of the self-possessed gravity of Calhoun, with more natural suavity than the great Carolinian, whom he resembled in many points of character. "Like the Southerner, he was capable, ambitious, indomitable, free from personal vices; deficient, too, like him in the plastic and congenial qualities that attach followers to party leaders. The versatility of position that marked the career of both was not the result of flexibility of purpose or vacillation of opinion in either; but of powerful ambition, wielding intellect as a weapon, and opening for itself a career wherever it chose."

It is easy to see that these features in his character, combined with certain family influences, caused him to adopt that course which, in the legislature of 1820, rendered him the leader of the Clintonian and federal parties.

At this session of the legislature an opportunity presented itself for Mr. Spencer to do an act of friendship for Governor Tompkins, and he promptly availed himself of it.

During the war of 1812 large sums of money, amounting to several millions, funds of the general government, passed through the hands of the governor. In the adjustment of his account the action of the state legislature was invoked. As the governor demanded a commission on the money disbursed by him, a committee, appointed by the legislature, awarded it to him, directing it to be paid on the order of Archibald McIntyre, then comptroller. But a dispute arising between the governor and Mr. McIntyre, as to the construction of the resolution recommended by the committee, another resolution was introduced into the assembly sustaining the comptroller's manner of auditing the amount.

The introduction of this resolution elicited a debate of an exciting and deeply interesting character. It was the great debate of the session. Mr. Spencer, Elisha Williams, Gen. Root, Messrs. Irving and Romaine, of New York city, participated in it. Mr. Spencer strongly favored the law or resolution as Mr. Tompkins construed it, and supported his position in a speech which greatly enhanced his reputation as a legislative debater. He was warmly supported by Elisha Williams, and as stronly opposed by Mr. Root.

At this period, perhaps no men in the state occupied a higher position than Messrs. Williams and Root. The former was one of the ablest lawyers and accomplished speakers then at the bar of the state. So extensive was his reputation that he was frequently retained in trials which occurred in distant counties; and he was now engaged in the city of New York, now in Albany, now in western and now in southern New York. As a lawyer, it is not invidious to say of him that, though surrounded by eminent advocates and civilians, he had few, if any, superiors. As a legislator, the records of the assembly are the best evidence of his ability. As an indication of his popularity in the county of Columbia, his native county, he represented it in the legislature [illegible] years nearly in succession. Nor is this all. [illegible] Albany, the citizens of Columbia confidence in his integrity and [illegible] as their representative in th[illegible] tion of 1821 — a mark of publ[illegible]

As the biography of Gen. [illegible] part of this work, it is suffic[illegible] many respects, he was the [illegible]

Mr. Irving was for many [illegible] of the New York court of [illegible] the state is indebted for the la[illegible] for full costs in actions for [illegible] slander, etc., where nominal dam[illegible]

covered. No matter how frivolous the case, how trivial the offense, in such cases a verdict for six cents insured a recovery of a heavy bill of costs, and hence, the courts in the state were incumbered with a vast amount of petty actions, brought solely for costs.

Judge Irving called the attention of Governor Clinton to this abuse, in an elaborate and ably written memorial, which, on the 10th of February, 1828, was embodied in a special message by the governor, and sent to the legislature, then in session, and the obnoxious law was repealed. There is another and deeper interest attached to this message; it was the last official act of De Witt Clinton; he died the next morning after sending it to the legislature.

Samuel B. Romaine was a distingushed member from the city of New York, and subsequently speaker of the assembly.

Such were the men who participated with Mr. Spencer in the great debate concerning the matters of Governor Tompkins; his position was in the end fully sustained, and his demand for percentage allowed. It was natural that a question containing so many elements of conflicting interest, invested with so many recollections of the recent war, debated by men of such eminent ability, should be memorable in the legislative history of the state.

The legislature of 1820 is characterized for the singular and bitter party dissensions which divided it. Mr. Spencer, as the leading Clintonian, by his abilities, his influence, his energetic vigor as a partisan, incurred the hatred of Mr. Clinton's enemies to such an extent, that when the time for adjournment approached, they refused to concur in the usual vote of thanks given to the speaker at such times, and the session closed in a storm.

In the autumn of 1820 the enemies of Governor Clinton triumphed in the state, and a legislature was elected decidedly hostile to him. But John C. Spencer was re-elected; and in him Clinton had a powerful champion. An extra session of the legislature convened in November for the purpose of choosing presidential electors. Mr. Spencer was again a candidate for speaker, but as his friends were largely in the minority he was of course defeated.

But, as the acknowledged leader of the Clintonians in the assembly, he occupied a no less distinguished position. With his large experience as a legislator he often baffled the majority against him, and gained such decisive a[illegible]antages in those party contests wh[illegible]ouse, that the foundation for [illegible]s chief was successfully laid. [illegible]d constitutional convention [illegible]f future political supremacy, [illegible]ntensified. In the debates [illegible]nergies of Mr. Spencer's [illegible] intellect never attained [illegible]plies to his antagonists. [illegible]r at this time was graced [illegible] and power. There was [illegible]Julian C. Verplanck, con-[illegible]nd grace, of philosophic [illegible]; the florid eloquence of [illegible]acious and profound prin-[illegible]ty, the inherent rights of [illegible]a Richelieu, in a strain of oratory, which flowed naturally, sometimes gracefully, interrupted occasionally by an exaggeration of passion, which exhibited his zeal; the attractive oratory of Elisha Williams, glowing with the strength of his illustrations, the felicity of his expressions, occasionally abounding with the excess of ornament, but replete with reason, which guided and enlightened; and the keen sarcasm, the terse, severe diction of Spencer, in which no redundant word or fanciful expression was permitted, who redeemed the abstruse subjects which he discussed by a union of subtelty and grace, with the utterances of a mind glowing with thought and research.

After a long contest and various party maneuvers, the bill for the convention passed both branches of the legislature, and became a law. But, through the management of the Clintonian leaders, it passed in a form that, notwithstanding the great majority against them, they gained as much, if not more, political power than the dominant party.

In due time the convention assembled. It was composed of the ablest and most distinguished men in the state; perhaps, in point of real ability, varied learning, and patriotism, the convention of 1821 has never been equaled by any deliberative body in the state. Its deliberations and proceedings now make a part of history, and most of its actors have left the scenes of earth. How many schemes of ambition and wealth; how many full-blown hopes of power and place; how much transient distinction and ephemeral elevation; how much bartering of all that is lofty and pure for some "bad eminence," has that assembly chamber witnessed since that convention assembled there! And like scenes are to follow; crowds, impelled by the same ambition — the same schemes — will press on to their destiny — to success and failure — to forgetfulness and oblivion.

After the adjournment of the legislature of 1821, Mr. Spencer returned to the practice of his profession, which had now become so extensive that he was compelled to devote his entire attention to it. The reports of the supreme court and the court for the correction of errors, through a long series of years, exhibit the large number of cases conducted by him in these courts. As they are the expression of extensive legal learning, and involve the consideration of almost every question, which, during that period, was settled by these courts, their examination would be profitable to the legal student.

Mr. Spencer continued steadily devoted to his profession, until the events of 1824 again called him before the people. When the legislature of that year was on the point of adjournment, a resolution came down from the senate to the house dismissing Mr. Clinton from the office of canal commissioner. This resolution was promptly passed by the assembly. As there was no pretense that Mr. Clinton had failed to discharge his duty with fidelity and ability, his dismissal was regarded as a high-handed act of party malevolence; but the act intended to annihilate him was the talisman which restored him again to power. It created the most intense excitement and indignation throughout the state. An immense meeting was held at Albany, at which resolutions of great strength and power denouncing the removal, were unanimously passed.

These resolutions were drawn by Hon. Alfred Conkling, now of Geneseo, N. Y., father of Senator Conkling, then a young but distinguished lawyer, and an intimate friend of Governor Clinton.

He was subsequently appointed by President Adams United States district judge for the Northern district of New York. This appointment was made on the recommendation of Mr. Clinton, then Governor of the state, General Van Rensselaer, and other eminent citizens. While in congress in 1822 and '23, Judge CONKLING made the acquaintance of Mr. Adams; a warm and intimate friendship commenced between them, which ended only with the death of "the old man eloquent." It was, therefore, a pleasure to him, by this appointment, to recognize the eminent legal abilities, profound learning, and purity of character, of his friend from New York.

After serving many years as district judge, winning the approbation and confidence of the bar and the public; after serving his country as minister to a foreign nation, Judge CONKLING has retired to that quiet and repose which his life and services so well merit.

So strong was the popular feeling in favor of Mr. Clinton, that in August, 1824, he was nominated for governor. To strengthen him in the western counties, Mr. Spencer was urged to accept the nomination for Senator from the eighth senatorial district. He consented, and both Spencer and Clinton were elected; the latter by a majority so large that, in the facetious language of Dudley Marvin, "he got a larger majority than he would had he ran alone." Once more John C. Spencer became a member of the state legislature.

As a member of the court for the correction of errors, his legal learning was now exercised judicially, and for four years his opinions pronounced in that court enriched its reports.

CURRENT TOPICS.

Judge E. R. HOAR resigned the office of attorney-general of the United States on the 15th inst., and the resignation was accepted on the same day by the president. It has long been the desire of Judge HOAR to retire to private life, and he has chosen the present time as best fitted for leaving the business of the office in a convenient condition for his successor. With the partisans and political hacks of the capital Judge HOAR has never been a favorite. They could never comprehend him, for he acted upon principles that were beyond their range. But the honest and intelligent portion of the people have found him an able and upright lawyer, and a zealous and faithful officer. It is said that he will continue to discharge the duties of the office until the confirmation of his successor.

A writer in the *Solicitors' Journal*, after discussing the English decisions on the liability of married women having separate property, says: "The rule may be taken to be this: when a married woman enters into a contract, which at the time she has no means of fulfilling, except at the expense of her separate estate, the court will assume her to have intended the honest consequences of her action, and will hold her separate estate liable. * * * Whenever, as for instance was the case in *Hulme* v. *Tenant* (1 Wh. & Tu. L. C.), a wife, having separate estate, joins her husband in an obligation, there arises at once a presumption that it was with the view of binding her separate estate, since, unless that were the object, her joining would be a mere farce." This is a very common-sense view of the matter, and we should be glad to see our judges arrive at the same conclusion.

Charges of a serious nature have been preferred against the Hon. J. H. Duvall, United States judge for the western district of Texas. It is alleged that he was holding court at the time of the breaking out of the war, and escaped through the lines, and came to Washington, after remaining in the confederacy two years. On his arrival in Washington he presented his claim for salary during the period of his absence, filing the iron-clad oath with his application. On the recommendation of Judge Holt, Secretary Seward, and others, President Lincoln ordered the payment of his claim. It is now claimed, by gentlemen from Texas now at Washington, who have certain records of the late confederacy, that Judge Duvall took the oath of allegiance to the rebel government, and drew his salary as judge of their court from the rebel treasury. It is therefore proposed to ask for his impeachment by congress.

A "Legal Education Association" has been formed in England, which has for its primary objects the formation of a legal university, and an examination test conducted by a public board for both branches of the profession. A bill to further the plan is to be introduced at this session in order to pave the way for legislation next year. In the published scheme, the committee say: "England, it is believed, is the only first-class state in Europe where a systematic study of the law does not exist, and the profession of the law is the only profession in England which exists in a state of almost complete isolation from all that has been done in late years for the science to which it relates on the continent of Europe. The reason of this state of things is, that in England all the lawyers are practitioners, and there is no school of law, and therefore no science of law, and no established system of teaching." We should be glad if some movement of the kind could be inaugurated in this country. Legal education here is even mo[illegible] ficient than in England, notwit[illegible] of the several law schools.

The president has nominate[illegible] of Georgia, for attorney-gene[illegible] Hoar, resigned. Mr. Akern[illegible] Hampshire, a graduate of D[illegible] about 46 years of age. He rem[illegible] he obtained his majority, and s[illegible] of J. McPherson Berrian, an ex[illegible] tor, and also President Jackson[illegible] He has been one of the leading law[illegible] but has never held public office u[illegible]

President Grant United States attorney for the district of Georgia, some eight months ago. He was a union man at the outset of the war, and strongly opposed to secession, remaining quiet, but firm in opposition to the rebellion for some time after hostilities commenced. But, after the confederate government had established itself, he entered its service, remaining therein about eighteen months. In December last he was relieved from the political disabilities imposed by the fourteenth amendment. Although admitted to be a thorough republican, it is intimated that his record during the rebellion may lead to his rejection by the senate.

The defects in our present system of selecting expert witnesses have been rendered prominent by the recent trial of McFarland, and considerable discussion has arisen as to the propriety of having them selected by the court. There can be little doubt that an expert selected and paid by a party is hardly so likely to be disinterested and impartial in his opinions as one selected and paid by officers of justice. Let the witness desire to be ever so fair in his conclusions, he is likely to be led to favor the views or hypotheses of the party in whose behalf he is called. He is told in the beginning that a certain condition of things exists, upon which is based certain hypotheses, and he is called upon to lend the aid of his skill to corroborate those hypotheses, rather than to detect or expose their errors. The wish becomes father to the thought, and if the general facts will bear out the desired conclusion he is content. Were experts selected by the court and paid by the state there would seldom be the slightest inducement for their giving an opinion not entirely justified, both by the general phenomena and by the minute details of the case. Experts thus selected would become ministers of equal and impartial justice, rather than, as is now too often the case, the parasites and advocates of the party at whose instance they are called.

The English court for divorce and matrimonial causes has just given judgment in the case of *Mordaunt* v. *Mordaunt*. It will be remembered that the suit is by a husband for a dissolution of marriage on the grounds of the respondent's adultery. After the commencement of the suit, it was alleged that the respondent was insane, and this question was tried before a jury, who found that she was insane at the time of the service upon her of the citation, and that she re[illegible]nce. Lord Penzance then [illegible]arther proceedings in the [illegible]hould recover her mental [illegible]ppealed against this order [illegible]ajority of the court, Lord [illegible]J., have affirmed the order [illegible]), holding that the insanity [illegible]r to a suit for dissolution of [illegible] of the court rested their [illegible]he analogy of the case to a [illegible]ELLY, C. B., argued strongly [illegible]he order, and of staying the [illegible]o time as long as a reasonable respondent may recover; but [illegible]e ceased, the petitioner should with his suit.

OBITER DICTA.

A *terre tenant*—one who lets the land run to weeds.

Dust in the summer time, like a venue, ought to be well laid.

Contributory negligence—that of writers for the press who fail to punctuate their articles.

The Pennsylvania legislature once voted that the "State-house land should be inclosed with a brick wall, and should remain forever an open enclosure."

Law dictionaries are very useful sometimes. One we have before us, open at "last sickness," defines it as "that of which a person died." This is a good thing to know.

A New York statute (session laws, 1863), provided that prisoners confined in the state prison should have two days for every six months, taken off their term for good behavior; but this "shall not apply where the sentence is for life."

A prisoner who was indicted for stealing goods was acquitted by the efforts of his counsel. It appeared he was found with a wheel-barrow, on which was some of the stolen property. Some one remarked that the eloquent counsel resembled his client, inasmuch as "he carried every thing before him." Some one else asked why didn't they haul him up for "wheel-barratry?"

In *Nash* v. *Battersby* (2 Lord Raym. 936,) the plaintiff declared with the addition of "gentleman." The defendant pleaded in abatement that the plaintiff was no gentleman. The plaintiff demurred, and it was held ill, for, said the court, it amounts to a confession that the plaintiff is no gentleman, and then not the person named in the count. He should have replied that he is a gentleman.

When Chief Justice Shaw, of Massachusetts, was on the bench, one of the associate judges happened to be in a barber's shop one day, having his hair cut. The proprietor, after various observations peculiar to that colloquially inclined profession, inquired where the chief justice was.

"Why doesn't he come in; I don't believe he has been here since—(naming the time) but then," he added, after a pause, "I dare say he has had *something else on his mind*."

"Are you going to the Astor House to see the Indians?" was asked of a New York lawyer when "Spotted Tail" was on his way home from Washington.

"No; why should I?" was the reply.

"They are a great curiosity."

"No! but I think I'd go a good ways to see a class that's now-a-days a greater curiosity, mentioned in our constitution."

"What's that?"

"Persons not taxed!"

"Your honors," said a flowery orator, "do not sit there like marble statues to be wafted about by every idle breeze. No, your honors, my astute and impetuous brother may rave and bellow for his wretched client till the court adjourns, but it will no more turn you from the path of legal rectitude than the buzzing of a fly will arrest the thundering progress of Niagara Falls—*on the Canada side!*"

This reminds us of an introduction we heard one

Fourth of July: "My friends," said the chairman, "I now have the pleasure of introducing the orator of the day, an eloquent and distinguished son of New Hampshire, that old Granite State, the birthplace of Daniel Webster, and where John P. Hale has—*walked with so much pleasure!*"

DIGEST OF RECENT AMERICAN DECISIONS.*

SUPREME COURT OF NEW YORK.

CONSTABLE.

Action on agreement to indemnify.—It is no defense to an action brought by a constable upon an agreement by the plaintiff in an execution to indemnify him against the costs of a suit brought against a deputy sheriff for levying upon and selling property which the constable had previously levied on, that where the defendants agreed to indemnify the plaintiff, they did not know that he had levied other executions upon the same property levied upon by virtue of theirs. *Berry* v. *Hemingway et al.*

CRIMINAL LAW.

Evidence.—On the trial of an indictment for erecting and maintaining a powder-house, and for keeping therein a large quantity of powder, near a city, a witness who has been in the infantry and artillery service of the United States cannot be allowed to answer the question, "What is the ordinary mode of constructing powder magazines?" such testimony being incompetent to prove that the building in question was improperly constructed. *Bradley et al.* v. *The People.*

EVIDENCE.

1. *Declarations.*—In an action against a husband, after his wife's death, to recover property claimed to have been owned by the wife, in her life-time, and to have been given to the plaintiff by her, in anticipation of death, proof of the declarations of the wife are not competent evidence against the defendant, to show that she was the owner of the property, where the answer denies that the wife ever was such owner, and claims that the property at all times belonged to the defendant in his own right, and he had the control and possession of it at the time. *Dewey* v. *Goodenough.*

2. *Testimony of parties.*—Under section 399 of the code of procedure the plaintiff in such an action cannot be allowed to testify as to all the circumstances of the transaction going to show property in the deceased, and a gift thereof to the plaintiff. *Ib.*

GUARANTY.

1. The defendant, on transferring to the plaintiff the note of a third person, then past due, guarantied its collection, provided due diligence should be used. The maker absconded and went to Canada, where he remained, leaving property in this state, liable to the payment of the debt. *Held*, that the plaintiff, before he could recover upon the guaranty, was bound to exhaust his remedy against the maker, by suing him to judgment in this state, and collecting what he could upon the execution. *Mosier* v. *Waful.*

2. The plaintiff, after the maker of the note had absconded, issued a summons against him, and obtained an order of the court directing service thereof by publication, and that a copy of the summons and complaint be deposited in the post-office, directed to the maker, if his residence could be ascertained: or that personal service be made. *Held*, that a compliance with this order was necessary to complete the service of the process, and to give the court jurisdiction of the action; and that without such compliance the subsequent proceedings, and a judgment entered thereon, were void as against the grantor. *Ib.*

LIMITATIONS, STATUTE OF.

1. *Attorney's fees.*—Although an attorney may, within two years after he has recovered a judgment, acknowledge satisfaction thereon, yet, upon a general retainer to collect, he is not bound to wait the two years before he can maintain an action against his client to recover for his services in obtaining the judgment. *Bruyn et al.* v. *Comstock.*

2. He has a perfect right of action against his client for his services in prosecuting suits for the collection of debts and recovering judgments and issuing executions from the time the services are rendered, without any previous presentment of his account, demand, or notice. And if an action is not brought within six years from that time, the demand will be barred by the statute of limitations. *Ib.*

3. In such a case, the statute begins to run as soon as executions are issued, if not when the judgments are perfected. *Ib.*

MUNICIPAL CORPORATIONS.

1. *Charter elections.*—In order to render an election for charter officers, in a city, valid, it is indispensable that a list or register of the voters shall be made, specially for that election. Without such a register all the votes cast at such election are illegal, and any election of any officer is a nullity. *Pitkin* v. *McNair.*

2. This principle applies to a special election, required by a city charter to be held annually, for the election of a particular class of officers (school commissioners). *Ib.*

NUISANCE.

Negligent keeping of gunpowder.—The careless or negligent keeping of gunpowder, in large quantities, near dwelling-houses, or where the lives of persons are thereby endangered, is a nuisance at common law. *Bradley et al.* v. *The People.*

PARTNERSHIP.

1. *Rights and duties of partners.*—The true meaning of the general rules applicable to the rights and duties of partners, as between themselves, is to require the members of a partnership firm to devote their time, labor and skill to the benefit of the firm, and not to themselves individually; and to forbid their purchasing for their own use articles in which the firm necessarily deals, at the risk of having the same, and the profits arising therefrom, claimed by the firm as belonging to them. *The American Bank Note Company* v. *Edson.*

2. These rules are not to be understood as prohibiting such dealings, nor as making void any contracts which violate such rules, but only as exposing the member of the firm who makes them to a liability to the firm to render to them an account of the profits. *Ib.*

PROMISSORY NOTES.

1. *Rights of surety.*—Where the [illegible]sory note has in his hands and und[illegible] longing to one of the makers w[illegible] a surety in such note is entitle[illegible] haust that fund in the discha[illegible] sorting to him, as surety. *Wr[illegible]*

2. The administrator of the p[illegible] to apply so much of a distrib[illegible] coming to the maker as wi[illegible] note. *Ib.*

3. And a surety of the maker [illegible] by the administrator of the maker being insolvent—to in[illegible] shall so apply the distributive [illegible]

PLEDGE.

To entitle a pledgor to a return o[illegible] see to it that his tender covers both

* From Hon. O. L. Barbour; to appear in the 56th volume of his Reports.

est, before he can claim a return of the pledge. *Woodworth* v. *Morris.*

RAILROADS.

1. *What is a passenger train.*—Where, although the main business of a train of cars, upon a railroad, is to carry cattle, yet it is a part of its regular business, daily, to carry such passengers as apply, it is really a *freight and passenger train*, whatever the company may choose to denominate it. *Dillaye* v. *The New York Central Railroad Company.*

2. It is not a material circumstance that the company does not check baggage on such a train, or that the passengers are left to take charge of it themselves. *Ib.*

3. *Liability of companies for negligence.*—A railroad company is bound to see that there is a safe and commodious passenger way from the station, or ticket office, to the place where the passenger car, upon a freight and passenger train, usually stops; and it is liable in damages for any injury sustained by a passenger upon such a train in falling into an improperly constructed cattle-guard, in consequence of the company. *Ib.*

SLANDER.

1. *Proof of provocation.*—In an action for slander, the defendants, either before or since the code of procedure, could not prove, for the purpose of diminishing the plaintiff's damages, any act or declaration of the plaintiff against *him*, unless such act or declaration formed a part of the *res gestæ*. *Richardson* v. *Northrop.*

2. He could prove the general bad character of the plaintiff, and any circumstances which, at the time the words charged were spoken, were calculated to irritate and excite the defendant, and provoke him to the utterance of the words complained of; but it is no answer to the plaintiff's claim for damages for slander, that he has said or done something against the defendant, whether actionable or not, for the purpose of reducing such damages, unless such act or declaration actually excited the defendant to use the words charged against him. *Ib.*

3. Yet the defendant may prove a *series of provocations* on the part of the plaintiff, commencing long anterior to the speaking of the words charged; provided they are continued from time to time down to and at the time the actionable words are uttered. *Ib.*

STATUTES.

A thing may well be within the spirit of a statute, although not within the letter; or it may be within the letter and yet not within the spirit of it. And, as a general rule, where a statute is intended to abrogate a common law right, or to confer a right not vested by the common law, it will be so construed as not to go beyond the letter; and not even to that extent, unless it appears to be according to the spirit and intent of the act. *Dewey* v. *Goodenough.*

TOCK.

laintiff employed a broker to
a stock. The broker applied
ed to make a loan. After in-
h refusal, the broker went a
nt, who then said he would
agreed to sell it to him, and
id the money paid. It was
ff brought the money back
uld return the stock. The
ered within the ten days, it
not lie against the defend-
a conversion of the stock.

nsaction was a *pledge*, the
rest on the loan; unless the
accept the principal with-
in the time; and that a ten-
day, without offering to pay
the interest which had accrued after the day, was insufficient. *Ib.*

VENDOR AND PURCHASER.

1. *Recovering back over-payments.*—Where the defendant sold to the plaintiff for $177 an account of $192 against the government for his services as an enrolling officer, upon which only $30 was finally allowed by the provost marshal; *held*, that, even if the defendant supposed at the time that he was entitled to the whole sum, it having turned out that he was not, he was bound to refund to the plaintiff the amount which the latter overpaid him for the claim. And that the plaintiff could recover that amount without applying to the defendants to have the contract rescinded. *Sherman* v. *Johnson.*

2. *Held, also*, that although the plaintiff, in his complaint, alleged that the statements of the defendant to him were false and fraudulent, still he could recover, if he proved enough to sustain an implied warranty, though no such fraud was shown. *Ib.*

3. *Fraudulent representations and concealment.*—The defendant, on selling to the plaintiff an account against the government, represented that he had performed sixty-four days services as an *enrolling officer* and in notifying men, at $3 per day, when, in fact, he had already been paid for the time spent in *enrolling*, and he had been engaged only ten days in *notifying* the men, for which latter services only $30 was finally allowed upon the account. *Held*, that the judge, at the trial, was warranted in directing a verdict in favor of the plaintiff for fraudulent representations, as well as for fraud in the concealment of material facts by the defendant. *Ib.*

4. The general rule is, that if a party selling any thing of value willfully misrepresents the true character of it, and thereby defrauds the purchaser, he is reponsible for the damage which the latter sustains. Every exception to this rule should be founded upon some strong or clear reason for making it. *Ib.*

5. *Tender of purchase-money.*—As a general rule, a purchaser of chattels, in order to recover damages for the non-delivery of the property by the vendor, pursuant to the contract, must show either a tender of the purchase price, or that he was ready to pay it, when he made the demand; especially where there is a mere failure to perform on the part of the vendor. But where the vendor *refuses* to deliver the property, when it is demanded of him, the purchaser is not bound to tender or offer the money to him. *Anderson* v. *Sherwood.*

6. *Contract of sale.*—The plaintiffs, at various times, sold and delivered to the defendant dry goods out of their store, to an aggregate amount of $331.68, in consideration of which, and in payment thereof, the latter agreed to deliver to the plaintiffs, on or before a day specified, nails, at the rate of $5.37½ per 100 lbs. *Held*, that the transaction was a *purchase of dry goods* from the plaintiffs by the defendant, from time to time, on credit, the goods being delivered at the time of each purchase, and to be paid for in nails, on or before the day mentioned, and *not a purchase of nails*, to be paid for in dry goods, or even an exchange of nails for dry goods; and that the plaintiffs were entitled to recover the balance of the purchase-money of the goods sold, remaining unpaid, with interest. *Herrick et al.* v. *Carter.*

COURT OF APPEALS OF MARYLAND.*

ADVERSE POSSESSION.

1. Where possession of land is shown to have existed for a great length of time without interruption, all those circumstances or formal ceremonies which the law deems necessary to make such possession rightful, will be supplied by presumption, and the possession thus supported will not be disturbed. *Crook* v. *Glenn et al.*

2. An exclusive adverse possession for more than twenty

* From Hon. J. Schaaff Stockett, reporter, to appear in volume 30, Maryland Reports.

years by a mortgagee and those claiming under him, without any account or acknowledgment of a subsisting mortgage, is a complete bar to an application for a surrender and cancellation of the mortgage, and a delivery of the possession of the mortgaged premises. *Ib.*

3. The statute of limitations applies to trust estates. *Ib.*

4. Where there is a trustee in existence to represent the *cestui que trust* and her rights and interest in the trust estate, the statute of limitations bars as effectually as if there existed no disability in the *cestui que trust*. *Ib.*

ASSIGNMENT.

A party being largely in debt, made a deed of assignment in trust for his creditors. In its recital, the deed stated the fact of his indebtedness, his inability to pay his debts in full, and his desire to provide for the payment thereof "as far as he could, in a just and equitable manner, by assignment of *all* his property and effects for that purpose." And in the granting clause, the property was described as "all and singular his goods, chattels, promissory notes, debts, wares, merchandise, securities, and vouchers for, and affecting the payment of money, claims, demands, *choses in action*, and property of every name and nature whatever, of and belonging to him, *and which are more particularly and fully enumerated in the schedule thereto annexed, [marked* schedule A." After making this deed, the assignor left the state, was pursued and overtaken by an agent of the appellees (creditors of the assignor), and compelled to surrender to him a sum of money sufficient to discharge their claim. This sum was handed over by the agent to his principals. The money thus recovered was not embraced in the schedule A annexed to the deed of assignment. On an action brought by the trustees under the deed of assignment against the appellees to recover, as belonging to the trust estate, the money so received by them,—*Held:* 1. That the right to this money did not pass to the trustee under the deed. 2. That the general words contained in the deed were restrained and limited by the reference to the schedule A, which did not embrace said money. *Mims* v. *Armstrong, Cator, et al.*

BANKRUPTCY.

1. Under the act of congress, entitled "An act to establish a uniform system of bankruptcy throughout the United States," approved March 2, 1867, the federal courts have exclusive jurisdiction in all matters and proceedings in bankruptcy. *Van Ostrand* v. *Carr et al.*

2. The application of a party for the benefit of the insolvent laws of Maryland, is an act of bankruptcy within the provisions of the 39th section of the bankrupt law of the United States. *Ib.*

3. The insufficiency of the assets of an insolvent debtor to pay fifty per cent of his debts, and the uncertainty of his being able to procure the written consent of a majority in number and value of his creditors, who have proved their claims, to his discharge, in no way affect the jurisdiction of the bankrupt court; its jurisdiction is independent of the right of the party ultimately to obtain his discharge. *Ib.*

DISTRIBUTION.

1. In determining questions of priority in the distribution of funds in court, there is an universal concurrence in the principle, that the intention of the parties contracting must govern, where that can be discovered, unless in contravention of some rule of law. *Chew, adm'x,* v. *Buchanan et al.*

2. Where the meaning of the parties has been expressed, or can be inferred from their acts, there has been no difficulty in disposing of the question. *Ib.*

3. No particular form of assignment, indicative of preference, is essential. *Ib.*

4. A being indebted to B, gave to her three several notes, for sums amounting together to the whole debt, and payable respectively, three, four and five years after date; and at the same time executed a mortgage to secure the payment of said debt, at the respective periods limited by the notes. On the same day B assigned to C the note first maturing, and also her interest in said mortgage, to be held by C, in as full and ample a manner, to the extent of the sum expressed in said note, with all interest which might accrue thereon, and costs, charges and expenses incident thereto, and so that the said C should have priority of lien therefor, as the said B might or could have held the same, if said assignment had not been executed. This assignment was duly acknowledged and recorded, and by subsequent assignments, at different times, duly acknowledged and recorded, the other notes, with a *pro tanto* interest in the mortgage, were assigned by B to other parties. The mortgaged property having been sold, under proceedings for a foreclosure instituted by C, the net proceeds of sale proved insufficient to pay the first note, with interest thereon. *Held,* that in distributing the net proceeds of sale C was entitled to a preference to the whole extent of his claim. *Ib.*

EXECUTORS.

1. A creditor who has recovered a judgment against the executor of a surety of his debtor, may enforce his claim by execution against the property of the executor, notwithstanding the pendency of an injunction enjoining the creditors generally of the principal debtor from proceeding against him at law. *Beale, ex'r,* v. *Osbourn et al.*

2. An absolute judgment against an executor is conclusive of the existence of the debt and the sufficiency of assets to pay it; and a *fieri facias* may be issued thereon and levied upon the lands of the executor, as well as upon his goods and chattels. *Ib.*

EVIDENCE.

1. In an action for goods sold and delivered, and money lent, it is not competent for the plaintiff to place in the hands of a witness the account upon which the action was brought, for the purpose of refreshing his recollection as to the particular items and dates therein, the account being merely a copy which the witness saw made from the original entries in the store-book of the plaintiff *Ward* v. *Leitch.*

2. Entries in the ledger and day-book of the plaintiff, in the handwriting of the party sought to be charged, may be offered in evidence, as declarations or admissions made by him, against his own interest. *Ib.*

3. The plaintiff offered in evidence entries made in his ledger of charges against the defendant's testator, and claimed that the same were admissible, because he had regularly, year by year, within twelve months from the date of such charges respectively, in pursuance of the 43d section of Article 37, of the code of public general laws, made oath to the sale [illegible] the goods, etc., charged in said ledger, the [illegible] the ledger, at the end of each y[illegible] however, make the additiona[illegible] section, whenever a suit is [illegible] defect was not cured by the evidence offered was proper to the competency of a wit[illegible] sworn, but before his exam[illegible]

FI[illegible]

1. Trade fixtures and build[illegible] strongly attached to the soil[illegible] treated as personal propert[illegible] moval by the person er[illegible] *R. R. Co.* v. *Canton Co. of B[illegible]*

2. The road-bed of a railr[illegible] the buildings at the depots certain circumstances, they be treated as personal proper[illegible]

3. The ground upon which a[illegible] his fixtures has been limited t[illegible]

term, rests upon the doctrine, that if he neglected to avail himself of his right within this period, the law presumed that he voluntarily relinquished his claim in favor of the landlord. This presumption cannot arise where the term, being uncertain in its continuance, may be terminated suddenly, and without previous notice. *Ib.*

FORGED CHECK.

On the 20th of December, 1868, H. presented himself at the Commercial and Farmers' National Bank, to whose officers he was unknown, and stated that he desired to open an account, and presented a check on the First National Bank for $4,600.15, purporting to have been drawn by A., dated the 18th of December, and payable to the order of H., who indorsed it, and the amount of the check was entered to his credit as cash in a bank-book furnished by the bank; but on the same day the teller was directed by the cashier not to allow the account to be drawn upon until the deposited check was known to be good or was paid. On the following morning, this check was sent to the clearing house, and thence was taken to the First National Bank, where it was passed as genuine by the proper officers of the bank, charged to the account of A., and credited to the Commercial and Farmers' National Bank. By the custom and usage of all the banks in the city of Baltimore, where a check is sent through the clearing house to the bank on which it is drawn, and is not heard from before eleven o'clock of the day on which it is so sent, the bank sending it has the right to assume it was good or had been paid, and to act accordingly. On the 22d December, H. called at the bank where he had made the deposit, with his bank-book, filled up a check for $4,500, payable to his own order, and handed it for payment to the paying teller, who, after satisfying himself by inquiry of the receiving teller as to his identity, and by the examination of the books of the bank as to the state of his account, paid him the amount of his check. On the 24th December, the account of A. was overdrawn to the amount of $372, on the books of the First National Bank, and the overdrawing continued until the 29th, when his account was overdrawn $2,297; after bank hours of that day, A. was for the first time informed by the bank officers of such overdrawing, when, upon an examination of his account and checks, he pronounced the check deposited by H. a forgery. Notice of the forgery was given by the First National Bank to the Commercial and Farmers' National Bank, on the 31st of December, and repayment of the money demanded; but the latter denied its liability beyond the $100.15, still remaining to the credit of
having refunded to
sued the Co

The First National Bank
ount of the forged check,
iers' National Bank to re-
Held: 1. That the law im-
l Bank the obligation of
ne of its depositors, and it
ver from the Commercial
the sum of $4,500, paid by
parties equally innocent
e one is bound to know
e, and the other has no
ould be thrown upon the
er. 2. That the sending
ough the clearing house
National Bank, and the
irst National Bank the
stranger, was not such
ss upon the former bank.
is entitled to a judg-
aining in the Commer-
nk to the credit of H.
al Bank v. *First National*

WARD.

nd are not responsible
l may have received as guardian without competent legal authority, and to which the ward had no legal title or claim during his minority. *Gunther and Canfield* v. *The State, use of Bouldin.*

INSURANCE.

The plaintiffs procured from the defendant a policy of insurance, by the terms of which they were not to keep, in the buildings occupied by them, any articles, goods, or merchandise, denominated hazardous, or extra or specially hazardous in the conditions of insurance annexed to the policy, except as provided in the policy or thereafter agreed upon by the insurer in writing upon the policy. Subsequently an indorsement was made on the policy in the following language: "Permission given to keep one barrel of benzine or turpentine in tin cans, and one-half barrel of varnish for use, in No. 9 Commerce street." The plaintiffs were engaged in the business of rectifying and selling liquors, and their business required the use of benzine for certain purposes. The benzine was always brought in a barrel, rolled into the warehouse, and transferred by means of a syphon into a single can, capable of holding the contents of one barrel. On one occasion, while this transfer was being made, an explosion took place which set fire to and destroyed the warehouse. In an action on the policy of insurance, *Held*, 1. That a fair and reasonable construction must be given to the indorsement so far as the intention of the parties can be deduced from the terms employed. 2. That said indorsement was not a warranty, but a *permission* given by the insurer, and to be substantially complied with on the part of the insured, to enable them to claim the benefit of the privilege. 3. That there was a *substantial* compliance with the provisions of the indorsement, in keeping the quantity specified in *one* tin can. 4. That under the permission to keep the benzine for use to the extent specified, the insured were not restricted in their right to procure it in any usual way; and the purchase of it from merchants or other persons having it, and its introduction and transfer from the wooden barrel to the tin can, were allowed to the insured by every reasonable intendment. 5. That the temporary introduction into the barrel, was not the *keeping of it*, in the wooden barrel, and cannot in any just sense be considered violative of the terms of the indorsement. 6. That although the fire may have been attributable to the want of ordinary care, or the fault and negligence of the insured or their employees or agents, yet in the absence of fraud or design their right of recovery was not barred thereby. 7. That what may have been the *habit* of the insured in regard to the *keeping* of the benzine, could neither, under the terms of the original policy (which provided that the keeping of any of the prohibited articles, or the storing thereof on the insured premises, only operated to make void the policy *so long as they were so used*), or the indorsement, have any application, unless *at the time of the occurrence of the fire*, the barrel of benzine was actually *stored* or *kept* upon the premises in the *wooden barrel*. *Maryland Fire Insurance Co.* v. *Whiteford et al.*

MISNOMER.

Where a party is sued by a wrong name, and the writ is served on the party intended to be sued, and he fails to appear and plead the misnomer in abatement, and suffers judgment to be obtained by default against him in the erroneous name, he is concluded, and execution may be issued on the judgment in that name and levied upon the property and effects of the real defendant. *First National Bank of Baltimore* v. *Jaggers.*

MORTGAGE.

1. When a mortgagee acquires the equity of redemption in the mortgaged property, it does not follow as a necessary consequence, that the mortgage becomes merged and extinguished. A person becoming entitled to an estate, subject to a charge for his own benefit, may,

if he elect so to do, and manifest such election, take the estate and keep up the charge. *Polk* v. *Reynolds.*

2. A court of equity will sometimes hold a charge extinguished, when, by the strict rules governing the subject at law, it would be regarded as subsisting; and sometimes preserve it, where at law it would be merged; the question being as to the intention, actual or presumed, of the person in whom the interests are united, founded upon the reason or necessity of the case. *Ib.*

3. A *bona fide* assignee of a mortgage has unquestionably the right to file a bill in equity to relieve the mortgaged estate from the cloud and embarrassment produced by the unfounded pretensions of a purchaser at a tax sale, and his assignee. *Ib.*

NEGLIGENCE.

1. In an action under the statute, by a father to recover damages from a railroad company, for the death of his child, aged about five years, caused by its negligence, the plaintiff is entitled to recover if it appear that the death resulted from the want of ordinary care and caution on the part of the defendant, and that the child used such care as might reasonably be expected under the circumstances from one of her age and intelligence, and that the parent or person to whose care she was intrusted at the time, did not by his negligence directly contribute to produce the result complained of. *Baltimore and Ohio R. R. Co.* v. *State, use of Fryer.*

2. The terms "ordinary and reasonable care" are relative and dependent, and whether such care has been used can only be determined by considering the age and capacity of the person injured. *Ib.*

3. In actions under the statute, or in other cases, where parties sue for personal injuries suffered by others than themselves, no recovery can be had if the party entitled to the action be guilty of negligence or the want of care, whereby the injury occurred. *Ib.*

PARTNERSHIP.

1. Where a party by his conduct held himself out as a partner of another, in a transaction affecting a third person, who had reasonable grounds to believe that he was such partner, and so trusted the firm, and had no knowledge to the contrary, they will be clearly held partners as to such third person. *Thomas* v. *Green.*

2. Whether a person held himself out as a partner is a fact to be ascertained by the jury from all the evidence in the case. *Ib.*

PRACTICE.

1. As a general rule, in actions upon partnership contracts, all the partners ought to be made defendants, but the omission to do so can only be taken advantage of by plea in abatement. *Smith* v. *Cooke.*

2. In default of such plea, a joint contract may be offered in evidence in support of the separate contract declared on. *Ib.*

3. The objection to an interrogatory that it is "leading," being to the form and manner in which the question was put, should be taken before the commissioner by whom the evidence is taken. *Ib.*

4. Where evidence has been offered to prove partnership between the defendant and his son, and that the business was carried on in one place in the name of the son, and in another in the name of the father, it is competent and proper for the plaintiff to explain why the goods (the price of which was the subject of the action) were charged to the father, and the circumstances under which they were delivered. *Ib.*

5. Where the defendant had offered evidence to prove that the "cans" mentioned in the declaration were sold to T. R. S. (not a defendant in the action), it is competent for the plaintiff, in rebutting this testimony, to prove what was the credit of T. R. S., and to explain why he would not have furnished to him the *cans* in controversy. *Ib.*

6. A contracted with B to manufacture and deliver to the latter certain *cans;* in an action by A against B for the price of the cans, B offered to prove that H, the agent of A, while the cans were being manufactured, stated, on several occasions, that he was selling the same to T. R. S. *Held,* that the evidence was liable to two objections. 1st. If offered for the purpose of impeaching the witness H, he should have been first asked whether he had ever made such declarations; and 2dly. Having been made after the alleged contract, the declarations were not binding on A. *Ib.*

7. In an action against a party to recover sundry claims placed in his hands for collection, and upon which he had obtained judgments before a justice of the peace, the justice testified (the executions on four of said judgments not being produced at the trial) that the entry "made and satisfied" on his docket in each of said four judgments, was made by himself, from information communicated by the defendant; but that independent and apart from the entries aforesaid on his docket, he had no knowledge or recollection of the admission by the defendant, that he had collected these four judgments. *Held,* that while the entries themselves were not admissible, as evidence, they could be used by the witness for the purpose of refreshing his recollection as to the admissions of the defendant, and the parol testimony was proper to go the jury to charge the defendant. *Spiker* v. *Nydegger.*

8. Claims placed in the hands of a constable for collection and receipted for by him as such, and which he collected, may be recovered from him by the assignee of said claims in an action of *assumpsit,* in his own name for money had and received. *Ib.*

9. An owner of claims may, by parol, authorize another to assign them in writing. *Ib.*

10. The entry of a judgment to the use of a party implies, in the absence of any proof to the contrary, that it has been legally assigned to him. *Ib.*

PRINCIPAL AND SURETY.

1. If the creditor release or compound with the principal debtor, without the consent of the surety, although the principal debtor may be in insolvent circumstances, and the arrangement with him be in truth to the surety's advantage, it will, nevertheless, discharge the latter from all responsibility. *Oberndoff, trustee,* v. *Union Bank of Baltimore.*

2. But before a surety or indorser can be exonerated from his responsibility upon the ground that there has been an unauthorized indulgence given, or composition made with the principal debtor, it must be shown that such indulgence or com[illegible]tion has been effected by some express agreement f[illegible]ded u[illegible] tion, and which is legally

3. Part payment of the am[illegible] pal or surety, will not disch[illegible] it is agreed that such par[illegible] effect. *Ib.*

4. Where a party is bound [illegible] is no consideration, in cont[illegible] ise that a less sum shall be

5. A and B, by a written [illegible] a number of collaterals a[illegible] it, whether then existing, [illegible] ers, indorsers, or otherwis[illegible] case of default on the pa[illegible] their liabilities, to collect [illegible] otherwise, to make compr[illegible] same, and to apply the pr[illegible] liabilities. A and B sub[illegible] indebted to the bank upo[illegible] discounted by it for them, [illegible] to C in trust for their credit[illegible] ure, the bank compromised wi[illegible] of the discounted notes, at fif[illegible] also made large collections up[illegible]

by it under said agreement, and claimed the right to apply the moneys so collected to the payment of the entire indebtedness of A and B to it, which claim was resisted by the assignee of C. upon the ground that by the compromises aforesaid, the makers of the notes compromised were released, and the liability of A and B as indorsers upon said notes was discharged. The agreement between the bank and the makers of the notes compromised was by parol, after the notes fell due, and the notes were not surrendered. On a suit brought by the assignee of A and B against the bank, *held:* 1. That there was no legal consideration for the relinquishment, on the part of the bank, of the balance due on the notes compromised, after the receipt of one-half of their face value. 2. That, in the absence of some sufficient consideration, the agreement between the bank and the makers of the notes was wholly inoperative, and could not be set up or relied on by the makers of the notes, either as against the bank or the indorsers. 3. That the bank was not bound to any active diligence in their collection, to give it the benefit of the collaterals deposited with it by the indorsers. *Ib.*

PROMISSORY NOTE. See *Principal and Surety.*

1. The purchaser of a patent right gave in part payment two promissory notes, payable six and twelve months after date. When the first note matured, in March, 1866, it was protested for non-payment; and was subsequently, together with the twelve months note, which had not matured, assigned to the plaintiff; in May, 1866, the maker of the notes was approached by the holder, and at his instance substituted a new note for the overdue and dishonored one, making it payable to the order of the original payees, refusing the request of the indorsee to make it payable to his order, and warning him to have nothing to do with it. The maker informed the indorsee, at the time, that he had been swindled in the purchase of the patent right, and that he should make the renewal note payable at the same date with the twelve months note, which had not matured, so that the controversy between himself and the original payees might be settled by one suit; in an action on the notes brought by the indorsee against the maker, *Held*, 1. That the indorsee of the note overdue took it subject to any equities between the makers and the payee, and that he took the renewal note with notice of the defense intended to be set up against the claim of the payees. 2. That while there was no evidence to show that the indorsee was not a *bona fide* holder for value without notice of the twelve months note, which had not matured when he got it, still as the notes were sued on together, there was error

[illegible] to the jury, that there was no [illegible] they could infer that when [illegible] was aware of any infirm-

[illegible] *Dederick.*

[illegible] the sufficiency in [illegible] in fact is for the

[illegible] vidence of the truth [illegible] protest is exclusively [illegible] y facts to fix liability [illegible] ust contain sufficient [illegible] ng requisite has been [illegible] the note, or his agent, the indorser. *People's*

[illegible] r on a promissory note, Baltimore, the notarial [illegible] fered to establish due [illegible] its dishonor by the [illegible] the defendant as in- [illegible] r that presentment of [illegible] payment at its matur- [illegible] nk for payment. The [illegible] te was presented, with- [illegible] ed. *Held*, that the evidence was insufficient to make the indorser responsible for the payment of the note. *Ib.*

SALE OF PERSONAL PROPERTY.

1. On the 23d of August, 1867, the appellants, who were engaged in the business of buying and selling horses in Baltimore, received into their possession, to be sold on commission, a horse belonging to the appellee, who resided in Frostburg. The horse, at that time, was apparently sound and in good condition. On the 12th of September, 1867, the appellants addressed a letter to the appellee, stating that the horse had been sick, but was doing well at that time, and offering $140 for her, clear of all expenses, and adding "*you can draw on us at sight for* $140." This letter was received on the 15th or 16th of September. On the 16th, the appellee signified his acceptance of the offer by drawing on the appellants for $140. The draft was sent on that day, and on the 17th, the appellants refusing to pay the draft, it was protested. On the 16th of September the appellants addressed a letter to the appellee, stating that when they wrote they did not think the horse was so bad, but since it had turned out to be "farcy," and they would not buy her at any price; and directing him not to draw on them for the money, as they would not pay the money until they saw how the mare got. This letter was not received by the appellee till after he had accepted the offer contained in the letter of the 12th, by sending the draft. In an action brought by the vendor to recover the price of the horse,—*Held*, 1. That until the notice of withdrawal actually reached the vendor, the offer was continuing, and the acceptance thereof by him completed the bargain. 2. That the vendees could not maintain the objection that they made the offer under a mistake of fact, and were therefore not bound by it. 3. That in a case where there is a mutual mistake of the parties, as to the subject-matter of the contract, or the price, or terms, going to show the want of a *consensus ad idem*, without which no contract can arise, such a defense may be made; but not where the mistake is in relation to a fact wholly collateral, and not affecting the essence of the contract itself. 4. That the vendees cannot escape from the obligation of their contract, because they have been mistaken or disappointend in the quality of the article purchased. 5. That in the absence of a warranty, the rule *caveat emptor* applies, and the buyer takes the risk of quality upon himself. 6. That the offer of the 12th of September was not, according to its legal construction, a conditional offer which might be withdrawn at any time. *Wheat et al* v. *Cross.*

2. Where a prayer is granted erroneously, at the instance of the appellants, and inures to their advantage, they cannot ask a reversal on account of any error therein. *Ib.*

SET-OFF.

1. An unliquidated and uncertain claim for damages cannot be set off against a judgment. In equity, as at law, a set-off is only allowed where there is mutuality in the demands, and the amounts are certain and determined. *Smith* v. *Washington Gaslight Company.*

2. Where a plaintiff, located and doing business in the city of Washington, recovers a judgment in the superior court of Baltimore city, and the defendant has a claim for damages growing out of the same transaction, the mere fact that the plaintiff is a non-resident does not give a court of equity in Baltimore jurisdiction to restrain the judgment against the defendant, and to enforce a set-off. *Ib.*

SETTLEMENT.

If a creditor of the principal settle with the agent, and takes a note or other security from the latter for the amount due by the principal, although, as between the parties, it is intended only as a conditional payment, yet if the creditor gives a receipt as if the money were received, or the security were an absolute payment, so that the agent is thereby enabled to settle with the prin-

cipal, as if the debt had been actually discharged, and the principal would otherwise be prejudiced, the debt will be deemed, as to the latter, absolutely discharged. *Brown* v. *Bankers' and Brokers' Telegraph Co.*

TAX SALE.

A purchaser of a house and lot in the city of Baltimore, sold by the city collector for non-payment of an assessment levied thereon, for opening the street upon which it was located, paid the purchase-money, received from the collector a deed for the property, and entered into possession; subsequently he was ejected by the owners, upon the ground that the collector had omitted to give the notice, as required by ordinance, of such sales, and was obliged to pay costs and *mesne* profits. He thereupon brought an action to recover damages from the city collector. *Held*, that the purchaser was bound to inquire whether the city collector, in selling the property, acted in conformity with the law authorizing the sale; and coming strictly and rigidly within the rule of "*caveat emptor*," he is not entitled to recover. *Hamilton* v. *Valiant.*

TENANTS IN COMMON.

1. One tenant in common, who solely occupies the common property, cannot be held liable to his co-tenants for use and occupation, unless there has been an actual ouster of his co-tenants. *Israel* v. *Israel and wife.*

2. A tenant in common, occupying the common property, will not be allowed for expenses which were incurred, not for the preservation of the property, but rather to gratify his taste and contribute to his convenience. *Ib.*

WILL.

A testator died in 1835, leaving a will by which he disposed of his property as follows: "I give and bequeath to my wife L. P. all my property, both real and personal, that now belongeth or in any wise appertaineth unto me, or that may or shall at any time hereafter belong unto me, to be wholly hers during her widowhood, out of which property she is to pay all my legal debts, and, at the determination of her widowhood, I give and bequeath unto M. D., I. S., T. O. and A. W. all the property, both real and personal, that my wife shall possess at the termination of her widowhood, to dispose of according to his or their verbal directions, should her widowhood terminate in death; but should her widowhood terminate in marriage, I give and bequeath unto the said M. D., I. S., T. O. and A. W. only three-fourths of the property, both real and personal, that shall be possessed by the said L. P. at the termination of her widowhood by marriage, and the said three-fourths to be disposed of according to the verbal directions of the said D., S., O. and W., or either of them; and the remaining one-fourth I will and bequeath unto the said L. P., to be wholly hers to make use of as she may see or think proper." The widow lived until 1866, and after her death there was found among her papers an instrument of writing, signed by the testator, without date, containing directions to the said D., S., O. and W. as to the manner in which he desired them to dispose of the property upon the termination of the widowhood of his wife, either by marriage or death. On the back of this instrument was found the following indorsement: "This paper with the contents is not to go to court, but to be kept at home in the hands of the executrix, or D., S., O., or W." On a bill filed after the death of the widow, to obtain a construction of this will,—*Held:* 1. That no positive rule can be laid down which shall determine in all cases what terms or expressions will carry a beneficial interest, or which will create a trust. 2. That any language which satisfactorily indicates an intention to stamp upon the devise the character of a trust, will be sufficient. 3. The *heir* is always favored in law, and is not to be excluded on mere conjecture; on the contrary, there must be satisfactory evidence of an intention to give a *beneficial interest* to the devisee, and not merely negative evidence that no benefit was intended to the heir. 4. That the devise to M. D., I. S., T. O., and A. W., was upon a trust, the terms of which were not declared in the will, and the paper found after the death of the widow was not a valid declaration of the trusts intended, and therefore a trust arose by implication of law in favor of the heirs of the testator in regard to the real estate, and as to the personal property in favor of his personal representatives. *Taylor* v. *Plaine et al.*

BOOK NOTICES.

Reminiscences of an old Georgia lawyer: By Garnett Andrews, judge of the superior court of Georgia. Atlanta; J. J. Toon. 1870.

The object of this little book, as we gather from its pages, is to give "a local habitation and a name" to the witty and humorous sayings and doings of the profession of the south, in years gone by, and which have heretofore had a place only in the memory of those who heard or saw them. It is written in an easy, gossipy style, and is withal a pleasant book to read.

The Law Magazine and Law Review, or Quarterly Journal of Jurisprudence. May, 1870. London: Butterworths.

The May number of this able and venerable law periodical is of more than ordinary interest. T. L. Murray Browne has a review of the Civil Code of New York. Mr. Browne measures the code by the standard of the English law, and comes to the conclusion that it is "meager and ambiguous." For instance, he says, in speaking of the subject of servitudes, "the important head of Lights is scarcely adverted to." Mr. Browne, before undertaking the work, should have made himself sufficiently familiar with our law to know what are and what are not important subjects in this state. He should have known that the servitude of lights is not recognized here. There is also a valuable article by the Hon. W. Beach Lawrence, on "The marriage laws of various countries as affecting the property of married women." The other articles are: "The Law Military as Distinct from Martial Law;" "The Diary of a Barrister;" "Friendly Societies;" "Mr. Justice Hayes;" "A MS. of Vacarius;" "Church Patronage in England and Scotland;" "On the proposed abolition of compulsory Pilotage as regards Liverpool;" "The Lord Chancellor's Judicature bill;" "Digest of Scotch Decisions;" "Book Notices," etc.

AN EMINENT ENGLISH LAWYER.—Sir Roundell Palmer might have been lord chancellor on the accession of the present government, but he could not subscribe to the policy of the cabinet on th
is a man of marvelous appr
mense income, a large part
chamber practice, $500 being th
him. The life of a great law
the most laborious in Englan
chambers, and yet has to stay
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used always to sit out the
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lish lawyer has sunk under h
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was in his grave before he
an Irishman, who, without a
position, was chancellor bef
quently leader of the house
delicate condition. Sir Rou
fail. On Sundays he regul
boys in humble circumstan
are familiar with his "Book o
known in England as "Hymns,
He is a son of a country clergyma
very able family.

TERMS OF THE SUPREME COURT FOR JUNE.

4th Tuesday, Circuit and Oyer and Terminer, Sandy Hill, Potter.
Last Monday, Special Term, Monroe, J. C. Smith.
Last Tuesday, Special Term, Albany, Peckham.

LEGAL NEWS.

San Jose (Cal.) has a Chinese lawyer, who graduated at one of the inns of court, London.

Miss Barkaloo, the brilliant female member of the St. Louis bar, has been appointed a notary public.

Hon. Thomas Dawes Eliot, a leading lawyer and politician of Massachusetts, died at his late residence in New Bedford, a few days since.

Colonel Augustus Kenon, a lawyer of eminent ability, died at his home, in Milledgeville, Ga., on the 2d inst. He was a member of the confederate congress, and had often served in the state legislature.

Governor Alcorn, of Mississippi, has appointed Col. W. G. Henderson to a judgeship, on the strength of a letter in his favor, written by a colored member of the legislature of that state, who was a former slave of the colonel.

The Boston *Advertiser* reports that William Shakespeare and Walter Scott appear as parties to actions on the docket of the supreme judicial court of York county, Me., and that Francis Bacon is counsel in both cases.

It was regarded as a strong case of circumstantial evidence in a Pittsburg court the other day, when the plaintiff produced the skillet with which his wife struck him, and showed the jury how nice the three legs fitted into the holes of his head.

The first case east of the Mississippi of a female counselor before the courts is recorded at New Albany, Indiana. A young man was arraigned for slander by a colored female, and a wealthy lady of that city appeared as volunteer counsel on his behalf.

A number of the members of the sophomore and junior classes at Bowdoin College, who intended entering upon the study of law after graduating, have organized a law association, and hold a mock court once a week.

Ex-Gov. Henry A. Wise and his son have been [illegible] half of the United States [illegible] eneral Hoar, to assist in [illegible] on, a soldier, whose trial [illegible] citizen of Camp- [illegible] began last [illegible] hburg.

[illegible] e was ad- [illegible] unds. A [illegible] was sent [illegible] ufficient [illegible] other [illegible] The [illegible] cord.

[illegible] e is slight [illegible] in Chicago ma [illegible] justi [illegible] that no once in ten times a day's law reports which does not include something of the sort. A little commonplace item, not worthy of special attention, was tucked away in the Chicago papers on the 8th inst., stating that defaults were entered in 24 divorce cases on the previous day.

Judge Joseph P. Bradley was tendered a dinner by the bar of Houston, Texas, on his recent visit to that city. In his letter, declining the invitation, he said that they might well be proud of their noble state, and added: "Such a state with such a foundation, fostered by free institutions and wise laws, must have a glorious future; and upon whom do its institutions and laws more closely depend than upon those who, by their profession, are called upon to assist in the administration of justice? A pure, incorrupt and learned bar, more than a standing army, is the bulwark of a nation's strength, because the bulwark of civil freedom. A corrupt magistracy cannot long endure a stern and indignant gaze. A corrupt state is incompatible with an incorrupt and intelligent bar."

At an adjudication of the bankruptcy case of a firm in Michigan, the wife of one of the members desired to prove a note for $10,500 against the estate, which amount she had loaned to her husband to enable him to enter the business in 1864. The note was given to the firm by the husband, and indorsed by him to the wife, and it was claimed that such a note, in the hands of a third person *bona fide*, may be proved against the firm in all respects like any other obligation of the firm. The creditors dissented, and the counsel agreed as to the facts. The court decided that the wife knew what her husband was to do with the money, and she would not be allowed to prove her note against the partnership estate, although the judge saw no objection to her being permitted to participate in any dividend of the proceeds of her husband's individual estate.

The first suit under the social equity law of Louisiana, brought against the proprietor of an ice-cream establishment who refused to receive colored applicants for refreshments, has resulted in a disagreement of the jury. It is said that a variety of races were represented among the jurymen, and that a colored juror was prominent in opposing the intentions of the framers of the law, alleging that he himself did not want white men as visitors at colored people's balls, "to come there and take my colored ladies away." After long and heated discussion, the other jurors agreed to take the opinion of a grave and silent German. He decided that, as it had been evident that the lawyers in the case were at variance upon the law, the justice, and the evidence adduced, it could not be expected that a jury which knew far less about such matters should agree. And this sagacious opinion was adopted as the finding of the jury.

A rather curious trial has just terminated in Cincinnati. A husband sued a man for seducing his wife, who seems to have been a woman of loose habits before and after her marriage, and from whom he had been divorced on the ground of her adultery before the beginning of the trial for seduction, he having also, in the mean time, married another woman. Notwithstanding these circumstances, the jury gave a verdict for the plaintiff, and assessed his damages at $8,000. The counsel for the defendant showed, or tried to show, that the husband was himself a man of immoral life; that he was in connivance with his wife's seducer, and that she had been guilty of improper conduct with other persons than her alleged seducer; but the judge charged that the defendant was not relieved from his culpability by any of these things, though they might be taken into consideration in mitigation of damages. In his charge the judge said that a husband is bound to protect the chastity of his wife; that the elements of a recovery consist in the loss of the society and duty of a wife, and the nature of the injury which the husband has suffered; and that the deliberate seducer of a married woman from chastity and marital duty deserves to be severely punished. It was on these principles that the jury rendered its verdict and gave damages.

NEW YORK STATUTES AT LARGE.*

CHAP. 299.

AN ACT declaring and providing for the punishment of certain offenses committed upon the lakes, canals and navigable waters of the state.

PASSED April 20, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. If any person or persons shall willfully or corruptly cast away, burn, sink, scuttle or otherwise destroy any vessel, canal boat or other craft upon any of the lakes or other navigable inland waters of this state, or upon any canal of this state, with intent to injure or defraud any owner of such vessel, canal boat or other craft, or with intent to injure or defraud the owner or owners of any property shipped or laden on board the same for transportation, or with intent to injure or defraud any insurer of such vessel, canal boat or other craft, or of any property so shipped or laden thereon, or of any part thereof, the person or persons so offending shall, upon conviction thereof, be deemed and adjudged guilty of a felony, and shall be punished by imprisonment in a state prison for a term not less than two years.

§ 2. Any owner or owners of any vessel, canal boat or other craft, or any other person who shall, upon any of the lakes or other inland navigable waters of this state, or upon any canal of this state, willfully or corruptly cast away, burn, sink, scuttle or otherwise destroy or injure any such vessel, canal boat or other craft, or in any manner direct, procure or cause the same to be done, with intent to injure or defraud any other or owners of any property shipped or laden on board the same, or any insurer of such property, or of any part thereof, shall, upon conviction thereof, be deemed and adjudged guilty of a felony, and shall be punished by imprisonment in a state prison for a term not less than two years.

§ 3. Any person or persons who shall willfully or corruptly attempt to cast away, burn, sink, scuttle or otherwise destroy any vessel, canal boat or other craft, upon any of the lakes or other navigable inland waters of this state, or upon any canal of this state, with intent or design to injure or defraud the owner or owners of such vessel, canal boat or other craft, or the owner or owners of any property shipped or laden on board the same, or any insurer of any such vessel, canal boat or other craft, or property, or any part thereof, shall, upon conviction thereof, be adjudged guilty of a felony, and shall be punished by imprisonment in a state prison for a term not less than one year.

§ 4. This act shall take effect immediately.

CHAP 423.

AN ACT to amend an act entitled "An act to prevent frauds in the sale of tickets upon steamboats, steamships, and other vessels," passed March twenty-third, eighteen hundred and sixty.

PASSED April 27, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section one of the act entitled "An act to prevent frauds in the sale of tickets upon steamboats, steamships, and other vessels," passed March twenty-third, eighteen hundred and sixty, is hereby amended by adding thereto the following:

"Any person or persons, or association, who shall keep an office within the city of New York, for the sale of the tickets or instruments referred to in section two, asserting or assuming an authority as above required to sell the same, shall keep affixed, in a prominent place in such office, a printed certificate of such authority, permission or agency, signed by the proper officers of the companies, and shall file a copy of such authority, permission, or agency with the chief of the police department within said city, which said printed certificate and verified copy shall contain the name of the company, line, ship, or steamship for which he or they shall act as agent; the name of the street and number of the same in which such office shall be kept for the sale of such tickets or instruments, and the name or names of the individual or individuals authorized to sell the same, who shall be considered the person or persons owning, leasing, or controlling the said offices; and for a failure to comply with these provisions such offices shall be deemed disorderly houses and subject to the penalties prescribed in section seven."

§ 2. Section two of said act is hereby amended by adding thereto the following:

"And no person or association, not having the authority required above, shall, under the pretense of selling or disposing of the same, procure, or attempt to procure, for any person or persons, in his or their names, any ticket or instrument mentioned in section two of this act from the regular and authorized agents, officers, owners, or consignees of any line, ship, or steamship, unless requested so to do by such person or persons, and unless such person or persons are made aware that the said tickets or instruments are procured from the said officers, agents, consignees, or owners for such person or persons, and that such procuring party has no authority to sell or dispose of the same. And any person or persons violating the provisions of this section shall be subject to the penalty prescribed in section five."

§ 3. Section five of said act is hereby amended by adding thereto the following:

"If any drivers of any hack, carriage, cab, or other vehicle, or any runner, decoy, or agent, shall knowingly lead, carry, direct, or convey from any depot, wharf, stopping-place, hotel, or lodging-house, any person or persons to any office, violating the provisions of this act, or any one of them, he shall, upon conviction, be punished in the manner prescribed by section five, and may be indicted and convicted as prescribed in section six."

§ 4. Section seven of said act is hereby amended so as to read as follows:

§ 7. All offices kept for the purpose of selling any passenger tickets or instruments in violation of the provisions of this act, or of any one of them, or where, without the authority required in section one of this act, a pretense is made to sell or dispose of the same, or where it is asserted or assumed that there is an authority to sell or dispose of the same as required by this act, or where such exists, or of which it is [illegible] newspaper, or by printed [illegible] affixed, that there is such [illegible] ists; and all offices where [illegible] made, in violation of the pro[illegible] deemed disorderly houses; an[illegible] offices, and all persons associ[illegible] pose of violating the prov[illegible] deemed disorderly persons a[illegible] and shall, upon convictio[illegible] association, or of being int[illegible] in the transaction of such [illegible] part of the profits thereo[illegible] deemed guilty of a misden[illegible] shall be punished by impris[illegible] for a period not less than [illegible] months; and it shall be the [illegible] county where such offices a[illegible] been made, or where such [illegible] due proof thereof, to issue a [illegible] of all persons that may be [illegible] such offices closed and suc[illegible] removed.

§ 5. This act shall take effect

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

CHAP. 491.

AN ACT to amend chapter two hundred and sixty-five of the laws of eighteen hundred and forty-eight, entitled "An act to provide for the incorporation and regulation of telegraph companies."

PASSED April 28, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section seven of chapter two hundred and sixty-five of the laws of eighteen hundred and forty-eight, entitled "An act to provide for the incorporation and regulation of telegraph companies," is hereby amended so as to read as follows:

§ 7. Any person who shall injure, molest, or destroy any of said lines, posts, piers, or abutments, or the materials or property belonging thereto, shall, on conviction thereof, be deemed guilty of a misdemeanor, and be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail not exceeding one year, or both, at the discretion of the court before which the conviction shall be had. In cases where, from necessity, by reason of the removal of houses or other like causes, the said telegraph lines are interrupted, broken, or interfered with, if the person causing such interruption shall have given twenty-four hours' previous notice, in writing, to any agent of the company to whom the lines belong, he shall be exempt from the effects of the penalty herein provided, and not otherwise.

§ 2. This act shall take effect immediately.

CHAP. 506.

AN ACT to facilitate the payment of taxes by railroad companies.

PASSED April 28, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It shall be the duty of the clerk of the board of supervisors of the several counties of this state (except New York and Kings counties), within five days after the making out or issuing of the annual tax warrants by the board of supervisors of their respective counties, to prepare and deliver to the county treasurer a statement showing the title of all railroad corporations in such county, as appears on the last assessment roll of the towns or cities in such county, the valuation of the property, real and personal, of such corporation in each town or city, and the amount of tax assessed or levied on such
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[illegible] heretofore organized under
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r city collector shall col-
pon the property of any
es by the supervisors of
such notice from the

of tax so received by the
m railroad companies, shall
he town or city for or on
as levied or assessed, and to
s to which the same is now
or appropriated by law, and the one per cent fees also paid shall be placed to the credit of the collector of said city or town; and in case such amounts shall exceed the sum due from said town or city, the surplus shall, on demand, be paid to the supervisor of said town or city, who shall receive, hold and disburse the same as if received from the collector of said town or city.

§ 5. Nothing in this act shall be construed to prevent any railroad company from paying their tax to the collector of towns or cities as now provided by law; nor shall the provisions of this act be construed to repeal or in any manner interfere with the provisions of chapter nine hundred and seven of the session laws of eighteen hundred and sixty-nine.

§ 6. This act shall take effect immediately

CHAP. 507.

AN ACT to define the powers of commissioners appointed under chapter nine hundred and seven of the laws of eighteen hundred and sixty-nine, bonding municipalities to aid in the construction of railroads.

PASSED April 28, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It shall be competent for any corporation, in and to the construction of whose railroad bonds shall have been authorized to be issued by any municipal corporation in this state, to enter into any agreement with the commissioners appointed to issue said bonds, limiting and defining the times when, and the proportion in which, said bonds or their proceeds shall be delivered to said corporation, and the place or places where, and the purposes for which, said bonds or their proceeds shall be applied or used, and any such agreement in writing, duly executed by such corporation, and a majority of such commissioners, shall in all courts or places be valid and effectual. And such commissioners shall not be compelled by any court to deliver such bonds or their proceeds to such corporation, until such agreement shall be executed, if required by them.

§ 2. This act shall take effect immediately.

CHAP. 525.

AN ACT to provide for the more effectual protection of the public health.

PASSED May 2, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. From and after the passage of this act it shall be unlawful for any person, or persons, or corporation, to deposit, cast, leave or keep, or cause to be deposited, cast, left or kept, upon or near any highway or route of public travel, either on the land or on the water, any noisome or unwholesome substance, or to establish, maintain, continue or carry on, or cause to be established, maintained, continued or carried on, upon or near any public highway or route of travel, either on the land or on the water, any business, trade or manufacture which is or shall be noisome or detrimental to public health. Any person violating the provisions of this section shall be guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not less than one hundred dollars, or by imprisonment not less than three nor more than six months.

§ 2. In case any person or corporation shall violate the provisions of the foregoing section, any person feeling aggrieved by such violation, may serve a notice, in writing, upon the person or corporation guilty of such violation, specifying the act in relation to which such person feels aggrieved, or the nature of the offense committed against the provisions of this act. Immediately upon the service of such notice, it shall be the duty of the person or corporation upon whom the same shall be served

to remove the substance so deposited, cast, left or kept (in case the notice shall refer to the depositing, casting, leaving or keeping of any substance in violation of this act), or to discontinue and cease to carry on or maintain the business, trade or manufacture specified in such notice (in case the same refer to the maintaining, continuing, or carrying on, of any business, trade or manufacture, against the provisions of this act), or, in default thereof, the person or corporation upon whom such notice shall be served shall forfeit and pay, to the person giving such notice, the sum of twenty-five dollars for each day's neglect to comply with the duty above specified, to be sued for and recovered by and in the name of such person for his own use and benefit; provided, however, that no action shall be brought to recover such penalty until the person, desiring or intending to bring the same, shall execute to the person or corporation against whom such action is to be brought a good and sufficient bond, to be approved by a justice of the supreme court, conditioned that the plaintiff in such action will pay all costs which may be recovered by the defendant therein, in case the plaintiff shall fail in such action. The notice, in writing, above specified, where the same is to be served upon an individual, may be served by delivering the same to him personally, or by leaving the same at his last known place of residence or business; and, where the same is to be served upon a corporation, it may be served personally upon any officer or director thereof.

§ 3. This act shall not apply to any city in this state in which there are or may be any ordinance in regard to the nuisances referred to in the first section of this act.

§ 4. This act shall take effect immediately.

CHAP. 527.

AN ACT to authorize rural cemetery associations to accept conveyances from religious societies and trustees of any grounds held by such societies or trustees for burial purposes.

PASSED May 2, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It shall be lawful for any cemetery association heretofore or hereafter formed under and in pursuance of the act entitled "An act authorizing the incorporation of rural cemetery associations," passed April twenty-seventh, eighteen hundred and forty-seven, and the acts amending the same, to accept of a conveyance to such association of any grounds owned or held by any religious society or by trustees, for burial purposes, whenever such society shall authorize the proper officer or officers to convey the same, and in cases where such ground is held by trustees, whenever all the trustees living or residing in this state shall unite in such conveyance; and such conveyance, when fully executed and delivered, shall be deemed and held valid to convey all the interest of such society, and of the said trustees, in such grounds, to the association therein named.

§ 2. The association named in any conveyance, so as aforesaid authorized, shall take, hold, and control the grounds so conveyed—subject, however, to any and all burdens, trusts, and conditions incumbent upon its grantors, and shall perform all such duties, trusts, and conditions.

§ 3. Lots which shall have been sold or granted in such burial grounds, prior to such conveyance, shall not be taken from the grantees thereof, nor their interest therein divested by such conveyance, nor shall any grave be disturbed or monument or remains removed without the consent of the lot owner or of the heirs of the person whose remains are intended to be removed.

§ 4. The grounds authorized to be conveyed by this act shall be surveyed and mapped by the association receiving them, and the portion or portions thereof unoccupied or undisposed of may be subdivided into lots and plots, and sold or granted, by the trustees of such association, in the same manner as the other grounds and lots of such association. And the moneys received on the sale of such lots shall be expended in payment of expenses, and improving and embellishing the grounds of the association, including the grounds conveyed under this act, in the discretion of the trustees thereof.

§ 5. This act shall take effect immediately.

CHAP. 576.

AN ACT to provide for the introduction of the European system of steam towage upon the canals of this state.

PASSED May 2, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Permission is hereby granted to Addison M. Farwell, of Watertown, New York, his associates and successors, who may organize a corporation under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical, and chemical purposes," passed February seventeen, eighteen hundred and forty-eight, and any act or acts amendatory thereof, to introduce upon the canals of this state the "European system" of steam towing.

§ 2. The said Farwell, his associates and successors, who shall organize as provided in previous section, are hereby authorized and empowered to tow boats, floats, and cargoes on the canals of this state for hire, and for that purpose may purchase and construct, or cause to be constructed, the necessary appliances for carrying on the business of canal towing under the said European method, and shall have the exclusive right and privilege, during the term for which said corporation may be organized, to submerge or place one or more chains or cables on the bottom of the canals of this state, and attach the same thereto in such manner as will not interfere with navigation; and shall have the exclusive right to use such submerged chains and cables, designated and known as the European system, in the prosecution of the peculiar method of towing thereby. And whenever and wherever it may be necessary so to do, the said Farwell, his associates and successors, or corporation aforesaid, are hereby authorized and empowered to own and employ other motive power in connection with said chain or cable process, provided the same shall not interfere with navigation. Nothing, however, in this section contained shall be construed as excluding other parties from the right or privilege of propelling or towing themselves or others by the agency of steamboats, propellers, elevated railway, or animal power, but simply to vest in the said Farwell, his associates and successors, or corporation organized as aforesaid, the exclusive right to lay and use chains or cables in the prosecution of the European system of towing thereby.

§ 3. Any person who shall meddle with or disturb the chains or cables, authorized to be laid under this act, with intent to injure the same, or in any manner to embarrass the operation thereof, or any person who shall willfully obstruct or interfere with boats rightfully using said chains or cables, or towed thereby, shall be deemed guilty of a misdemeanor, punishable by fine or imprisonment—the fine not to exceed two hundred dollars, and imprisonment not to exceed three months. And any person who shall willfully injure the chains or cables as aforesaid, or, by other improper conduct, shall detain the boats rightfully using said chains or cables, or being towed thereby, shall be liable, to the parties aggrieved, for all damages occasioned by said injury or detention.

§ 4. The tugs, with machinery connected therewith, employed by said Farwell, his associates and successors, or corporation aforesaid, in the prosecution of towing, together with the fuel necessary to the voyage carried thereon, shall be exempt from the payment of tolls.

§ 5. In case said Farwell, his associates and successors, or corporation aforesaid, shall neglect or fail to introduce

said system of towing on the Erie canal within eighteen months after the passage of this act, all rights and privileges herein granted shall cease.

§ 6. Nothing herein contained shall be construed to exclude the system of towage hereby authorized from the supervision and control of the canal board; but the same shall be subject to all the rules and regulations from time to time established by the canal board for the navigation of the canals.

§ 7. The legislature may, at any time, alter, modify or repeal this act.

§ 8. This act shall take effect immediately.

CHAP. 655.

AN ACT to provide for the introduction of an improved system of steam towage upon the canals of this state.

PASSED April 5, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Permission is hereby granted to Norman W. Kingsley of New York, and Charles H. Gardner of Brooklyn, their associates and successors, who may organize a corporation under the act entitled "An act to authorize the formation of corporations for manufacturing, mining, mechanical and chemical purposes," passed February seventeenth, eighteen hundred and forty-eight, and any act or acts amendatory thereto, to introduce upon the canals of this state an improved system of steam towage, by the use of chains, cables or rails suspended over the canal, under a patent or patents to be held or acquired by said corporation, with the exclusive right to use the said system thereon, during the full term for which the said corporation may be organized.

§ 2. The said Norman W. Kingsley, Charles H. Gardner, their associates and successors, as heretofore specified, are hereby authorized and empowered to transport cargoes, and to tow boats and floats, loaded or unloaded, for hire upon the canals of this state, at a rate of speed not [illegible] miles per hour, and which shall not [illegible] may purchase, [illegible]s, engines, apparatus, suspend[illegible]s, and machinery, as shall be necessary to ap[illegible] perate said improved system of steam towage, in such manner as shall not interfere with the navigation on said canals. Nothing, however, in this section contained shall be construed as excluding other parties from the right or privilege of propelling or towing any boat or float upon the canals of this state by the agency of steamboats, propellers, tugs, chains, cables, elevated railways, engines or animal power, but simply to vest in the said Norman W. Kingsley, Charles H. Gardner, their associates and successors, or corporation organized as aforesaid, the exclusive right to apply and operate the said improved system of towage.

§ 3. The machinery, engines and boilers used in pursuance of this act, the boats carrying the same, and the fuel necessary for the voyage, shall be exempt from the payment of tolls upon all the canals in this state.

§ 4. In case the said Norman W. Kingsley, Charles H. Gardner, their associates and successors, or corporation aforesaid, shall neglect or fail to introduce said system of towing on the Erie canal within eighteen months after the passage of this act, all rights and privileges herein granted shall cease.

§ 5. Nothing herein contained shall be construed to exclude the system of towage hereby authorized from the supervision and control of the canal board, but the same shall be subject to all the rules and regulations established, and to be established, by the canal board for the navigation of the canals.

§ 6. The legislature may, at any time, alter, modify or repeal this act.

§ 7. This act shall take effect immediately.

CHAP. 660.

AN ACT to provide for the appointment of an additional number of notaries public in the city of New York, and in the several assembly districts of this state.

PASSED May 5, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The governor is hereby authorized and empowered, by and with the advice and consent of the senate, to appoint, in and for the city of New York, two hundred and fifty notaries public in addition to the number now provided by law, and ten additional in and for each assembly district in the state, outside of the city of New York.

§ 2. This act shall take effect immediately.

CHAP. 752.

AN ACT to amend an act entitled "An act to authorize the board of supervisors of the several counties in this state to make the office of district attorney a salaried office, and to fix the salary thereof," passed April fourteenth, eighteen hundred and fifty-two.

PASSED May 7, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The first section of the act entitled "An act to authorize the board of supervisors of the several counties in this state to make the office of district attorney a salaried office, and to fix the salary thereof," passed April fourteenth, one thousand eight hundred and fifty-two, is hereby amended so as to read as follows:

§ 1. The board of supervisors of the several counties in this state, the county of New York excepted, at any annual meeting of such board, duly convened, may lawfully determine that the office of district attorney of such county shall be a salaried office, and thereupon it shall be their duty, and they are hereby authorized, to fix the amount of compensation to be paid to the district attorney thereof for his services; and the salary, when so fixed, shall not be diminished during the term for which the district attorney has been or may be elected.

§ 2. This act shall take effect immediately.

CHAP. 773.

AN ACT to amend an act entitled "An act to authorize the formation of companies for the erection of buildings," passed April fifth, eighteen hundred and fifty-three.

PASSED May 10, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The first section of the "Act to authorize the formation of companies for the erection of buildings," passed April fifth, eighteen hundred and fifty-three, is hereby amended by inserting after the words "for the erection of buildings," the words "or for the laying out and subdivision of lands into building lots or villa plots, and the improvement and sale thereof." And by striking out the words "five hundred thousand dollars," and inserting in lieu thereof the words "one million dollars."

§ 2. The trustees of any company organized, or hereafter to be organized, under said act may purchase lands and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable to any further call; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of the said act; but, in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact.

§ 3. This act shall take effect immediately.

The Albany Law Journal.

Albany, July 2, 1870.

CRIMINAL LAW AT HOME AND ABROAD.

(*Concluded.*)

When we take up the French procedure, we find the same general vice displaying itself, though in a different form. We have the same spectacle exhibited of the strong attacking the weak, of the skillful attacking the ignorant, of the self-possessed attacking the feverish or the frantic; but that which in Germany is usually done by a sort of siege — by carefully drawing the trenches closer and closer, and then undermining until the structure of the defense falls as if by itself — in France is performed by a sort of brilliant judicial Zouavism, in which the judge, with bold and histrionic effect, pounces on the party on trial, and, tearing asunder his supposed subterfuges, seeks to expose, to degrade, and to immolate him on the spot. Of course there are multitudes of exceptions to this, but the temptations to such displays seem to rise with the *eclat* and the conspicuousness of the trial. Of this the following illustration will be sufficient.

In the city of Toulouse is a monastic foundation, whose fundamental principles are that its members should be exclusively *lay* — that they should take the vows of chastity, obedience, and poverty — and that they should devote themselves to the education of the lower classes. The name of the society is the "Brotherhood of Christian Doctrine;" and, during its existence of centuries, it has gradually erected, on the large tract of land acquired by it, a series of buildings, some traceable to the Middle Ages, others added from age to age down to the present era — buildings of no architectural pretensions or regularity, separated by many shaded alleys and cloisters, and interspersed with many secluded nooks. Close to the monastery is a graveyard, in a dark corner of which at daybreak on the morning of April 16, 1847, was found the body of a young girl, Cecilia Combettes, who, as it appeared by unquestionable testimony, had been, a few hours before, ravished and then murdered. She had for some previous months been in the employment of a bookbinder named Conte; and on the morning of the 15th was sent by him to carry some books to the monastery, within which, according to undisputed evidence, she was seen to deliver the package. There was no direct proof that she was seen to come out of the institution, which was surrounded by a wall, to which was attached a gate with a porter's lodge; nor was any trace of her discovered from ten in the morning of the 15th until the discovery of her body early the next day. By whom, then, was the outrage perpetrated? Conte, her employer, had accompanied her to the monastery, and testified that he left before she had delivered the parcel, and that while he was there he saw near to her two of the brothers — Jubrien and Leotado. Against the latter some slight circumstantial evidence, which hereafter will be incidentally noticed, was adduced. He was arrested, and on February 7, 1848, after eight months' imprisonment, was brought to trial. In reviewing the evidence then adduced, our object is to confine ourselves to such portions of the judicial examination of Leotade as serve to illustrate the general proposition which we have in this article undertaken to canvass. It is sufficient, therefore, at this point, to say that on the trial there was positive testimony to show that Conte had himself previously attempted improper familiarities with Cecilia, who was proved by unquestionable evidence to be a girl of excellent character; and that some years afterward he confessed that he himself was the perpetrator of the crime. On the trial, however, no evidence was presented showing the whereabouts of Cecilia after her visit to the monastery on the morning of the 15th; and this, coupled with the circumstantial evidence to which we have already referred, arrayed against the accused a popular prejudice, by which the terror of his position was vastly increased. Having made these preliminary explanations we proceed with our extracts from the judicial examination on the trial.

Chief Justice. What is your name?

Prisoner. Louis Bonafons; my ecclesiastical name is Brother Leotado.

Ch. J. How old are you?

Pris. Thirty-six years.

Ch. J. Did you know Cecilia Combettes?

Pris. I have never even seen her.

Ch. J. Did you often visit Conte?

Pris. Yes; yet, reviewing the past as closely as I can, I cannot recollect to have ever seen her with him.

Ch. J. Why this circumlocution? You either knew her or you did not.

Pris. I did not know her.

Ch. J. Did you not go to Conte, some days before the murder, to order a writing-table?

Pris. I did.

Ch. J. Did you not say to Conte, "when the portfolio is ready, send it to me by the child?"

Pris. I cannot recollect this.

Ch. J. If you did, this involves your acquaintance with Cecilia.

Pris. I never saw a workman at Conte's, and therefore I could not have said it.

Ch. J. Where were you in the morning of the (15th of) last April?

Pris. I was first at morning mass, which lasted longer than usual, as it was read for a brother who had recently died in Paris; then I breakfasted and went from the refectory to the clothes-room, and brought the pupils of the Pension the things they needed, and then I wrote to the general of the order a letter on my spiritual state. This lasted until 9½ o'clock.

Ch. J. What did you do next?

Pris. I went to the kitchen and to the director, to hand him my letter.

Ch. J. You went about 9½ o'clock in the kitchen; where were you till 10 o'clock?

Pris. I went back into the clothing-room, after I had spoken with the director, until 9¾ o'clock.

Ch. J. Where did you meet the director?

Pris. On the corridor of the Pension; he asked for my letter; I told him that I was just looking for

him. It was then I went into the clothing-room, and afterward into the school-room.

Ch. J. How late was that?

Pris. About 10½ o'clock.

Ch. J. Go on.

Pris. I then fed the canary-birds in the presence of the hospital nurse, and then went to the cellar, and afterward to pater noster. Then dinner, then the usual studies, then to supper, and then to bed.

Ch. J. The accusation charges you with having been seen at least twice during the day with Brother Jubrien.

Pris. I talked with him after supper, when we were bringing some casks out of the cellar.

Ch. J. Although I have earnestly urged you to consider your answers carefully, you have failed to do this; on the 23d of last April you were asked what you did on the prior 15th. *Then* you said nothing about having seen Jubrien, having spoken to him, and having helped him in the cellar. Were the other members of the community then asleep?

Pris. Yes.

Ch. J. Then *you* must have gone very late to bed on the 15th; and although before this we believed that all the brothers went to bed at the same time, it seems that some must have been excepted from this rule.

Pris. When we retired later than usual, then we had next day to account for this to the superior.

Ch. J. Your memory on the 23d must have been fresher than to-day. You then said that the mass was ended at 8½ o'clock, that you then breakfasted, then went into the kitchen, where you spoke to Brother John, and to the clothing-room, where you spoke to Brother Leopold, and then to the cellar. This had kept you till the pater noster, at 11 o'clock. But Brother Leopold fixes the times of your conversation with him at an hour earlier. You have been asked as to your occupations from 6 o'clock in the morning; and you said that about this time you met Brother Leopold in the clothes-room.

Pris. This is entirely correct. Does this hinder me from having seen him also at 11 o'clock? If I did not mention this at the preliminary examination it was because I was only interrogated as to my surroundings after 8 o'clock in the morning.

Ch. J. Very true. But in a subsequent examination you said that at 9½ o'clock you were in your office; then in the hospital, where you met the director, who asked you for wood for a fire for a sick child; that you then went to fetch the wood, and then to prayers. And yet, notwithstanding these extended details, you did not till this moment utter a syllable as to the important circumstances of the letter on your spiritual condition.

Pris. If I did not mention this to the examining magistrate, it was through confusion. *Daily, almost hourly* [for the eight months] *these examinations were continued; I was put under a moral torture;* I was treated, not as merely suspected, but as convicted. When I appeared in this court before yourself, I was first able to collect myself, as in the presence of a kindly judge.

Ch. J. You can spare your praises of me, as well as your censures of the examining magistrates. I will have neither. In your examination of the 3d of May, you declared that on the 15th of April you wore the same gown (*soutane*) and the same stockings which you now have; while on the next day, on the 4th of May, when the question was put to you, "How long you had worn the trousers and drawers you now have," you answered, "For ten days." How is this explained? You further said, that you had laid the trousers and drawers, which you wore on the 15th of April, in the third chamber of the clothes-rooms on a table close to the entrance—where, to your great astonishment, they were not discovered—while on the previous day you said that on the 15th you wore nothing but the gown (*soutane*) and stockings. On the 6th of May you voluntarily stated to the examiners, "The trousers, now shown to me, I recognize as those I wore on the 15th of April. I used these in the bed to cover my feet." How is it that, in spite of your statement, the drawers were not found with the trousers?

Pris. I remember now for the first time that I did not lay the two off together, and that I wore the drawers at the time of the preliminary examination.

Ch. J. Were you in the habit of keeping rabbits?

Pris. They belonged to the brotherhood.

Ch. J. Did you ever give rabbits to Conte or his wife?

Pris. I sold some to them.

Ch. J. Did you ever invite Cecilia to look at the rabbits?

Pris. No.

Ch. J. You, with the other brothers, were asked as to the condition of your garments on the 15th of April. While the others gave satisfactory answers to this, you are the only one as to whom this was not the case; and besides, you maintained that the shirt, which the examining physician found on you on the 18th of April, had been put on by you on the previous Sunday, and was worn because it had wide sleeves, which did not chafe the plasters that your health required you to wear. Where did you leave the clean shirt which you received on Sunday evening, for a change? You say that you did not often change your linen, and that you laid the clean shirts under your pillow, and in this way retained two at a time. But in spite of this usage, you maintain that you gave back the shirt of April 17th to the brother who had charge of the linen, who, on his part, declares that he never received clean linen back from the brothers. After this you modified your answer so as to make it that you gave this shirt to the hospital nurse, who says, however, that he does not recollect this. Where did you hand it to him?

Pris. At the door of the hospital, in the week after April 18th.

Ch. J. You all say that at the time Conte met you in the corridor, you had gone to the communion. Conte, however, persists in his statement, and specifies your dress. At first (in one of the preliminary examinations) you distinctly denied this, but afterward said that you could not call it to mind. Brother Jubrien, who was with you, follows the same theory, first a plump denial, then, "I believe not," and at last, "I do not recollect." In all earnestness I demand to know whether, on the morning of the 15th

of April, you were in the corridor of the common hall?

Pris. I am not in a condition to answer so complicated an analysis of the evidence.

Ch. J. It is not a complicated analysis, but facts. Were you in the common hall on the 15th?

Pris. No. On the 10th I was there between 7 and 7½ in the morning.

Ch. J. Did not the way to it lead by the linen-rooms?

Pris. Yes.

Ch. J. Did you have a key to the latter?

Pris. I do not know.

Ch. J. And yet (at the preliminary examinations) it was shown that you had a key which locked the door of that room, and that you could therefore change your linen without attracting any one's notice. This key was afterward shown to you, and you stated to what lock it belonged. Had you no conversation with Jubrien on the 15th?

Pris. Yes. In the evening, when I helped him in bringing the large casks out of the cellar.

Ch. J. I have now a correction to make. I asked you whether you possessed a key to the linen-room; and you answered that if you possessed it, you did not know it. I will now show you a key which is proved to lock that room. You will now tell me whether you recognize it.

Pris. It is the key of the kitchen closet.

Ch. J. Do you know if it locks the door of the linen-room?

Pris. No.

This is a specimen of the examination in chief of the prisoner, which was followed by the calling of the witnesses for the prosecution. The method pursued is very much the same as that which we have already noticed as existing in Prussia. The judge has full notes of the various preliminary examinations, both of the accused and of the prosecuting witnesses. The prisoner is first called, and interrogated as to the points that these examinations developed, and as to any others that suggest themselves to the judge. Then the prosecuting witnesses are called, and all the statements of the prisoner, relevant or irrelevant, are put in issue, to be contradicted, if practicable, by the testimony so adduced. But in France, however, as has already been noticed, it is deemed not unsuitable for the judge at any period of the trial to surprise the defendant with the most sudden and confusing of appeals. This may be dramatic enough, but, apart from the objections we shall presently notice, utterly destructive of a calm, judicial rendering of testimony. Thus, in the case before us, several hours after the prisoner's formal examination was closed, and while Conte—the chief prosecuting witness, and the real assassin—was under examination, the court with sudden swoop pounced on the prisoner as follows:

Ch. J. (To prisoner.) You have just heard that on the 15th of April, at 9½ o'clock, you were seen in the corridor of the brotherhood with Brother Jubrien?

Pris. Conte is a falsifier. On the 15th I was not in the corridor. As to what relates to my former life [which Conte had endeavored to attack] I can, at least, say that it is not so stained as that of my assailant. You can inquire at my early home, of my former employers, of my teachers. I had the wish to escape from the worry of the world. This is why I entered the order. I am in the jury's hands. Decide what my fate is to be; I will await even death in peace, as a missionary who will sacrifice his life to what is right; and (to the jury), so far from blaming you, will I the more fervently pray for you, for your efforts to decide rightly.

Now, we may pardon such distracted utterances in a prisoner subjected to such sensational shocks as those we here notice; but we cannot excuse the system which invites the judge to consider the application of such shocks as among the chief feats of judicial prowess. Again and again during the trial do similar incidents occur. Let something inculpatory turn up, and down comes the judge: "There, do you hear this — what do you say *now?*" The examination in chief is bad enough; but no presence of mind, no power of memory, can endure such torture as this, lasting, as in the present case, through a trial occupying an entire week. It is not to be wondered that Leotade's memory partially failed him, and that his replies became confused and delirious. He had been kept on the rack for the eight months prior to the trial by solitary confinement, broken only by the visits of his inquisitors coming to probe his conscience as to his entire past; and this agony reached its climax when, in the crowded court-room, his whole nervous and moral system was made the subject of the assaults we have detailed.

With the topic we have undertaken to discuss in this article, Leotade's innocence has no immediate connection. Innocent he undoubtedly was; innocent he continued to declare himself to be until his death, nineteen months afterward, in the galleys to which he was sentenced for life; innocent he was proved to be by the subsequent confessions of Conte, uttered under the solemn sanctions of a death-bed, and verified by collateral proof which removed the slightest possibility of doubt. But, guilty or innocent, the merits of the system under which he was tried, as we stated in the prior case, are the same. That system, so far as concerns the compulsory examination of the defendant, and the introduction, by the prosecution, of his character into the issue, obtains through the continent of Europe; and wherever it exists it is associated with the abuses which exhibit themselves in the cases which we have just considered in detail. In the vast number of trials reported in the many volumes of the *Neue Pitaval* there is not one, where this system is applied, in which these abuses do not in a greater or less degree exhibit themselves. And it is but fair, in the present stage of our American jurisprudence, that the question in all its bearings, practical as well as speculative, should receive grave consideration.

For the changes which have been lately initiated in our American jurisprudence, as was stated in the beginning of this article, bring us very near to the practice which the cases before us display in so hideous a light. Take the first point, that of the introduction of the defendant's character into the issue. By the common law, it is so far from being allowable for the prosecution to prove that the defendant has a "tendency" to commit the particular crime, that the merest

allusion, by the prosecuting attorney in his opening address, to the defendant's bad character, has been looked upon as a grave offense; and juries have been discharged because such allusion has been made. Every man is permitted to carry to his case the presumption of general good character; and this presumption no one is permitted to assail, unless, as has been said, he should, in his defense, introduce the issue himself. No criminal, no matter how profligate, but, by the common law, is allowed his *locus penitentiæ;* if he has committed an outrage, he is tried for it, but he never is put on trial because he has previously been generally bad. The common law, in its humanity, says: "You shall have a chance to reform; at all events, what you are liable to be tried for is an overt act of guilt, and not a violent temper or a depraved heart." But in the last few years, some of our American courts have been departing from this rule. The departure began in cases of forgery, when it was permitted, though at first reluctantly and cautiously, to the prosecution to show, as part of its evidence in chief, that the defendant was an expert in the counterfeiting art. The next step, which was taken by some of our western courts, was to permit the prosecution, in homicide cases, to prove also as part of the evidence in chief, that the defendant was a man of bloodthirsty and violent temper. If the principle of the latter case, at least, holds good, it is difficult to see what further obstacles remain in the way of our adopting the civil-law practice, in this respect, as a whole.

Then, toward the defendant's compulsory examination we have recently made great strides. It is true that the statutes recently enacted in this respect only permit such an examination after the defendant has voluntarily placed himself on the witness stand. But the experience of the few months that have elapsed since the passage of these statutes show that there will be few criminal cases in the states where these statutes are in force in which this exposure will not be made. The fact is, first, that the temptation to venture testifying in his own behalf, to a man whose life and liberty are at stake, is irresistible, even though the probability be that a cross-examination will ruin him; and, second, that to refuse to be sworn will come soon to be acknowledged as a tacit confession of guilt. Wherever such statutes exist, therefore, defendants will be uniformly submitted to examination; and the main difference between our own and the European practice will be that with us the inculpatory examination will be conducted by the prosecuting attorney, and not by the judge. Whether this will be an improvement may well be questioned. A judge, no matter how keen may be the spirit with which he may enter upon what he may consider the exposure of error, is yet, in the main, an impartial arbiter between the two contending parties. An attorney is, and ought to be, simply the representative of one of them.

Let us, then, look the system which is thus approaching us gravely in the face; recapitulating to some extent, as we do so, the points which suggested themselves incidentally in the review given by us of the two cases especially selected by us for consideration. And first, with regard to the first practice touched by us, that which authorizes the prosecution to put in issue, as evidence in chief, the defendant's character, by way of showing his liability to commit the particular crime. Notice, first, the debasement which the public mind must suffer from the judicial exhibition of prurient psychological detail. Nothing can be worse in this respect than the displays listened to by greedy audiences in what are considered the more "interesting" cases, and which are subsequently through the press presented to the public at large. We have before us in the third volume of the new series of the *Neue Pitaval* the report of a homicide case, that of Count Gustavus Chovinzky and of Julie Ebergenyi, in which the general sexual tendencies of the defendants, and their victim, the wife of the first, were made the subjects of the minutest and most discursive exploration; and in which, according to the reporter, who prints these details at large, the court room was crowded by some of the highest as well as by the most abject of the land. It is before such audiences, and then through the press, that this emptying of the most fetid contents of the human heart is artistically consummated. It is like the baling out the contents of a putrid well — the process is one which cannot but spread contagious disease. For the exploration and exhibition is not, as with us, one of naked, hard fact, but one of prurient motives. The worst, vilest, most morbid of all human desires and impulses, things which we are impelled by every right feeling instinctively to hide even from ourselves, are keenly searched after, and ruthlessly displayed to the public gaze.

Then, second, this process destroys all power of rightful defense. The defendant, in the old common-law courts, knows what he is to prepare to meet. The issue is a single one; to this he adjusts his plea and calls his witnesses. Whatever his past may have been, he knows that the law, in its humanity, has given him an apportunity for reform; and that now he is to be tried for a single, well-defined act, as to which he has full notice, so as wisely to make ready for his defense. But with the civil law, a prosecution is limited by no such restraints. There is no point in the defendant's past history, no matter how distant or how recent, which may not be suddenly sprung on him; and when the judge's knowledge does not enable him to touch such points, the drag-net of a general interrogatory is swept over the offender's memory. No offense has been so atoned for as to protect it from being thus brought up in judgment. No oblivion, no death of witnesses, no long passage of time consuming all explanatory or vindicatory circumstances, are allowed to intervene between the judge and the coveted disgraceful fact. The defendant goes to trial prepared to meet a particular issue, and he finds himself confronted with others, any one of which involves disgrace, but to meet which he has had no notice to prepare. And if no other acts or tendencies of guilt are available, then his prevarications on trial — prevarications often the convulsions of a man in torture — are charged against him, and on these he finds the issue is made to rest. We do not say that under this system there is no security for innocence; for in a general sense — in that sense which involves a free uncovering of the secret frailties and

passions of the human heart — no man is innocent. But we do say, that in this view there is no security for any one. No one can in safety walk the streets, for there is no one who, if under trial, cannot be exposed to an investigation more or less destructive. We have no time here to dwell on disarrangement of judicial mechanism, and the consequent frequent escape of the real offender, wrought by this clumsy confusing of relevant with irrelevant issues. We have simply to say that by it no protection is left either to liberty or life.

The remaining question before us — that of the judicial examination of the defendant on trial — invites but few remarks in addition to those which have already been incidentally made. No doubt there is a class of temperaments which can escape this ordeal comparatively uninjured. Men of imperturbable temper and of comprehensive intellect and of quick wit may be able, during the trial, as well as during the numerous preliminary hearings, to maintain a calm and consistent theory of defense. But men of this class are rare, and are at least not unknown among those inured to crime. The consummate villain is, in fact, likely to be the most successful in the execution of this most difficult task; while the guiltless, from their very inexperience in crime, and from the peculiar terror which disgrace possesses to them, are as likely to break down in the attempt. Thus, in the case last noticed by us, Conte, the real assassin, played his part through a protracted cross-examination with every trait of candid innocence; while Leotade, his victim, was betrayed into the apparent contradiction and confusion of guilt. For, it should be remembered, the strain is the severest to which the nervous system can be exposed. Let us suppose that the judge is deterred, either by his own humanity or by public opinion, from sustaining such attempts as those of the chief justice at Toulouse — attempts to bully, to terrify, to crush, to annihilate the victim who lies exhausted in his clutch. Let us suppose that he simply permits the method which the German courts have in the main adopted, of taking to the trial a minute brief of all that the witnesses for the prosecution are expected to testify to, and then examining the defendant in advance on each point. Let us remember how protracted, how multifarious, and how exhausting such an examination must be; and then let us inquire which of us could submit ourselves to such a test, even though the topic might be the most innocent event in our past lives, without being betrayed into embarrassments and inconsistencies which may readily be received as confessions of guilt. And then let us rise from this personal view to the general considerations of public policy to which the issue thus ascends. The civil law — and with this recollection let us conclude — in this, as in all other respects, is the product of despotism. Its object is to level the citizen to the grade of the slave. It recognizes in him no sancity of character, just in the same way that it awards to him no sanctity of home. He is the creature of the government that overshadows him; and at its command he must in public unveil the most secret motives of his heart; and the system is one, therefore, which produces, not freemen, but tools; not high personal enterprise, but apathetic sloth; not political liberty, but political torpor and death. But the common law is the system of personal liberty, of manly independence and self-respect. It was produced by these great qualities, and these, in return, it fortifies and protects. If it makes every man's home his castle, and if these castles are sometimes a little too roughly garrisoned, let us remember that they are not merely the shelters which protect the rights of the individual, but the fortresses which assure the grandeur of the state. And if, in declaring that no man shall be forced to degrade himself by his own lips, the same common law may give in isolated cases impunity to crime, let it be also remembered that by this process it not merely implants in the individual breast a consciousness of self-respect and sanctity which ultimately makes crime less frequent, but it summons for the commonwealth the services of high-toned, strong, rightfully loyal men. Let us beware lest, in infringing on this principle, we undermine some of the foundations, not merely of personal liberty, but of the public weal.

FRANCIS WHARTON.

LEGAL REFORM IN ENGLAND.

The following letter from Austin Abbott, the well-known author, to Mr. Throop — one of the commissioners recently appointed to revise the laws of this state — contains much information of interest to the profession. Mr. Abbott sailed for Europe a few days since, and it gives pleasure to state that he will, from time to time, communicate to the LAW JOURNAL his impressions of European law and lawyers.

MONTGOMERY H. THROOP, Esq.:

My Dear Sir — Your letter of the 6th, asking what has been recently done in the way of legal reform in England, is just received.

The present movement in England involves three distinct efforts:

The consolidation of statutes.

The digesting of the law.

The simplification of jurisdiction and procedure.

I. CONSOLIDATION OF STATUTES.

In the parliamentary papers of 1835, xxxv, 361, which, I think, you will find in the Astor library, is a report on this subject, which will indicate what had been done previous to that time.

In 1856, Sir Fitzroy Kelly (February 14), proposed a consolidation or revision of the general statutes, but nothing substantial was then accomplished, except the initiation of a series of repealing acts, carried on and completed under Lords Westbury and Chelmsford, by which thousands of obsolete statutes were declared repealed.

The principal of these repealing acts are: 19 and 20 Vict. c. 64, 1856; 96 Stat. at L. 320; 24 and 25 Vict. c. 101, 1861; 101 Stat. at L. p. ——; 26 and 27 Vict. c. 125, 1863; 103 Stat. at L. 578; 30 and 31 Vict. c. 59, 1867; 107 Stat. at L. 244; same act, 2 Stat. 622.

These acts, often referred to as expurgation acts, but usually known, I believe, as the statute law revision acts, clear the way for a new edition of the statutes subsisting in force.

The next step proposed, I understand to be the publication of an official index to the statutes, to be corrected and republished annually, as successive acts of legislation may modify the statutes.

I am not aware that this has yet appeared, although it was announced two years ago.

Finally, a new edition of all the subsisting general public acts is to be prepared by an editor acting under the direction of an official committee. The arrangements for this work were announced last July.

Pending these steps toward a general revision, the statutes relative to some special subjects have been revised and consolidated in new acts by special commissioners, or by the ordinary methods of legislation.

On the subject of law revision, you will be interested to look at Coode's "Remarks on Legislative Expression, or the language of the written law."

This little book is reprinted in the Philadelphia law library, N. S., vol. 44; but a second edition was issued in 1852.

Mr. Coode's rules are too theoretic and artificial for a rigid application, but are suggestive and useful.

In this connection, let me mention a little book on the "Art of *Precis-writing*" (that is, condensing and abridging), used in the British government offices, in which you will find the methods of condensation discussed in a very practical way.

But, with all their defects, I think the American systems of statute law are, on the whole, in advance of the English, not only in respect to methodical arrangement, but in respect to the modes of expression. The recent revisions of several of our states afford striking instances of this. The movement for revision in England, I suppose, has been assisted, if not led on, by the American system of general statute law, which we may say was originated in New York forty-five years ago. Mr. Duer, one of the New York revisors, when in England, was called on by a parliamentary committee for information respecting the New York revision; and that revision and the series of codes recently prepared by the commission, consisting of David Dudley Field and the late Wm. Curtis Noyes and Alex. W. Bradford, have encouraged the belief of what was before doubted — that even the acts of parliament might be revised and consolidated.

II. DIGEST OF LAW.

Lord Westbury, in 1863, on the occasion (if I recollect aright) of introducing the expurgation act of that year, made an extended speech on the subject of law reform, in which he advocated the preparation of an official digest of the law. I think this was published in pamphlet form by Stephens & Norton, of London. Nothing was then accomplished; but in 1866 the *Digest of Laws Commission* was appointed, consisting of Lords Cranworth, Westbury and Cairns, Sir J. P. Wilde, Mr. Lowe, Vice-Chancellor Wood, Sir George Bower, Sir Roundell Palmer, Sir J. G. Lefevre, Sir T. E. May, Messrs. Daniel, Thring and Reilly.

Mr. Godfrey Lushington, whose address is 2 Stone Buildings, Lincoln's Inn, London, is the secretary of this commission.

The first report of this commission was made in 1867. It only discusses the expediency of the plan, and pronounces in favor of it. You will find a copy of this report in the Am. Law Review, vol. 2, 1867 and 1868, p. 361.

The commissioners were subsequently authorised to cause specimens of the proposed digest to be prepared.

They selected three subjects for this purpose:

Commercial paper;
Liens (including mortgage); and
Easements.

By inviting proposals, in which a great number of members of the bar competed, they obtained sample specimens of style of work, and suggestions as to the controlling principles proper to guide in the preparation of the work. It was observed that many men of fair professional standing, but (as must have been expected) none of first rate standing, competed. The commission could probably have done better by employing such help as they might, in the exercise of their judgment, have selected; but, for obvious reasons, it was thought better to adopt a free competition.

Mr. Holland, one of the competitors, has published his draft, with other papers, on the subject of statute revision, codification, etc., under the title of "Essays on the form of Law" (Butterworth's 1870). You will find this volume in the library of the New York Law Institute.

From the competitors the commissioners, in June 1868, selected three gentlemen, to each of whom they allotted one of the above mentioned subjects. The results of the labors of these gentlemen, I believe, have not yet been made public. It was expected that their tasks would occupy a year and a half; and it would not be surprising if the difficulties incident to such a work should prolong the time far beyond that. To the successful accomplishment of such a task as the codification and digesting of the law, some labor-saving methods are essential. The plan adopted was to leave each draughtsman to go through all the reports to be embraced, and make his own list of the cases concerning the topic allotted to him. This labor alone, thus thrice repeated, would occupy no little time, to say nothing of the main work remaining, of preparing and arranging statements of the points decided.

In these specimens it was not intended to include the black letter reports; but to begin with the earlier reports of modern times.

III. SIMPLIFICATION OF JURISDICTION AND PROCEDURE.

In 1868 the judicature commission was appointed, including among its members Lord Cairns, lord chancellor, judge of court of appeals in chancery, etc.; Lord Hatherly, lord chancellor, and formerly, as Sir Wm. Page Wood, vice-chancellor; Sir Wm. Erle, Sir James P. Wilde, judge of probate, divorce, etc.; Justice Blackburne, of the queen's bench; Justice Montague E. Smith, of the common pleas; Sir John B. Karslake, queen's counsel; Sir Roundell Palmer; Wm. M. James, vice-chancellor; Henry C. Rothery, registrar in admiralty, and a number of others.

The object of this commission is to investigate the English system of judicature, and suggest improvements in the organization of the courts and the modes

of procedure. In the early part of 1869 this commission made their first report. They propose the following changes:

The consolidation of all the superior courts of law and equity, together with those of probate and divorce, and of admiralty, into one new court, to be denominated her majesty's supreme court. Suits of every kind then commenced shall be brought in this court; and, as far as practicable, in a uniform system of procedure. It is proposed that the court shall be divided in various chambers or divisions for convenient dispatch of business; but suits are to be brought in the court, not in the divisions of the court, so that suitors shall no longer be dismissed for invoking the wrong jurisdiction. Each division is to have all the powers necessary to administer such relief as any of the existing courts can administer. The principles of procedure recommended are substantially the principles embodied in the New York code of procedure. Radical changes in the appellate tribunals are also proposed.

In reference to all of these subjects of law amendment the information is chiefly to be found in the parliamentary papers, and in various periodical publications. There is a very large, if not complete, collection of the former in the Astor library, but it contains nothing later than 1867.

I expect to be in London in a few weeks, and shall take pleasure in procuring for you, if you desire, such as may be accessible in separate form.

Very truly yours,

AUSTIN ABBOTT.

LAW AND LAWYERS IN LITERATURE.*

XXIII.

"PICTURES OF THE FRENCH;

A series of literary and graphic delineations of French character, by Jules Janin, Balzac, Cormenin, and other celebrated French authors," is a very entertaining book, embracing a variety of characters, from peers to pensioners, including attorneys, judges, and law students. I make a few extracts from the sketch of "The Attorney," by Altaroche:

"It might seem, at first sight, that the French attorney exercises one of those patent professions which can be known and understood by such of the public at large as will merely take the trouble to look and listen. This supposition is the more natural, as the profession is created and regulated by the law, which everybody is supposed to know. Such, however, is not the case — at least in Paris. There the attorney is not the slave of the legal text, but rather the proprietor, with all the proprietary rights of use and abuse. We might almost say, considering the animosity with which he tortures it, that he is its executioner. The country attorney has simply to follow set forms; the Paris attorney is compelled to invent and imagine."

"An attorneyship in Paris is not a possession for life, but merely a transitory employment. It is only in the country that a man dies an attorney. In Paris, an attorney's office is a kind of park preserve, well laid out, abounding with game, in which it is neccessary to purchase a license to hunt for fortune. His game bags being well filled, the sportsman resigns his snares and the key to the first comer."

"The head clerk buys an attorneyship in order to marry; the attorney in order to raise the expenses of commencing a chase after fortune."

During his courtship he is a dandy; after marriage a sloven. His office, always at his residence, is fitted up with great elegance, and is a lounging place for gossips, who bring him business out of gratitude. His head clerk generally knows more law than his principal. Most of his copying is done by students, without remuneration, who write "vaudevilles destined to be refused by the Follies Dramatiques, or love-letters to the milliner's girls round the corner."

"In his summary the Parisian attorney complicates the proceedings as much as possible, while the country attorney generally tries to simplify them. To attain his end, the provincial attorney takes the shortest way, while the Paris attorney makes a long detour, well knowing that to him the road is not sown with thorns and flints. He introduces the utmost possible number of pleadings into the same cause; he crowds proceeding upon proceeding, suit upon suit. He not only goes through all the formalities necessary to the affair in hand, but complicates it in every way that the law directly or indirectly authorizes. In a word, his talent consists in extracting from a suit all that is legally possible, and in making every squeeze advantageous to himself."

Then follows an account of the manner in which the French attorneys get up their pleadings. The folio system prevails, and if a pleading is reasonably only twenty-five folios in length, they insert in the middle a parcel of manuscript, which they keep on hand for the purpose, and serve the whole on the opposite attorney, and charge for serving — say seventy-five folios. The opposite attorney removes the injected manuscript, and sends it back in his answer, making a similar charge. And so this shuttle-cock is kept flying to and fro, and nobody suffers but the suitors.

Then we have a narrative of how a partition suit is managed:

"The *licitation* is the legal sale of an estate that cannot be divided. For instance, a house in Paris descends in heritage to two brothers. It being impossible to divide it into two portions, the brothers apply conjointly to an attorney to have it legally sold. In such a case the attorney's business would appear to be of the simplest nature. The two parties being agreed, it would only be necessary to procure the assent of the court, to a judgment drawn up by himself, authorizing the *licitation*, or legal sale, after going through the usual forms.

"But widely different is the Parisian attorney's interpretation of his duty. So simple a proceeding would not produce a sufficiently long bill of costs. Our attorney's way of going to work is as follows: Having received the written request of the two brothers, who have but one will, one common wish,

* Entered, according to Act of Congress, in the office of the Clerk of the District Court of the United States for the Northern District of New York, in the year 1870, by IRVING BROWNE.

namely, to sell as soon as possible, and share the proceeds — the attorney draws up the demand for *licitation* at Peter's request; Paul offers no opposition — far from it. But no matter; our attorney fictitiously selects for Paul another attorney, and under the name of this colleague, who kindly lends his signature (such being the custom), serves himself as Peter's attorney, with a request to hinder the *licitation* in the name of Paul.

"The reasoning urged in this process cannot be otherwise than illusory, for a *licitation* is never opposed by the law; therefore it is only an affair of form, to which no great importance is attached. The second clerk has in store an abundance of consecrated phrases for this fictitious opposition.

"In the request that he draws up in the name of the opposing Paul, he says: 'You must be aware, and unfortunately it is an observation but too well-founded, that, at the present moment, all business is stagnant, in consequence of the existing commercial crisis. Paris, in particular, has especial reason to complain of the sad effects it produces. Time was when the capitalist sought with avidity for eligible investments in houses; but now that the rage for joint-stock companies has made such rapid advances, complete discredit has fallen on all that does not offer tempting advantages to speculators and stock jobbers; buyers are therefore at a discount, and houses, no more than land, cannot be disposed of even at the most deteriorated price,' etc.

"Now comes Peter's turn. Peter replies to Paul's plea by a rejoinder; and the same clerk, after having manufactured the demand, is charged with the reply. He makes Peter speak in such terms as the following:

"'Our opponent is in error, and completely mistaken in his view of the actual state of business. Joint-stock companies have fallen into complete discredit; capital is flowing back into solid and substantial investments, exempt from the risk and hazard of speculative commerce, and confidence is universal. It would be a difficult task to find a more propitious moment to effect an advantageous sale of houses, landed property,' etc.

"We need not say that this theme may be varied at will to the same tune, and that under the pen of the second clerk, similar phrases may be spun out to an indefinite length, so as a produce two voluminous requests. Formulæ, consisting of a certain number of pages each, according to the importance of the *licitation*, are in use. If the property be of small value, the style of the request is rapid and concise as that of Paul Louis Courrier; on the contrary, if the price is considerable, the style of the request is diffuse and inflated as that of Victor Ducange or Salvandy.

"A suppositious exchange of summonses then ensues between Paul and Peter, who, after a certain time, find to their amazement, that they have unconsciously sustained a formal law-suit! Singular litigants! who, without the slighest difference of opinion, have contested in the judicial arena till their worthy attorney has exhausted his fictitious combinations."

In the chapter on "The Court of Assize," by Cormenin, are some severe remarks on public prosecutors and judges.

"Little do they understand their office and their calling, who debase the magistrate in the man, the actor, the partisan. They do not arraign the prisoner; they plead, they bawl, they rave, they rage with invective; now they arrange the folds of their black drapery in studied folds, to accuse with elegance, as the gladiators of Rome studied the attitude in which they should gracefully await the death stroke; now they mimic the gesture and voice of a tragedy-king, and fancy they are making an effect, when they are only making a noise.

"Erect at the bar, with a countenance flaming with animation, they command the jury, seated at their feet; they perplex them with gesticulation — they stun them with vociferation. I have seen jurors shut their eyes and stop their ears at the approach of these storms of rhetoric — of these deafening clamors. Pity, oh! pity for the jury, if not for the prisoners!"

"But when reality takes the place of fiction — when these same spectators sit as jurymen in court — when it is their verdict which is to kill or acquit, their thoughts assume a graver color. They bid the giddy fancies, which queen it in the brain, keep out. They have no ears but for the calmer voice of reason, no eyes but for the fact, no thought but for the thoughts of the prisoner; they question his every feature; they anxiously scrutinize his answers — his contradictions, his ejaculations, his emotions, his smiles, his pale countenance, his chill shudder. There they sit in the presence of God, of man, and of that sacred Truth which they would fain lay hold on — which they search, they demand, they implore. Waken them not from so holy a meditation — the rhetoric of all your orators is not worth a good man's conscience. No, they mistake their calling, who, as counsel for the crown, are forever straining their sinews and their jaws to stilt up a henious crime on the shoulders of a trifling misdemeanor. They mistake their calling who dress up their common truisms of morality in the jingle of poetic rodomontade, and who would scare the public, if public vengeance does not fall on the veriest trifles. They mistake their calling who apostrophize the prisoner, inveigh against his counsel, and browbeat his witnesses. They mistake their calling who do not frankly abandon the prosecution, when the evidence has brought out the innocence of the accused, but who persist in the demand of punishment, lessened by one degree. They mistake their calling who stimulate and excite the jury, the court and the audience by their impassioned metaphors, their frantic appeals to political sympathies, their rolling eyes and threatening gestures — to earn the wretched satisfaction of having it said, 'How powerfully he has spoken! How eloquent he has been!'

"The duties of that higher branch of the magistracy which occupies the bench are not less numerous than those of the lower branch which pleads at the bar. I know of no office more sacred, more solemn, or more august than that of the chief judge of the assize. The assemblage of his powers represents the triple sway of might, religion and justice. He unites the triple authority of the king, the priest, and the judge. How high an opinion ought a magistrate placed in so eminent a situation — perhaps the first in society — to have of himself, that is to say, of his proper duties, in

order to discharge them worthily. With what sagacity must he connect the thread of evidence, broken a hundred times by the tortuous skill of the advocate. To bring out truth from the contradictions of the witnesses; to compare the oral with the written evidence; to combine the analogous points of the case; to cut short doubts; to urge the questions; to lay hold of every circumstance, every fact, every letter, every admission, every exclamation, every word, every gesture, every look, every tone of voice which may give a clue to the truth; to interrogate the prisoner with gentle firmness; to exhort him to confession and repentance; to raise his fainting spirits; to warn him when he is committing himself; to direct him when he proceeds; to restrain the counsel for the crown and for the prisoner within the bounds of propriety, without checking their rightful liberty; to explain to the jury the points of law; to give the witnesses full time to reflect, and to give their answers clearly; to keep a respectful silence in the court; these are the manifold duties of the president of a court. Happy is he who can understand them — who can discharge them. But the great stumbling-block of the judge is the summing up of the evidence. To sum up is to give a clear account of the facts; to go over the evidence on either side; to examine what has been said in support of the charge, and in behalf of the prisoner, and nothing but what has been said; and to place before the jury, with logical simplicity, the questions to which their verdict is to be the answer. All summing up ought to be precise, firm, full, impartial and short.

"But there are judges who loll in their chairs, as if they were taking their ease; there are judges who sketch pen-caricatures of the people in court, who twine their fingers through their curls, who pass all the pretty women in court in review with their eye-glass, who intimidate the prisoner by the harsh and imperious brevity of their questions, who affront and put out the witnesses, bully the counsel, and provoke the jury. Some are ridiculous, and others impertinent; but there are some who are worse than either — those who give way to all their passions, as men or as partisans. They rush into the strife of politics, their weapons in their hand, their finger on the trigger; they open upon the jury all the batteries of the accusation; they throw into the shade the defense; they lump the facts of the case together, instead of clearing them up; they expatiate upon times, and places, and persons, and characters, and opinions, wholly foreign to the cause; they want to court the government, or a coterie, or a personage; they hint that what the jury still consider as a mere charge, is in their eyes a convicted crime; they point out its obvious commission, and its imminent danger; they quibble with law, and flourish with rhetoric; they supply fresh arguments, which they invent, to those which he, the public accuser, has left untouched, and excuse themselves by saying such is the language of the indictment, though the indictment says nothing of the sort, and they add a falsehood to their shame.

"Fancy the position of a prisoner who has been refreshed, who has been restored by the courageous and persuasive language of his counsel, only to be felled to the earth by the terrible weight of the judge's charge! The jury, too! the jury might be upon their guard against the vehemency of an accuser, who was only doing his daily work, and of the counsel for the prisoner, because theirs was avowedly partial language; but what protection is there against the hand that holds the impartial beam of justice? against the judge, who ought simply to report upon the cause, without letting his own opinions transpire, without disclosing the man under the robe of the magistrate.

"The jury have no vast and practiced powers of memory to retain, to compare, to arrange, and to judge the conflicting arguments bandied from side to side. What with the excitement of their feelings, and the fatigue of their duties, they yield, as all plain men do, to the last impression they have received. If that last impression be given under the form of a reiterated accusation, how heavy a weight must lie upon the conscience of that jury! how great a peril on the head of that prisoner!"

The last two paragraphs are applicable to other countries than France, and to other judges than French judges. Those judges who seem to regard themselves as helpers of the people's attorney, and to fear that they themselves suffer reproach if a prisoner is acquitted, may well ponder these sentiments.

MRS. OSGOOD

wrote the following exquisite poem, entitled "A Flight of Fancy:"

At the bar of Judge Conscience, stood Reason arraigned,
The jury impaneled — the prisoner chained,
The judge was facetious, at times, though severe,
Now waking a smile, and now drawing a tear;
An old-fashioned, fidgety, queer looking wight,
With a clerical air, and an eye quick as light.

"Here, Reason, you vagabond! look in my face;
I'm told you're becoming a real scapegrace.
They say that young Fancy, that airy coquette,
Has dared to fling round you her luminous net;
That she ran away with you, in spite of yourself,
For pure love of frolic — the mischievous elf.

"The scandal is whispered by friends and by foes,
And darkly they hint, too, that when they propose
Any question to your ear, so lightly you're led,
At once to gay Fancy, you turn your wild head;
And she leads you off in some dangerous dance,
As wild as the polka that galloped from France.

"Now up to the stars with you, laughing, she springs,
With a whirl and a whisk of her changeable wings;
Now dips, in some fountain, her sun-painted plume,
That gleams thro' the spray, like a rainbow in bloom;
Now floats in a cloud, while her tresses of light
Shine through the frail boat and illumine its flight;
Now glides through the woodland to gather its flowers;
Now darts like a flash to the sea's coral bowers;
In short — cuts such capers, that with her I ween
It's a wonder you are not ashamed to be seen!

"Then she talks such a language! — melodious enough,
To be sure — but a strange sort of outlandish stuff!
I'm told that it licenses many a whopper,
And when once she commences no frowning can stop her;
Since it's new — I've no doubt it is very improper!
They say that she cares not for order or law;
That of you — you great dunce! — she but makes a cat's paw.
I've no sort of objection to fun in its season,
But it's plain that this Fancy is *fooling* you, Reason!"

Just then into court, flew a strange little sprite,
With wings of all colors and ringlets of light!
She frolicked round Reason — till Reason grew wild,
Defying the court and caressing the child.
The judge and the jury, the clerk and recorder,
In vain called this exquisite creature to order: —
"Unheard of intrusion!" They bustled about,
To seize her, but, wild with delight, at the rout,
She flew from their touch like a bird from a spray,
And went waltzing and whirling and singing away!

Now up to the ceiling, now down to the floor!
Were never such antics in court-house before!
But a lawyer, well versed in the tricks of his trade,

A trap for the gay little innocent laid,
He held up a *mirror*, and Fancy was caught
By her image within it, so lovely she thought—
What could the fair creature be!—bending its eyes
On her own with so wishful a look of surprise!
She flew to embrace it;—the lawyer was ready,
He closed round the sprite a grasp cool and steady,
And she sighed, while he tied her two luminous wings,
"Ah! Fancy and Falsehood are different things!"

The witnesses—maidens of uncertain age,
With a critic, a publisher, a lawyer and sage—
All scandalized greatly at what they had heard,
Of this poor little Fancy (who flew like a bird)!
Were called to the stand and their evidence gave;
The judge charged the jury, with countenance grave,
Their verdict was "guilty," and Reason looked down,
As his honor exhorted her thus, with a frown;—

"This Fancy, this vagrant, for life shall be chained,
In your own little cell, where *you* should have remained,
And you—for *your* punishment—jailer shall be;
Don't let your accomplice come coaxing to me!
I'll none of her nonsense—the little wild witch!
Nor her bribes—although rumor does say she is rich.

"I've heard that all treasures and luxuries rare,
Gather round at her bidding, from earth, sea, and air;
And some go so far as to hint, that the powers
Of darkness attend her more sorrowful hours.
But go!" and Judge Conscience, who never was bought,
Just bowed the pale prisoner out of the court.

'Tis said—that poor Reason next morning was found,
At the door of her cell, fast asleep on the ground,
And nothing within, but one plume rich and rare,
Just to show that young Fancy's wing once had been there.
She had dropped it, no doubt, while she strove to get through
The hole in the lock, which she could not undo.

ROBERT CROWLEY.

"The voyce of the laste Trumpet, blowen by the seventh Angel (as is mentioned in the eleventh of the Apocalips), callying al estate of men to the ryght path of theyr vocation; wherein are conteyned xii lessons to twelve severall estats of men; which, if they learne and folowe, al shall be wel, and nothing amis," is a book printed in London, in 1550, and so scarce that I have never been able to find a copy in this country, and have become acquainted with it only by seeing a copy quoted in an old catalogue at £15, and some extracts cited in Brydges' Restitua. The lessons are addressed respectively to beggars, servants, yeomen, lewd priests, scholars, learned men, physicians, lawyers, merchants, gentlemen, magistrates and women. The following is a portion of "TheLawiar's Lesson:"

"Nowe come hither, thou manne of Lawe,
And marcke what I shall to the saye;
For I intend the for to drawe
Out of thy most ungodly waye.
Thy calling is good and godly,
If thou wouldste walke theren aryght;
But thou art so passying gredy,
That God's fear is out of thy syght.
Thou desirest so to be alofte,
That thy desyre can have no staye;
Thou hast forgotten to go soft,
Thou art so hasty on thy way.
But now I call the to repent,
And thy gredines to forsake;
For God's wrath is agaynst the bent,
If thou wilt not my warnyng take.
Fyrst, call unto thy memorye
For what cause the Laws wer fyrst made;
And then apply the busily
To the same ende to use thy trade.
The Lawes were made, undoubtedly,
That al such men as are oppreste,
Myght in the same fynde remedy,
And leade their lyves in quiet reste.
Dost thou then walke in thy callyng?
When for to vexe the innocent
Thou wilt stande at a barre, ballyng.
Wyth all the craft thou canst invente.
I saye ballyng—for better name
To have it cannot be worthye;
When lyke a beast, without al shame,
Thou wilt do wrong to get money."

WHEN DO TAXES BECOME A DEBT AGAINST THE TAX PAYER AND A LIEN ON HIS LANDS?

A correct answer to this question is incidentally given in the prevailing opinion of JOHNSON, J., in *Kern* v. *Towsley*, 45 Barb. 150, where he says (p. 152):

"Until the assessments are completed so that the amount of tax can be ascertained or determined, no tax can be said to be assessed or taxed on premises."

This statement, plainly and rightly, refers the birth or coming into existence of the tax as a debt and lien, to the annual meeting of the board of supervisors, when the board, by virtue of the statute (1 R. S. 395, part 1, chap. 13, title 2, art. 3), examine and correct the assessment roll, ascertain the aggregate amount of tax to be collected, and extend and insert the portion each tax payer is to pay in "the fifth column" of the corrected assessment roll. This is intelligible, practical, and, withal, a sound construction of the whole statute taken together, and the settlement of this question might well have been allowed to rest there; but for the fact that the question has been since incidentally discussed in the court of appeals in the case of *Rundell* v. *Lahey and Goldsmith*, as published in 1 Hand (40 N. Y.) 513, where the defendants sold and conveyed a farm to the plaintiff on the first day of September, being the same day on which the assessors delivered the complete assessment roll to the supervisor of their town, to be by him taken to the board of supervisors at their annual meeting in November, to be examined and corrected, and have the tax ascertained and inserted in it. The case appears to have been decided rather upon a subsequent verbal agreement between the parties after the tax had been levied and assessed by the board of supervisors, and the tax warrant issued to the collector, in which the tax was regularly assessed and taxed to the defendants, and on which the judgment appears to have been rightly affirmed; as the defendants were clearly "legally liable to pay the tax" as between them and the collector.

But some of the members of the court are reported as in favor of affirmance, on the ground that the defendants, as between themselves and the plaintiff, "were legally liable to pay the tax," under their covenant (the usual covenant for quiet enjoyment), in the deed, independent of the verbal agreement; while one was in favor of affirmance solely on the ground of the liability of the defendants under the verbal agreement, and one was in favor of reversal, on the ground that the tax "was no lien until laid by the board of supervisors, which was after the conveyance."

The statute referred to is contained in articles two and three, title two, chapter thirteen, part one, of the revised statutes, and prescribes the proceedings requisite to charge a tax payer and his property with the payment of the tax. Upon a careful reading of the statute, it will be found that the proceedings, to charge the tax payer and his property, consist of two separate and distinct operations, performed by different official bodies.

1. The first is obtaining an official list of the tax-payers and their taxable property, known as the assessment roll. This is the work of the assessors,

and must be completed and delivered to the supervisor of the town on or before the first day of September. And here ends the power and duty of the assessors. The object of this roll, and its only object and effect, is to furnish to the board of supervisors an accurate and reliable list of all the taxable inhabitants in the town, with a description and valuation of all the taxable property owned by each. It is an official list, made under official oath, and settles the question as to against whom, and upon what amount of taxable property, the board of supervisors, at their next annual meeting, are to distribute and levy the tax, and to this extent it is conclusively binding on all named in it, and has all the force of a judgment. But it must be remembered that it is not yet finished. No amount of tax is yet inserted in it. The amount of the tax to be collected is not yet ascertained; the time for doing this has not yet arrived; consequently it does not and cannot constitute an existing debt, lien, or incumbrance against any person or property. This debt and lien are created by operation of law, not by contract; and a debt created by operation of law cannot be said to be an existing debt or lien until the amount is ascertained, or the materials given by which to ascertain the amount by computation.

2. The second step in the proceedings to charge a tax payer and his property with the payment of a tax is: The supervisor, to whom the complete assessment roll is delivered by the assessors, keeps it in his possession until the next meeting of the supervisors in November, when he delivers it to the board, and the board of supervisors examines, equalizes and corrects it, and then, having ascertained the aggregate amount of all the tax to be collected, and the portion thereof chargeable to each town, proceeds to distribute the portion chargeable to the town among and upon the several tax payers, according to the several amounts of their property, as set down in the corrected assessment roll, and set down the amount in a "fifth column in the corrected assessment roll prepared for that purpose." When this is done the complete assessment roll becomes the "corrected" assessment roll, or tax list, and it, or a copy of it, is to be filed in the town clerk's office, and another copy, with a tax warrant signed by the supervisors, is to be delivered to the collector. When the tax is so ascertained and inserted in the fifth column of the corrected assessment roll, then, and not till then, does the tax become an existing debt against the tax payers named therein, and a lien on their land, and is binding and conclusive on them and their property, with all the force of a judgment; and every tax payer named in the roll is "legally liable to pay the tax," whether he still owns the farm assessed to him or not. And ignorance of this legal position was the shoal on which Lahey and Goldsmith were wrecked in their suit with Rundell. If they, after the tax had been levied by the board of supervisors, instead of agreeing to refund it to Rundell "in case they were legally liable to pay it," had stopped there, standing upon the covenant in the deed, and Rundell had paid it, or allowed it to be collected by sale of the land, he could not have recovered it from them; or if they had paid it themselves, under protest, to Rundell, they could have recovered it of him. It will not do to say that if they had refused to pay, and Rundell had suffered the farm to be sold to satisfy it, that "it would have been a sale to satisfy a liability of the former owner, for the reason, as shown above, that it was not, at the time of the conveyance, an existing liability; the tax was not then in existence, its amount had not been then, and could not have been then, ascertained by any law or authority in the state. The fact that proceedings had then been commenced which would ultimately result in taxing this farm to the vendors, does not alter the case as between them and the vendee. Each was equally bound to know the law and to know that the proceedings had not matured, but ultimately would mature into a lien on the farm; and, in the absence of any specific agreement on the point, the purchaser takes it subject to that contingency. Neither the covenant of quiet enjoyment, nor even that against incumbrances, reaches such contingencies.

PARKER'S REMINISCENCES OF RUFUS CHOATE.

Apropos of the new edition of Professor Brown's "Life of Rufus Choate," which has just been published, we reprint a review of Parker's "Reminiscences of Rufus Choate" — a book with which many of our readers are familiar. It is to be regretted that Choate has not been more fortunate in his biographers, but especially is it to be regretted that his own friend and pupil — one who had every opportunity to study his inner life, his every-day thoughts and habits — should have proved so poor a Boswell. The following review of Mr. Parker's book was written by the Hon. Joseph Neilson, of the New York bar, and who has recently been elected judge of the city court of Brooklyn. It is full of terse suggestions to be pondered by students, and even by authors. It is, moreover, so happy in illustration, so genial and sprightly that the criticism becomes as exquisite and pleasing as it is pungent and severe. It is gratifying to know that a lawyer of Judge Neilson's conceded learning and ability has had the time and the good taste to cultivate a style at once so forcible and so pure and musical:

This book will disappoint most readers: a fact sad and surprising, as the author had signal advantages — a young lawyer with opportunities and incentives to self-culture, and, therefore, it may be assumed, trained to habits of thought, of analysis, of criticism; competent to see things in their true relations, and to make the most of a given case.

But, over and above all this, he was favored as few mortals could be favored; he was the friend of the eccentric and special man of whom he writes; saw him as the world did, and as the world did not; was with him in hours of unrestrained converse, when he sat, reclined, talked, jested and recited, read and criticised, ate, drank, laughed, fretted and fumed as a mere man, and so got to know the king all by heart. It was as if Homer, instead of musing on the dust, had been caught up on Olympus, now and then, to hear Jove chat and discourse in all his moods, while Juno dispensed the nectar and ambrosia; and so had

got really to know something of the celestial manners and conversation.

Thus prepared and thus possessed, the voice of the departed yet lingering like well-remembered music; love, fervid and not to be restrained, thrilling and enlarging his heart, this author sits down to write as if by time, relation, destiny, some sacred election set apart to the work. Under such circumstances, if ever, the interior life, the gifts which make up the genius and character, however rare and peculiar, might be revealed and canonized. From this actual contact and fellowship, and from a sympathetic sense of brotherhood, a true insight and poetic adoption, the writer might take the subject not merely to his arms, but to his innermost spirit. This Stephens did when he depicted Ignatius Loyola with all the fervor and loyalty of a friend and disciple; this Irving failed to do when, seeing Mahomet afar off, as through a "glass darkly," he recounted his deeds and history.

But, in this case, every favoring circumstance culminated. This sweet intimacy and exchange of rare thoughts, how helping and *imposing* culture! This sovereign friendship, how inspiring! This recent death, what an illumination! This present sense of bereavement, how it lifts the contemplation to a diviner atmosphere, making one graver, wiser than before! The tone and temper of a great sorrow, terse and fervid, yet serene and hallowed, how they give grandeur, sweetness and emphasis to all the utterances, as music in its saddest office — moaning, throbbing, pensive — becomes grand and cheering as in a national ode or anthem.

In personal delineations of this nature the true author is sympathetic; his purpose fills his heart and brain, takes possession of all his faculties: he feels as one of old did when he said, "Woe is me if I preach not this gospel." Thus inspired, he writes, the hand tremulous, and eyes suffused with tears. His is the comforting assurance, however, that the emotion which melts his heart is the same emotion which shall move the hearts of all his readers. So, allied to his readers and to the future, he perpetuates his hero and perpetuates himself. Thus do men of genius build monuments to each other, the living and the dead co-ordinating and working together for a common end and benefit.

Hence, it would seem, that, if any one could have written these reminiscences in the true sense and spirit, this author should have done so; should have so depicted his august friend that for all time the young and the old might read and read on, and be satisfied.

But, alas, not so! He is not in the heart of his subject, but wanders out of doors. When he should be clear and strong, if not radiant, he is devious and uncertain, weak and literary. His performance is feeble in tone, confused in arrangement, artificial in statement, slovenly in style, crude in illustration, redundant in repetition, and commonplace; and, in respect to the dignity and ultimate object of such a work, is unjust to the memory of the remarkable personage whose genius and character it was intended to commemorate. The author, however, did what he could; he said, understood and recorded after his kind. But his spirit was moved by no special call: no angel stood by commanding him to write; and, happily, no woes were threatened to those who should "take away from the words of the book."

A competent man could have made a good book out of the author's manuscript. Having some regard for the reader's patience, and no egotism to restrain him, he would have sifted out and cast away the "glittering generalities," inanimate forms of thought and barren images — mere *debris* — making up so much of this volume; and would have given us twenty pages where now we have a hundred. He would have found warrant for this, too, in Mr. Choate's opinion of two works referred to (pp. 241, 300), either of them immeasurably superior to this book: the one, Wirt's Life, "His biographer was not quite lawyer enough to write" it; the other, a then recent volume of Lord Campbell's Chancellors, "He writes like a gossip, not as a jurist. He picks up all the exaggerated stories of the bar and retails them as gospel." Merciful Powers! what would have happened to our author if the man who uttered such condemnations could have had a prophetic view of this, his own biography? Ames, or some other of "clarion voice," might well have shouted that "awful adjuration," "*Let no man sleep in Boston this night*" (p. 292).

But, in this instance, we want the gossip and the stories; therein lies the value of the book; but, like the two Dromios, after a beating, we object to a cruel and unnecessary repetition. The gossip and the stories, with incidental expressions and opinions of Mr. Choate, not always valuable or even characteristic, are not only given, but repeated. We are told *thrice* that Mr. Choate read at late hours; *twice* that he read Baque; *twice* that, to a proper estimate, Pinkney's earlier and later arguments must be considered, and that Mr. Choate saw him in his last effort, when he was carried out of court to die; *twice* that the gothic language has not the words for the *crown speech*; *thrice* is Grattan quoted, and *twice* Kossuth, the same passages, to the same uses, each once untruly. We are told *twice* that Mr. Choate's lecture on the Sea was stolen *out of his pocket*; *twice* how ether affected him; and *twice* that hot water is a good stimulant, and that if wine be necessary for any *trying occasion* (like reading reminiscences, perhaps), brown sherry is the best. More than once remarks not worthy of Mr. Choate, nor, indeed, of any man, are repeated; as, for instance, that if he should go to Newport, he should *hang himself* upon the first tree before night (p. 55); *hang* himself by five o'clock (p. 236).

Other repetitions are useful, as contrasting Mr. Choate's simple utterance with the superlative and exaggerated method of Mr. Parker — a question of style, also of fact. Thus the one says: "For five years I studied law exclusively, and *dried* my mind." The other says: "His mind became entirely arid and desolate, so exclusively did he study law."

This is equal to the Hibernian echo in form, but worse in principle. No mind given to study ever became "entirely arid and desolate." That is not permitted.

In works of this class it is important that the person of the hero be described. But if he were the most peculiar-looking and acting man, living or dead, a

page or two might suffice. Sydney Smith mentions a chapter, in a historical work, entitled "Reptiles," the entire chapter being: "There are no snakes in Ireland." Our author is less clear and summary. Neither Ulysses, Luther, Doctor Johnson, Erskine, nor Mr. Tulkinghorn have had such prolonged, painful, and obscuring delineations; and these, too, not given consecutively, but scattered throughout the volume, like grains of gold in a mountain of sand, requiring a miner's skill and patience in the search. To assits the reader, we have brought a few of these descriptive passages together thus: "Mr. Choate's head and face and figure all equally signalize him;" "that dark, Spanish Hidalgo-looking head;" "the oriental complexion, speaking of an Asiatic type of man;" "his broad, square shoulders careen from side to side, like the opposite bulwarks of a ship;" "the corrugated, bloodless, startling look of his haggard physiognomy:" "his forehead was not high, but wide;" "the prominent eye-brows;" "the contorted lips;" "the wasted cheeks;" "the almost coffee-colored face is deeply marked," etc. "He was the handsomest *homely* man in the world." "Perhaps," says the author, "this remark may help to convey some notion of his appearance." We fear not. No one could have picked him out in the crowd.

But any thing like a *speaking likeness* was not to be expected if it be true (which some may doubt) that "as he spoke, his forehead seemed to lift, his temples to expand" (p. 88), or if "the brow lifts, swells, expands, tightens and grows white" (p. 485).

As to the eyes, we have "the flash of his own sad eyes;" "the unearthly flame of those deep eyes;" "his eyes blazing with supernatural fires;" "his eyes were dark avenues, at the bottom of which there was a great light;" "eyes blazing like a wild man of the desert;" "his unfathomable eyes burning with a basilisk glare," etc.

If it were not the author's purpose to frighten children to whom afflicted mothers may read these and the like passages, we should think them bordering on profanity.

With the abatement of the simple element of *fire*, Mr. Parker's description and use of Mr. Choate's hair, in passages curling and entangled, through many pages, are equally touching and extravagant.

Thus, as nervous travelers describe a lion, does this unrelenting author describe this lion of the Boston bar, and so reminiscences may be made up. We commend him, for the next edition, to a few lines from Coleridge, more to the purpose, and, if amplified through five chapters, more telling and descriptive:

> "Beware, beware!
> His flashing eyes, his floating hair!
> Weave a circle round him thrice,
> And close your lips with holy dread,
> For he on honey dew hath fed,
> And drank the milk of Paradise."

In his desire to be emphatic, the author sometimes offends the moral sense and good taste of his readers: "The client was Choate's God" (p. 305); "clients worshipped him as a God" (p. 192); "next to his God he believed in Daniel Webster" (p. 66).

There are no words in the *Gothic language* strong enough to reprobate such writing as it deserves.

The author says of Mr. Choate, "with all his energy, he was never a profane man" (p. 87). The theory that morals depend upon temperaments has never before been so applied. It would be more sensible to suppose that one who was jolly, indolent or frivolous would blaspheme, than to couple, as is naturally allied, the earnestness that elevates and dignifies a man with that which would degrade and brutalize. Indeed the connection and dependence of the parts of this grave statement are about as clear as in the English epitaph: "She was own cousin to Lady Willoughby, did fine needlework, painted in water colors, and of such is the Kingdom of Heaven."

In 1855 Mr. Choate was injured by a fall (pp. 56, 57). The consequent illness, we are told, "was the first blow to the exertion of his powers." "His oratory, too, underwent a marked revolution. He no longer tore a passion to tatters." Had he previously done so? We deny it. A man of severe taste and ripe culture, had he not the sense to appreciate Hamlet's advice? What is the suggestion? that he no longer tore a passion to tatters is put as the evidence of his decline, the revolution, rather, in his oratory.

Somewhat akin to this, and not less treasonable to Mr. Choate's career, and to the profession in its highest department, is a statement which the author quotes with apparant approbation (p. 161), "The jury advocate must, to some extent, be a mountebank, if not a juggler or a trickster." A more miserable conceit was never uttered, yet it finds a place in this book as if replete with instruction. Was Mr. Webster, while before a jury, a mountebank, a juggler, a trickster? Was Erskine, or Wirt, or Dexter, or Hamilton? *Was Rufus Choate?*

Uncharitable things have been said of many great advocates; but, as an illustration, the worst thing ever said of Choate was, that he could play the *artful dodge* in reading an affidavit. That was but a rude description of fine, forcible, effective, reading; reading which gives significance and character to vital passages, discloses the latent sense and spirit, aids the apprehension, and receives a certain, and it may be, a favorable interpretation. Such a reader, natural, yet artistic, "tells the great, greatly; the small, subordinately;" and thus we have heard Macready play the artful dodge; thus Fanny Kemble Butler; thus the gentle Melancthon may have read; thus every pulpit orator, from Whitfield down.

A merely clever man, with no high aims or love of truth; a wordy, sharp, false man, however adroit and plausible; the artful dodger, the mountebank, juggler, trickster, can never, in the proper sense, be a jury advocate. With all his gifts and acquisitions, the advocate must be a high-toned, moral man, not a harlequin; a vital utterance, not a mere sham. Jurors are representative men, coming from the entire circle of the social zodiac, and are practical, sensible, and often sagacious men, as fond of fair dealing in counsel as in suitors. Hence, in cases involving life, liberty, or character, an able advocate goes to the jury in a spirit akin to that which Esther went in before the king to plead for her people. At such an hour he indulges in no mere fancies, his style becomes a reflect of his own mind and heart; if, as in Mr. Choate's efforts, a flash of poetic thought or beauty gleams forth, it is merely because the vision is in his spirit, and reveals itself as naturally as the simplest

conception. He is not the less dealing with realities, after his fashion.

Still, the crowning power, enriching, dignifying, and making useful all studies, wherewith to reach or influence a jury, is common sense; and the perfection of manner is that which is the most simple, natural, and truthful. It was because of his more massive common sense that Webster was a better jury lawyer than Mr. Choate. It was the same quality of mind, possessed in large measure by each, that distinguished Martin Van Buren, Thomas J. Oakley, and Jeremiah Mason while at the bar; and that would have made Silas Wright controlling with a jury.

The most difficult part of an advocate's duties, however, is the examination of witnesses. In this Mr. Choate excelled. But his advice to our author on the subject (p. 304): "Never come down upon a witness, unless you are satisfied yourself that he is lying," is good, but inadequate. Can you satisfy the jury that he is lying? If not, it will be suicidal to come down upon the witness. If the experiment must be tried, however, exercise the utmost skill, prudence, and caution, or the jury will reprobate your severity, and sympathize with the witness.

Mr. Choate's treatment of witnesses was generally considerate and fair, as many of the profession know, and as appears from parts of this volume; yet, when the author makes an allegorical dash at the subject, he gives us pain peculiar to railroad travel and accidents. "But, if it became necessary; if the witness lay athwart his verdict, he was crushed down, and crushed up, and marched over." (p. 25.) How a witness could lay athwart a verdict not yet obtained; or, indeed, athwart any verdict; or why, being down on the verdict, he should be crushed down, does not appear; nor is this murderous attack upon a prostrate witness quite consistent with the fact, that, "If he wished to break a witness, he made no direct assault upon him." (p. 177.)

But inconsistencies and errors, indicating want of attention, give us less concern than the author's style or mode of statement, inasmuch as this book is dedicated to young men whose taste may not be quite incorruptible. He indulges in mixed metaphors and extravagant forms of speech, condemned by Blair and eschewed by Addison and Goldsmith; he is as fond of the superlative as if Emerson had not warned him that the person who "uses the superlative degree puts whole drawing-rooms to flight." He likes to tell a plain thing in a marvelous manner, and forgets that honest substantives should be allowed to perform their office, unattended by troops of adjectives, as men of dignity walk the streets without parading their lackeys and retainers. Hence, we have, as to Mr. Choate's active brain, "his head expanding with a thousand thoughts" (p. 135); as to his rapid study and apprehension, that "he grasped the thoughts of a book like lightning" (p. 81); as to the impression he made upon a jury, that he would "launch upon him" (a juror) "a fiery storm of logical thunderbolts" (p. 141); "hurl his argument home in solid, intense mass that crashed upon the ear;" that he "dashed his view into their minds with all the illuminating and exaggerating lightnings of his portentous passion" (p. 100); as to his exhaustive argumentation, that he "advanced with a diversified but long array, which covered the heavens; thunderbolts volleying, auroras playing, and sunlight, starlight and gaslight shooting across the scene with meteoric radiance" (p. 180); and as to his power to excite an audience, that "it was literally almost as if a vast wave of the united feeling of the whole multitude surged up under every one's armpits" (p. 493).

To turn from such reading to the vital portions of the book, Mr. Choate's own sayings, is like passing from the gloom of the ravine to the grandeur and serenity of the mountain side. The extracts from his speeches are terse, epigrammatic and exhilarating, though they must lose some of their original power, somewhat as brilliant passages, selected from an opera, move us less than when heard in their true connection. The two articles written by Mr. Choate, and now happily rescued from a Boston paper, are simple, clear and musical — the perfection of language.

We have always had a fondness for Mr. Choate, the unique man of his day, so brilliant, yet so logical. Thanks to the author, we now see him in new phases of life, and learn many things about him unknown before. But we close the book, and muse in sadness. Poor Choate! What severance and alienation from sources of life, health, and elasticity! He had no Ashland, no Marshfield, no Sunnyside; no flocks or herds; no fields of golden grain; but the school, the closed study, the dusty street, the crowded forum; so half his nature was stifled in its growth, if not killed. How, through life, he turned blindly from the smiling mother earth, when, as only a true mother can, she would have comforted and soothed him! How he looked on coldly, while his school-fellows enjoyed sports ordained for him! How, in later years, he read, and read when a gorgeous sunset or a waving forest would have fed his famished spirit! How he brooded about books, as he passed inspiring landscapes, and felt no thrill as they spoke to him! How he treasured up and tried to love a piece of cold statuary, but had no interest in the perfection of form and motion — man's friend in service — though "he trots the air, and the earth sings as he touches it;" though "his neigh is like the bidding of a monarch, and his countenance enforces homage."*

Yet, as the Caliph Omar, whose drink was water and whose food was barley and dried fruits, achieved conquests, so this idealist, a stalwart student, toiled and conquered. He saw his vocation, and, without faltering or repining, accepted it; not the vocation of the statesman, diplomatist, or magistrate, of the poet or reformer, but that of a mere *pleader* — the representative of those who, being dumb, need an advocate. Had he been proud, austere, exacting, or imperious, no one would have wondered; but he was neither. In his courtesy to his brethren at the bar; in his kindness to his juniors — too sovereign to seem like condescension; in his fidelity to his clients; in his genuine spirit and sweetness of temper; in his freedom from egotism; his love of study and submission to labor, he dignified a weary life, and, as we believe, a useful one. But, by his own thoughts and

* Mr. Parsons says he took Mr. Choate down to the country where there were some remarkable fine horses, but he could hardly get Choate to look at them.

words, rather than from the feeble speech of friends, is he to be judged; they *testify of him;* and upon the case thus prepared and to be submitted to a jury of the whole country, he, who for many years pleaded so earnestly for others, puts in a final plea for himself. Let him be kindly judged.

The indulgence with which this book has been received by the public and by the press must be ascribed, in some measure, to the fact that it belongs to a department of letters much neglected. Reminiscences and biographies of lawyers and jurists are seldom written. Many of the most eminent of these men are only brought to mind as we turn the leaves of the law reports; and others of them who have left the field of labor so recently that we seem still to hear the echoes of their retiring steps — the Spencers, David B. Ogden, the Sanfords, Duer, Oakley, Ogden Hoffman, are only, or mainly, to be thus announced to the next generation. Thus, as otherwise, do we "bury our dead out of our sight." Even that most pure and useful of men, Benjamin F. Butler, has no memoir, save a few words of sorrow uttered by the New York bar. At this time the only work of the kind in preparation, so far as we know, is the life of Alvin Stewart, a man who could, by a word or look, convulse or hush a crowded court; a man who had as much wit and was as special as Mr. Choate. Hence, when any member of the profession can break in upon this silence, and lessen the sin of this ingratitude and neglect, by shadowing forth the daily life of an eminent lawyer or jurist, we hail him as a benefactor. If an author meets with such favor as to encourage others qualified to labor in such a field he will confer a great and lasting benefit.

With this number closes the first volume of the LAW JOURNAL. We have prepared an index to the contents of the volume, which will be sent to subscribers with the next number. With the opening number of the new volume, we shall commence an interesting series of sketches of "Oriental Laws and Lawyers," by Dr. J. V. C. Smith, ex-mayor of Boston, which embody the observations of the writer while traveling in the Orient. We have also made arrangements with Austin Abbott, Esq., now on his way to Europe, to contribute to our pages his observations and impressions of legal matters in the countries visited by him. Irving Browne, Esq., author of the series of articles on "Law and Lawyers in Literature," will contribute a series of sketches of "Eminent English Judges;" also articles on miscellaneous subjects. The Hon. John W. Edmonds, F. W. Hackett, Esq., of Boston, L. B. Proctor, Esq., of Dansville, N. Y., John F. Baker, Esq., of New York, the Hon. Edmund H. Bennett, of the Harvard law school, and many other able writers will also contribute articles on subjects of interest from time to time. The LAW JOURNAL has already reached the largest circulation of any law periodical published in the country, and no effort will be spared to increase its interest and value.

The bill fixing the salaries of chief justices and associate justices of the territories has been signed by the president.

CURRENT TOPICS.

We are glad to notice that Rutgers College, at its recent commencement, conferred the honorary degree of LL. D. on the Hon. Henry Hogeboom, justice of the supreme court of the state for the third district. Judge Hogeboom is known throughout the state as a lawyer of the most profound learning — a judge of the highest integrity and ability, and a gentleman of the most liberal culture. Rutgers could not have more worthily bestowed its honors.

On Monday next the new court of appeals and the commission of appeals will meet at the capitol and organize. On the day following both the court of appeals and the commission of appeals will commence terms for the hearing of causes. It is announced on the authority of the clerk of the court of appeals that the court will only sit for a week, and that it will hear no cases unless both sides are anxious to have a hearing. No cases will be forced on, and no defaults will be taken.

Governor Hoffman has appointed Hiram Gray, of Chemung, and William H. Leonard, of New York, commissioners of appeal, and William L. Learned, of Albany, justice of the supreme court, vice Judge Peckham, elected to the court of appeals. Judge Gray was appointed circuit judge under the second constitution, by Governor Wright, in 1846, and his term was continued, by popular vote, in 1847, under the present constitution. In 1851 he was again elected as justice of the supreme court, and served out the full term of eight years. He won a wide reputation as an able judge and a sound lawyer. Judge Leonard was elected justice of the supreme court for the first district in 1859. He is an able jurist, and is particularly qualified, both by experience and learning, to discharge the duties of the office to which he has been appointed. Mr. Learned is a graduate of Yale, and has been a practicing lawyer at the Albany bar for a quarter of a century. He is a gentleman of most liberal culture and a well-read and capable lawyer. His selection gives much satisfaction to the profession of the third district.

Notwithstanding the many predictions to the contrary, the senate has confirmed the nomination of Amos T. Akerman as attorney-general. The president having signed the bill creating the department of justice, the new attorney-general will become the head of that department. The bill establishing this department was introduced by Mr. Lawrence, of Ohio, and is drawn with great care. It provides that there shall be an executive department of the government, to be called the department of justice, of which the attorney-general shall be the head; that there shall be in such department a solicitor-general, and two assistants of the attorney-general, and that the solicitor of the treasury, and his assistants, the solicitor of the internal revenue bureau, the naval solicitor, and judge-advocate general, and their clerks and assistants, and the examiner of claims in the state department, shall be transferred to the department of justice. The attorney-general is required to report to congress annually, and is to have the same charge of the patronage and disbursements in his depart-

ment that the other heads of departments have in theirs — including the control of the district attorneys and marshals, etc., throughout the Union. All legal questions and law matters relating to the government are to be settled by the department of justice, and the heads of other departments are prohibited from employing legal counsel at the public expense, in any case, and no extra counsel can be employed by the attorney-general, except as hereafter authorized by law. In this respect alone the new department will save to the government at least a hundred thousand dollars annually. The act went into effect yesterday, and the new department will be organized as soon as Mr. Akerman assumes charge of his duties.

That human laws are not the perfection of justice as well as of reason was exemplified by a decision of the registers' court of Philadelphia, on the 18th ult. George A. Alter and Catharine, his wife, had mutually agreed to make their wills, giving to the other the property he or she possessed. Two wills were prepared for execution, and, as was supposed, were duly executed. The husband died, and on examining the envelope containing, as was thought, his will, it was discovered that the husband had signed his wife's will, and the wife the husband's. In this dilemma the wife applied to the legislature, and an act of assembly was passed authorizing her to file a petition stating the facts, and upon proof of "the alleged mistake" to the satisfaction of the registers' court, that tribunal is clothed with "the powers of a court of chancery," and is authorized "to reform said paper-writing," and "to have entered in the office for the register of wills in and for the city and county, the said paper-writing, which he (George A. Alter) intended to execute as his last will and testament, as if the said writing had been signed by him, with his own hand and seal, and not by his said wife Catharine." But the court has decided that no process of legal ingenuity, aided by legislative action, can reform the instrument so as to make it the will of the husband. The court argued that, while deeds, contracts, and wills have been reformed, the effort has invariably been to find out the intention in an instrument having a legal existence, and not to execute a paper. A case was cited from 14 Jurist, 402, where the prerogative court of England refused probate in a cause precisely like the one at bar, except that the parties executing the supposed wills were sisters. The court based its decision that the legislature had no power in the matter — on the article in the bill of rights, which declares that no man shall be "deprived of his life, liberty, or property, unless by judgment of his peers or the law of the land;" and held that by "law of the land" is meant "a pre-existent rule of conduct declarative of a penalty for a prohibited act; not an *ex post facto* rescript or decree made for the occasion."

The appointment of Mr. Akerman as attorney-general recalls an anecdote relating to him that occurred in 1866, and was quite extensively circulated at the time. Just after the superior court of Georgia had opened its session at Lincolnville, Col. Akerman, one of the Grant electors for the state at large, entered the court-room and said: "May it please your honor, I have come to this place for the purpose of transacting business as an attorney of the court. The keeper of the only hotel here, with whom I have been in the habit of putting up for many years, informs me that he fears that he may be injured if he receives me, because a large number of citizens of the county have threatened to withdraw their patronage from him if I am entertained at his house. He has no personal objection to me, and says that the persons who urge him to reject me make no objection except on account of my politics. For my politics I am responsible to my conscience. As long as my conscience approves them I shall not change or modify them in the slightest degree to humor the citizens of Lincoln county who have interfered between landlord and guest. I am not willing to be the occasion of injury to him. I am not disposed to inquire into the extent of my rights under the law prescribing the obligations of inn-keepers. There is no private family here whose hospitality I would ask or accept in the present circumstances. Being unable to attend to my business in this court for the reasons that I have given, I request that the cases in which I am employed may stand continued for the term." Gen. Toombs, being present, opposed granting the continuance, contending that the ground was not authorized by law. Presiding-Judge Andrews said that he deeply regretted the state of things disclosed in the application. If the law did not provide for it, the omission was because the makers of the law never suspected that such a thing would happen in a civilized community. He valued Col. Akerman as an able and skillful practitioner, and it was mortifying to him to learn that such a feeling existed in the circuit. A non-resident attorney must stay somewhere in the place. He would not require of Mr. Akerman an impossibility: therefore he granted the application.

DIGEST OF RECENT ENGLISH DECISIONS.

(Q. B. refers to Queen's Bench; C. P. to Common Pleas; Ex. to the Exchequer; P. C. to the Privy Council; Ch. to Chancery, and L. J. R. to Law Journal Reports.)

BANKRUPTCY.

Sale by husband to wife: furniture: separate use: bill of sale: apparent possession. — A husband, in consideration of an advance made to him by his wife of her separate property, agreed by parol to settle the furniture in their residence to her separate use, and subsequently assigned it to a trustee for her by a deed poll which was registered as a bill of sale, but the registration turned out to be void. The husband afterward became bankrupt. *Held*, that his assignee in bankruptcy was entitled to the furniture. *Ashton* v. *Blackshaw*, Ch., 39 L. J. R. 205.

COMPANY.

1. *Transfer of shares to a trustee to escape liability: costs: appeal from orders in chambers.* — Where a holder of shares in a company, which were quoted in the market at a large discount, transferred the shares to a person of unsubstantial means, apparently intending to retain control over them, although the transfer purported on its face to be made upon a sale, — *Held*, on the company being subsequently wound up, that the trasferor ought to be held liable on the shares; and on an application made under section 35 of the companies' act, 1862, the transferor's name was restored to the register of members. *In*

re the Bank of Hindustan, China and Japan; Kintrea's case, Ch., 39 L. J. R. 193.

2. *Borrowing powers of directors: debt already due: assignment of call about to be made.* — Assignment by directors, in consideration of further time being given for payment of a debt already due, of a call already determined on, and made a few days afterward, — *Held*, not an interference with the discretion which directors are bound to exercise in making calls, and consequently a valid assignment, enforceable after an order to wind up under supervision. *In re Sankey Brook Coal Co.* (*Lim.*), Ch., 39 L. J. R. 223.

COMPROMISE OF SUIT.

Married women: petition. — The court has jurisdiction to bind a married woman, by giving sanction to a compromise of a suit instituted by her husband in her name and his own, with reference to her reversionary interest in personal estate. On the petition to sanction the compromise, she must appear separately from her husband. *Wall* v. *Rogers; Wall* v. *Ogle*, Ch., 39 L. J. R. 204.

CONTRIBUTORY.

1. *Forfeiture of shares: ultra vires.* — The owners of mines formed in 1835 a joint-stock company for working the mines by dividing the mining property into a certain number of shares, and after distributing a part of such shares among themselves, allotting the remainder to the public at 40*l.* per share, payable by installments to the said owners. The deed of settlement of the company provided for the forfeiture of the shares on non-payment of the installments due thereon, and reserved powers for increasing the capital of the company by augmenting the amounts of the shares, and for altering the articles of the company. Under a subsequent deed the share certificates were made transferable by delivery. In 1866, in order to raise additional capital of the company, and with the view of having the company registered as a limited company, resolutions were passed by general meetings of the company, that the amount of the existing shares should be increased by 10*l.* per share, payable by installments, and in default of payment, that the share should be forfeited, and that the holders of share certificates should return their certificates, with their names and addresses, before a given day, or in default that their shares should be forfeited. The holders of a number of shares did not send in their certificates by the day named, and their shares were accordingly declared forfeited. The company was shortly afterward registered as a limited company, the list of shareholders sent in to the registrar comprising the names of those only who had sent in their certificates in compliance with the above resolution. On the company being subsequently wound up, — *Held*, that the shares of the members of the old company who had not sent in their certificates had been effectually forfeited, and they were not liable to be placed on the list of contributories to the new company. *In re the Royal Copper Mines of Cobre Co., Kelk's case, and Pahlen's case*, Ch., 39 L. J. R. 231.

2. *Register of shareholders.* — A sold shares on the stock exchange; the name of B, who had not bought them, was given as that of the ultimate purchaser. A executed a transfer to B, whose name was placed on the register of shareholders, though he had not executed the transfer. B compelled the company to remove his name. Afterward the company was wound up. A was made a contributory. *Re Merchants' Co., Heritage's case*, Ch., 39 L. J. R. 238.

COPYHOLD.

Right of heir to be admitted before devisee has claimed admission. — Upon application for a mandamus to the lord of a manor to admit the infant heir of a deceased copyholder, it appeared that the deceased, having been admitted to his tenements, died seized of them, and, by his will, devised them to trustees for the benefit of his family. The trustees were, by the will, appointed guardians of the infant heir. The trustees proved the will, but did not ask for admittance as devisees. They, however, as guardians, demanded admittance on behalf of the heir, but the lord refused to admit him on account of the devise in the will. *Held* (dubitante MELLOR, J.), that the court, in the exercise of its discretion, could not grant the mandamus, as it would enable the devisees to avoid the performance of their duty as trustees, and as it was clear that the application was not made *bona fide* on the part of the heir, but merely for the purpose of reducing the amount of the fine which would otherwise be payable on admission. *Regina* v. *Garland*, Q. B., 39 L. J. R. 86.

DAMAGES.

1. *Misrepresentation of authority to sell land: statute of frauds: telegram: authority to sell: advertisement.* — Defendant, professing to be agent for the owners (he being one of them) of an estate, entered into a contract of sale of it to plaintiff; some time afterward he wrote to say that there had been some misunderstanding, that he thought he was authorized to sell, but that it appeared that the parties interested took a different view; the owners refused to complete, and sold the estate for a larger sum than that offered by plaintiff; plaintiff then brought an action against the owners, when, in answer to interrogatories, they (including defendant) swore there was no authority, but plaintiff still prosecuted the action on the ground that an advertisement, stating that to treat and view the property applications were to be made to defendant, was sufficient authority, and was nonsuited; he then brought an action against defendant for misrepresentation of authority. *Held*, that he was entitled to recover as damages, first, the cost of investigating title; secondly, the costs of the previous action up to the time of the answers, and a reasonable time to consider them, but not beyond; thirdly, the difference between the contract price and the market value, of which the price for which the estate sold was *prima facie* evidence; but could not recover loss on cattle, etc., bought in contemplation of the completion of the purchase. *Godwin* v. *Francis*, C. P., 39 L. J. R. 121.

2. Where, in answer to an offer to buy land, written and signed instructions of acceptance are given in the usual way to a telegraph company to be telegraphed, and a telegram is sent in the usual way in accordance therewith, there is a sufficient contract in writing within the statute of frauds. *Ib.*

3. An advertisement of sale of real estate, stating that to treat and view the property applications are to be made to certain named persons, does not hold them out as authorized to enter into a contract of sale. *Ib.*

EVIDENCE.

Copy policy: non-existence of original: when question of fact upon which admissibility depends is for the judge. — In an action upon a policy of marine insurance, defendant pleaded a traverse of the insurance. At the trial plaintiff gave evidence that the usual course of business was, that, upon execution of a policy, a copy was delivered by the underwriter's broker to the assured, but the original remained in the hands of the broker till the payment of the premium; he proved that a document purporting to be a copy policy had been delivered to him by defendant's broker, and having given notice to defendant to produce the original, and it not being produced, he tendered the copy in evidence to prove the existence of a duly stamped and executed policy. Defendant's counsel then proposed to call witnesses to show that no such policy as alleged had ever been executed, and asked the judge to hear this evidence, and decide upon it as a necessary preliminary to the admissibility of the copy. The learned judge refused to do so, and admitted the copy. *Held*, that he was right in so doing, inasmuch as by doing otherwise he would have decided the issue, which was for the jury. *Boyle* v. *Wiseman* distinguished. *Stowe* v. *Querner*, Ex., 39 L. J. R. 60.

LANDLORD AND TENANT.

Lease: liability of assignee for breaches of covenant committed during the time of their being assignees: implied contract with original lessee: privity. — Plaintiff being the lessee of certain premises assigned to A B, who assigned to defendants, who committed breaches of the covenant in the lease, and then assigned over. Plaintiff was subsequently sued by the lessor for the breaches of covenant committed while defendants were assignees. He now sued defendants for the amount which he had had to pay the lessor in respect thereof. *Held*, per CHANNELL, B., and PIGOTT, B., dissentiente CLEASBY, B., that plaintiff was entitled to recover. Per CLEASBY, B., that plaintiff was not entitled to recover, there being no privity between plaintiff and defendants. *Mule* v. *Garrett*, Ex., 39 L. J. R. 69.

LIMITATION, STATUTE OF. See *Trust and Trustee.*

MARRIAGE SETTLEMENT.

1. *Covenant to settle after acquired property: property acquired by husband's will falling into possession after husband's death.* — A marriage settlement, made in 1828, contained a joint covenant by the husband and wife to concur and join in conveying and settling upon the trusts of the settlement, all property, real or personal, which the wife, or the husband in her right, might thereafter become entitled to or interested in, under the will or intestacy of, or by gift from the wife's father, or under the will or intestacy of, or by gift from any other person or persons whomsoever. The husband died in 1843, having by his will, made in 1841, left all his property to his wife absolutely. *Held*, that the covenant did not apply to the property acquired by the wife under the husband's will. *Dickinson* v. *Dillwyn*, Ch., 39 L. J. R. 266.

2. The wife's father died in 1836, and under his will she became entitled, in reversion, to a sum of 100*l.* which did not, however, fall into possession until after the husband's death. *Held*, notwithstanding, that this was subject to the covenant. *Ib.*

3. *Covenant to settle after acquired property: gift by husband's will to wife of property acquired after the coverture.* — A joint and several covenant by intended husband and wife to settle after acquired property applies only to property acquired during coverture, and does not, therefore, operate on property coming to the wife under her husband's will. *Carter* v. *Carter*, Ch., 39 L. J. R. 268.

(*To be continued.*)

THE COURT OF APPEALS.

A list of the first fifty causes on the Calendar for the commissioners of appeals for the term of their court to commence on the first Tuesday of July, 1870:

14. Westbrook *v.* Jackson.
82. Decker *v.* Saltsman.
44. Woodgate *v.* Fleet.
84. Corning *v.* Troy Iron and Nail Factory.
85½ Lorimer *v.* Stephens.
101. Supt. of Poor of Cortland Co. *v.* Supt. of Poor of Herkimer Co.
107. Hunt *v.* Johnson and or's.
109¼ Cromwell *v.* The Brooklyn Fire Ins. Co.
110. Stuart *v.* The Columbian Insurance Co.
111. Reeve, rec., etc., *v.* Johnson.
112. Hudson *v.* Caryl.
113. Howell *v.* Knickerbocker Life Ins. Co.
114. Palmer et al. *v.* Darling et al.
115. Conger *v.* Aernum.
116. Charter et al. *v.* Otis.
117. Wise and ano. *v.* Chase et al.
117½ Tremper *v.* Conkin, Sen., etc.
118. Austin, rec. etc. *v.* Groesbeck, impl., etc:
119. In the matter of the Buffalo, New York and Erie Railroad Co., and Patchen and John A. Stevens, trustee.
120. Pratt and ano. *v.* Chase.
121. Shreve et al. *v.* Chase.
122. Kavanaugh and ano. *v.* Beckwith.
123. Brotherson *v.* Consaulus.
124. Saratoga County Bank et al. *v.* King and ano.
125. Price *v.* Hartshorn.
126. Burden *v.* Sedgwick and ano., impl'd etc.
127. Gould *v.* Gould.
128. Rittenhouse et al. *v.* The Independent Line of Telegraph.
129. Newell *v.* Warren.
130. Sanger *v.* Murray.
131. M. Monneis *v.* McKenzie, impl'd, etc.
192. Wetmore and ano. *v.* Goetzman.
133. Terwilliger *v.* Brown, impl'd, and others.
134. Clark *v.* Cottrel.
135. Dustan *v.* McAndrew and ano.
136. Wilkins *v.* Earl and ano.
137. Barttell and ano. *v.* Main.
138. Hammott *v.* Linnman and ano.
139. Knight *v.* McDonough.
140. Dudley *v.* See et al.
141. Clapp and ano. *v.* Schutt and ano.
142. The Star Steamship Co. *v.* Mitchell.
144. Underhill *v.* North American Kerosene Gaslight Company.
145. Sauer *v.* Chretien, impl'd, etc., and ano.
146. Wells *v.* Yates.
147. Livermore and ano. *v.* Northrop
148. Peck et al., assignee, etc., *v.* Crouse and ano.
149. McAuliff *v.* Eighth Avenue Railroad Co
149½ Van Rensselaer *v.* Akin.
150. The City Bank *v.* The Rome, Watertown and Ogdensburgh Railroad Co.

E. O. PERRIN, *Clerk.*

TERMS OF THE SUPREME COURT FOR JULY.

1st Monday, Special Term (Chambers), New York, Brady.
1st Monday, Special Term (Motions), Kings, Pratt.
1st Monday, Special Term, Dutchess, Barnard.
2d Monday, Circuit and Oyer and Terminer, Belmont, Daniels.
1st Tuesday, General Term, 3d Department, Plattsburgh, Miller, Potter and Parker.
3d Tuesday, Special Term, Broome, Parker.
Last Monday, Special Term, Livingston, Johnson.
Last Tuesday, Special Term, Albany, Hogeboom.
Last Tuesday, Special Term, Delaware, Murray.

LEGAL NEWS.

Daniel McFarland writes from Indiana that he has made all the necessary arrangements for the setting aside of the divorce granted to his wife, and also that he is confident of success.

The bar of West Tennessee held a meeting in Jackson, recently, and issued a call for a convention in Nashville on Monday, July 11, to nominate candidates for supreme judges from each of the three grand divisions of the state, to be supported at the election in August.

Gov. Hoffman has appointed the following persons, under the concurrent resolution of the last legislature, commissioners to visit the several prisons and report on the question of convict labor: E. C. Wines, secretary of the prison association; Thomas Fencer, lodge 105, knights of St. Crispin, representing the workingmen's union, and Michael S. Meyers, of Auburn.

NOTICE TO THE NEW YORK BAR. — The jury and equity calendars of the court of common pleas will be renumbered, and the call of the cases will be resumed in October next, of such dates of issue as were entitled to be called at the adjournment of the June term. Notes of issue must be filed for the new calendars on or before the first day of August next, stating the number of the cause on the present calendar, and the fee required by the act passed May 2, 1870, in relation to jurors, &c., must be paid, in addition to the stenographer's fee, or the cause will not be continued upon the calendar. A new calendar will be made up for the trial terms of the superior court for the October term. All notes of issue for causes now on the calendar must be filed before the first day of August, or the same will not appear upon the new calendar. Such notes of issue must contain the date of the issue and the number of the cause on the present calendar. The jury fee of $6 must be paid upon filing the note of issue. In cases where the stenographer's fee has not been paid, an additional fee of $3 will be required. For all notes of issue of cases not now on the calendar the stenographer's and the jury fee must be paid upon filing the same.

NEW YORK STATUTES AT LARGE.*

CHAP. 431.

AN ACT to amend an act entitled "An act to allow the trustees, directors or managers of incorporated asylums to bind out orphans or indigent children surrendered to their care," passed April fifth, eighteen hundred and fifty-five, and to provide for the custody of such children.

PASSED April 27, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The trustees, directors or managers of any incorporated orphan asylum or institute, or home for indigent children, may bind out any orphan or indigent child, if a male, under the age of twenty-one years, or if a female, under the age of eighteen years, who has been or shall be surrendered to the care or custody of said society by the parent or guardian thereof, or placed therein by the superintendent of the poor of the county, or the overseers of the poor of any city or town in the county within which said asylum or institute is located, to be clerks, apprentices or servants until such child, if a male, shall be twenty-one years old, or if a female, shall be eighteen years old, which binding shall be as effectual as if such child had bound himself or herself with the consent of his or her father,

§ 2. In case of the death of the father of any indigent child, or in case the father shall have abandoned his family, or neglected to provide for them, the mother shall be the guardian of said child for the purpose of surrendering the said child to the care and custody of said society, and, in case of the death of both parents, the mayor of the city, or the supervisor of the town within which the said asylum or institute may be located, shall be, ex officio, the guardian of said child for the purpose of enabling said trustees, managers or directors to bind out such child.

§ 3. The father of any indigent child, or, in case the father shall be dead, or shall have abandoned his family, or neglected to provide for them, the mother may, by a written instrument, commit the guardianship of the person and custody of said child to the directors, trustees or managers of any incorporated orphan asylum or institute upon such terms, for such time, and subject to such conditions, as may be agreed upon by the parties; and, in case of the death of both parents, the guardian of said child, legally appointed, may, with the approval of the court or officer appointing him, to be entered of record, commit to such asylum the guardianship of the person and custody of said child in the same manner and upon the same terms that the parent might, as herein provided.

§ 4. The provisions of sections eight, nine and ten of article first of title fourth of chaper eight of part second of the revised statutes shall apply to all cases of binding under this act.

CHAP. 559.

AN ACT to amend an act entitled "An act for the preservation of the public health," passed April tenth, eighteen hundred and fifty.

PASSED May 2, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. For the purpose of facilitating the proceedings of boards of health of towns and villages, the third section of the act entitled "An act for the preservation of the public health," passed April tenth, eighteen hundred and fifty, is amended by adding the following clause thereto:

9. To impose penalties for the violation of, or non-compliance with, their orders and regulations, and to maintain actions in any court of record to collect such penalties, not exceeding one hundred dollars in any one case, or to restrain by injunction such violations, or otherwise to enforce such orders and regulations.

§ 2. This act shall take effect immediately.

CHAP. 568.

AN ACT in relation to telegraph companies.

PASSED May 2, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. In order to perfect and extend the connections of telegraph companies in this state, and promote their union with the telegraph systems of other states, any telegraph company organized under the laws of this state may lease, sell, or convey its property, rights, privileges, and franchises, or any interest therein, or any part thereof, to any telegraph company organized under, or created by, the laws of this or any other state, and may acquire by lease, purchase, or conveyance the property, rights, privileges, and franchises, or any interest therein, or any part thereof, of any telegraph company organized under, or created by, the laws of this or any other state, and may make payments therefor in its own stock, money, or property, or receive payment therefor in the stock, money, or property of the corporation to which the same may be so sold, leased, or conveyed; provided, however, that no such purchase, sale, lease, or conveyance by any corporation of this state shall be valid until it shall have been ratified and approved by a three-fifths vote of its board of directors or trustees, and also by the consent thereto in writing, or by vote at a general meeting, duly called for the purpose, of three-fifths in interest of the stockholders in such company, present or represented by proxy at such meeting.

§ 2. This act shall take effect immediately.

CHAP. 799.

AN ACT to reappropriate moneys for construction of new work upon, and extraordinary repairs of, the canals of this state, and for payment of awards made by the canal appraisers.

PASSED May 20, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The unexpended balance of one million four hundred and fifty-three thousand four hundred and eighty-four dollars and fifty-five cents, appropriated by the act entitled "An act to authorize a tax of three-quarters of a mill per dollar of valuation for construction of new work upon, and extraordinary repairs of, the canals of this state," passed May seventh, eighteen hundred and sixty-eight, being the sum of two hundred and ninety-two thousand five hundred and eighty-seven dollars and eighty-one cents, is hereby re-appropriated to the same objects. In case there shall remain a balance of the sum herein re-appropriated to the same objects specified in said act, either by change of plan for said work, or from reductions in the awards mentioned, the said balance so remaining is hereby appropriated to the payment of the awards of the canal appraisers for eighteen hundred and sixty-eight, and for new work and extraordinary repairs authorized by chapter eight hundred and seventy-seven, laws of eighteen hundred and sixty-nine.

CHAP. 656.

AN ACT to authorize the canal board to change the present system of weighing boats and cargoes on the canals of this state, and appropriating money for that purpose.

PASSED May 5, 1870, by a two-third vote.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. The canal board is hereby authorized to adopt the "Reims Champion Boat Scale," in place of the present system of weighing boats and cargoes on the

* These laws have been carefully compared with the originals, and may be relied upon as accurate. We have not thought it necessary to take up space by attaching to each the certificate of the secretary of state which is attached to the copy from which we print. — ED. L. J.

canals of this state, if they are fully satisfied from tests already made, or from such further tests as they shall deem necessary, that the interests of the state will be subserved thereby, and they are hereby empowered to contract with the owners of the "Reims Champion Boat Scale," for the use of said scale on the various canals of the state.

§ 2. The state treasurer shall pay on the warrant of the auditor of the canal department, or the comptroller, out of any funds appropriated for canal purposes, the moneys necessary to carry out the first section of this act.

§ 3. This act shall take effect immediately.

CHAP. 760.

AN ACT to amend chapter seven hundred and twenty-seven of the laws of eighteen hundred and sixty-nine, entitled "An act authorizing cities and villages to acquire title to property for burial purposes, and to levy taxes for the payment of the same," passed May eighth, eighteen hundred and sixty-nine.

PASSED May 9th, 1870.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. It shall be lawful for the common council of any city, or the trustees of any incorporated village in this state, or the trustees of any incorporated rural cemetery association, in cases where such city or village needs lands for burial purposes, to purchase or acquire the title to such lands, provided such lands are vacant or have no buildings thereon exceeding in value five hundred dollars.

§ 2. If the said common council or board of trustees of such village or association shall be unable to agree with the owner or owners of such lands for the purchase thereof, the said common council or board of trustees may proceed to acquire the title thereto in the manner, so far as is applicable, prescribed by chapter one hundred and forty of laws of eighteen hundred and fifty, entitled "An act to authorize the formation of railroad corporations, and to regulate the same," and the several acts amendatory thereof, and supplementary thereto. The amount paid for such lands, by such common council or board of trustees of a village as aforesaid, and all the expenses attending the same, with the expenses of fencing and improving the same, shall be assessed and collected by a general tax upon all the taxable property of such city or village, in the same manner as other city or village taxes are assessed and collected. In the case of a rural cemetery association, the said amount shall be raised and paid as other expenses of such association.

§ 3. The common council of said cities, and the board of trustees of said villages and associations, are authorized to borrow the sum of money provided for by the second section of this act, and in anticipation of the tax aforesaid, or so much thereof as may be necessary to purchase the burial lot as aforesaid, and procure a good title in fee to the same.

CHAP. 789.

AN ACT to amend chapter nine hundred and seven of the laws of eighteen hundred and sixty-nine, entitled "An act to amend an act entitled 'An act to authorize the formation of railroad corporations, and to regulate the same,' passed April second, eighteen hundred and fifty, so as to permit municipal corporations to aid in the construction of railroads,'" passed May eighteen, eighteen hundred and sixty-nine.

PASSED May 18, 1870; three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

SECTION 1. Section four of chapter nine hundred and seven of the laws of eighteen hundred and sixty-nine is hereby amended so as to read as follows:

§ 4. It shall be the duty of such commissioner, with all reasonable dispatch, to cause to be made and executed, the bonds of such municipal corporation, attested by the seal of such corporation affixed thereto, if such corporation has a common seal, and, if not, then by their individual seals, and signed and certified by said commissioners, who are hereby authorized and empowered to fix such common seal thereto, and to sign and certify such bonds. Such bonds shall become due and payable at the expiration of thirty years from their date, and shall bear interest at the rate of seven per cent per annum, payable semi-annually, and shall not exceed in amount twenty per cent of the entire taxable property within the bounds of said municipal corporation, as shown by said tax list, nor shall they exceed in amount the amount set forth in such petition. The said bonds shall also bear interest warrants, corresponding in number and amounts with the several payments of interest to become due thereon, but the commissioners may agree with any holders to register any such bonds, in which case the interest warrants on the registered bonds shall be surrendered, and the interest shall be payable only on the production of the registered bond, which shall then be transferable only on the commissioner's records.

The savings banks of this state are authorized to invest in said bonds not to exceed ten per cent of their deposits. All taxes, except school and road taxes, collected for the next thirty years, or so much thereof as may be necessary, in any town, village, or city, on the assessed valuation of any railroad in said town, village, or city, for which said town, village, or city has issued or shall issue bonds to aid in the construction of said railroad, shall be paid over to the treasurer of the county in which said town, city, or village lies. It shall be the duty of said treasurer, with the money which has heretofore been or shall hereafter be paid to him on said bonds, including the interest thereon, to purchase the bonds of said town, issued by said town, to aid in the construction of any railroad or railroads, when the same can be purchased at or below par; the bonds so purchased to be immediately canceled by said treasurer and the county judge, and deposited with the board of supervisors.

In case said bonds so issued cannot be purchased at or below the par value thereof, then it shall be the duty of said treasurer, and he is hereby directed, to invest said money so paid to him as above mentioned, with the accumulated interest thereon, in the bonds of this state, or of any city, county, town, or village thereof, issued pursuant to the laws of this state, or in bonds of the United States. The bonds so purchased, with the accumulated interest thereon, shall be held by said county treasurer as a sinking fund for the redemption and payment of the bonds issued or to be issued by said town, village, or city in aid of the construction of said railroad or railroads. In case any county treasurer shall unreasonably refuse or neglect to comply with the provisions of this act, any taxpayer in any town, village, or city, theretofore having issued bonds in aid of the construction of any railroad or railroads, is hereby authorized to apply to the county judge, on petition, for an order compelling said treasurer to execute the provisions of this act. And it shall be the duty of said county judge, upon a proper case being made, to issue an order directing said county treasurer to execute the provisions of this act.

All provisions of law now in force relating to the enforcement of the decrees or orders of the supreme court are hereby declared to apply to and devolve upon said county judge in the enforcement of said order. The county treasurers of the several counties of this state, in which one or more towns are situated which have issued bonds for railroad purposes, shall execute a bond, with two sufficient sureties, to be approved by the county judge of the counties respectively, to the people of the state of New York, in such penal sum as may be prescribed by the board of supervisors of the respective counties, conditioned for the faithful performance of the duties devolving upon him, in pursuance of the provisions of this act.

§ 2. This act shall take effect immediately.

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D.