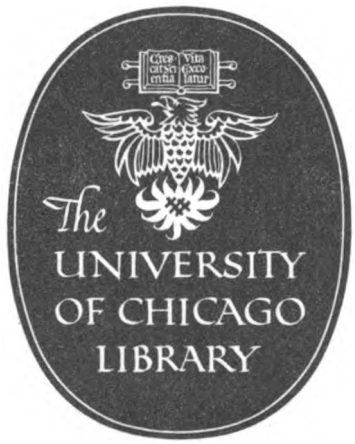

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GENTLEMEN :—

Your kind invitation to direct you in your proposed investigation of the principles of the civil law, so courteously communicated by your Committee, has afforded me very great pleasure. Though its acceptance imposes upon me very great labor in addition to that demanded by my practice in the courts, I shall undertake it *con amore*. The invitation comes from one of the oldest and best literary societies in the land and is therefore an honor I highly prize. It comes from you, my brethren of the Hamilton, and is an expression of confidence I shall never forget and shall endeavor to deserve.

But there is still another reason for my acceptance which may not be without interest to you. In the Spring of 1860 at the close of the winter semester at the Carl Ruperta University at Heidelberg I called upon my Professor, the late Dr. Carl von Vangerow, to bid him adieu. He received me with the utmost kindness, showed me some new English works he had received upon the civil law and at parting, with a genuine hearty German shake of the hand, said referring to the study in which I had been engaged, "Lassen Sie es nicht ganz liegen"—do not wholly neglect it. This injunction from my lamented master I have ever regarded as a sacred trust held for the benefit of my countrymen who for lack of time or money are unable to prosecute their legal studies in Europe and which your invitation affords me an opportunity partly to discharge.

I shall discuss this evening under the general head of "The Study of the Civil Law"

I. The utility of an acquaintance with the civil law to the American lawyer and layman;

II. The method pursued in the best law schools in Europe with special reference to German Universities.

The first question which the American puts to one proposing a new project whether it be a novelty in mechanics, the passage of a new statute, a change in the mode of election or the undertaking of a new study is What is the use? or *cui bono?* I am confronted by this query at the

outset and will endeavor to answer the same fully and I hope satisfactorily. I assert that an acquaintance with the jurisprudence of ancient Rome is practically as useful to the American lawyer as a knowledge of her language is necessary to the scholar. It is in fact the only sure basis of a thorough legal education.

No man can gain an intelligent comprehension of Roman history or read her classic authors if he be ignorant of her jurisprudence. No teacher of Latin in our schools is competent to fill his chair if he be ignorant of the civil law. Its study is one of the most absorbing interest to the man of letters. For the *Corpus Juris Civilis* stands to-day the most wonderful monument of intellectual greatness that has survived the darkness of the middle ages. It has stood for fifteen centuries and for centuries will remain a living proof of the superiority of mind over mere physical force, of reason over brute impulse.

How insignificant, gentlemen, are the results of physical force compared with the achievements of the mind. The conqueror may work devastation in the present, the blows of thought awake the echoes of the future. A revolution is achieved in the brain of the dominant thinker before the immediate actors step upon the stage. The marvellous exploits of the successful general may never be known for want of a biographer while the creations of the poet's fancy become household guests and enter into our lives.

She who sits desolate upon the seven hills is no longer the enthroned mistress of the world. Her generals no longer return to celebrate their triumphs over the barbarous Gauls! Her splendid edifices have nearly all disappeared and the pilgrim scholar, reverently approaching the shrine, learns the extent of her grandeur from the magnitude of the ruin. Each footprint left by relentless Time upon the crumbling monuments of her material greatness is but another mournful "Fuit." But although the nations of Europe no longer tremble before Rome's victorious eagles, and the ecclesiastical sceptre seems about to be wrested from her grasp by another Martin Luther, they still acknowledge allegiance to the supremacy of her laws. Fifteen centuries ago the Roman Empire fell before the invasion of the barbarous hordes of the North: to-day the Roman prætor virtually sits in judgment over their enlightened descendants. Belisarius was defeated but Trebonian has conquered. The lawyer has done more to perpetuate the name and fame of his imperial master than the general.

As I have before remarked, amid the ruins of Rome's material greatness stands the *Corpus Juris Civilis*, an intellectual edifice of marvellous beauty and perfection and which will ever remain an object of the most profound interest to the scholar, lawyer and publicist. "The grand destinies of Rome are not yet accomplished. She reigns throughout the

world by her reason after having ceased to reign by her authority." "Says the eminent French civilian. Chancellor D'Aguesseau :

"The whole body of the civil law will excite never failing curiosity, and receive the homage of scholars as a singular monument of wisdom ; it fills such a large space in the eye of human reason ; it regulates so many interests of man as a social and civilized being ; it embodies so much thought, experience and labor ; it leads us so far into the recesses of antiquity and it has stood so long 'against the waves and weathers of time' that it is impossible while engaged in the contemplation of the system, not to be struck with some portion of the awe and veneration which are felt in the midst of the solitudes of a majestic ruin."

No nation has ever exhibited so great capacity for legal investigation as the Roman, and the *Corpus Juris Civilis* is the only law book that deserves to be called the jurist's Bible. One of the most eminent lawyers of any age declared "*bonus pandectista bonus jurista.*" He who knows the Pandects knows the law." Said Dr. von Vangerow "Das Roemische Volk war das Rechts Volk *per eminentiam* und die Entwichelung der Rechts Idea hat ihm seinen Ruhm gegeben."

The Roman nation was eminently a legal nation and the development of the legal idea gave it its glory. The student becomes more deeply impressed with the truth of this remark as a more extended investigation enables him to comprehend its import. With all reverence it may be said that it is a difficult matter to determine whether the faded manuscript sacredly preserved in the Medicæan library of Florence has had less to do with the present political and social condition of humanity than the sacred volume compiled by the learned Council at Nice.

But the principal reason why the American student at law should devote especial attention to the study of the civil law arises from the fact, not generally understood or admitted by our profession, that the English common law as appropriated and applied by our American courts and as found in our best Reports and Treatises was almost wholly founded upon or derived from the civil law. In a subsequent lecture I shall more fully discuss this question which even in the time of our learned Chancellor Kent was not actually decided. For more than three hundred and fifty years Great Britain was a Roman province and Roman civilization with its laws usages and language have left a lasting impression and together with Saxon laws and customs constitute the English common law.

Fourteen centuries before the discovery of the Pandects at Amalphi the victorious armies of Cæsar had introduced the Roman law to our brave but half-civilized ancestors. It was administered by the illustrious *prætor præfectus* Papinianus with an impartiality that surprised them, when Rome distracted by domestic dissensions was compelled to relin-

quish her prey. But so firmly had the principles of the civil law been fixed in the minds of the early English lawyers that a struggle immediately arose between the advocates of their laws and usages and the civilians in which the latter were temporarily worsted.

Lord Holt admitted that the principles of the English law were formed from the civil law and grounded upon the same reason. (*Lane* vs. *Cotton*, 12 Mod. Rep. 482). If you will open Bracton or Fleta you will perceive almost at a glance how largely the early English law writers borrowed from the civil law.

Blackstone, animated by his wonted prejudice against whatever is not of English origin, reluctantly admits in his introductory lecture the influence of the civil upon the common law. But Sir Matthew Hale hesitates not to declare that "the true grounds and reasons of the law were so well delivered in the Digest, that a man could never well understand law as a science without first resorting to the Roman law for information." (Burnet's Life of Matthew Hale, p. 24.)

The revival of the study of the civil law which followed the discovery of a copy of the Pandects in the year, A. D. 1135, and which formed an important element in the intellectual dawning that succeeded the night of the middle ages, extended to England and roused both priests and laity from their devotion to the Saxon and Normon traditions. The Romish prelates early became friends of the civil law, protected and extended the same until it became the distinctive feature of the English ecclesiastical tribunals. One of the charges preferred against Cardinal Woolsey was his encouragement of the civil law. The early Chancellors, whenever a novel question arose for which the common law failed to furnish a mode of procedure or a satisfactory solution, invariably had recourse to the opinions of the Roman jurists. Thus arose our distinction between law and equity and thus it happened that our equity jurisprudence is almost identical with that of the civil law, so far as its principles are concerned. No better order of legal study, and no better definition of law and its precepts have been given than those found in the *Corpus Juris*. The grand divisions *jura personarum* and *jura rerum*, the distinction of *lex scripta* from *lex non scripta*, &c., found in our elementary books were borrowed from the Institutes of Justinian. The general principles of the *lex contractus* as recorded in the Pandects have never been successfully controverted, are daily recognized and applied in our courts, and form the groundwork of distinct departments of law, which like the law of bills of exchange and promissory notes or the law of insurance or patents, are of comparatively modern origin.

The civil law affords an inexhaustible storehouse of maxims of which every code has availed itself. On this point a competent writer says

"The title *De Diversis Regulis* in the Pandects as well as the sententious rules and principles that pervade the whole body of the civil law show how largely the common law of England is indebted to the Roman law for its code of proverbial wisdom, and it has been affirmed by a very competent judge, that if the fame of the Roman law rested on the single book of the Pandects which contain the *Regulæ Juris* it would endure forever on that foundation."

Robert Brown, Esq., one of the members of the London bar and for a long time lecturer at Lincoln's Inn, alludes to this point in the preface to his Legal Maxims, (a work that should become a text book in every law school) as follows: "A great majority of questions respecting the rights remedies and liabilities of private individuals were determined by immediate reference to such maxims, many of which *obtained in the Roman Law*, and are so manifestly founded in reason, public convenience and necessity, as to find a place in the code of every civilized nation." (Brown's Legal Maxims, vol. 1, Preface.)

The English and American statutes of distribution of intestate estates are founded upon the celebrated 118th novel of Justinian. The English statute was penned by a civilian and its provisions have ever been construed in accordance with the civil law. The law of inheritance, guardian and ward, trusts and easements, is substantially the same in the civil and English common law. The Roman *hypotheca* is the common law mortgage, and in both there was originally no equity of redemption. The Welsh mortgage is the Roman *antichresis*. The *actiohypothecaria* is almost identical with our foreclosure and by neither process can the pledge be sold without previous notice and a judicial decree. The relation of patron and client resembles that of the feudal lord and vassal and Niebhur declares the former relation to have been the feudal system in its noblest form.

It is not contended that in all cases of similarity the common law has borrowed from the civil law. Since, the data being the same, the enlightened reason will arrive at the same conclusion at all times and among all nations, but often, as in the case of *tutor* and *pupillus* or guardian and ward the identity is apparent.

"The authority of a tutor is in some cases necessary to pupils and to others not. Where others stipulate to make a gift to them the authority of the tutor is unnecessary. But if they contract with others it is necessary. For the rule is, that pupils may better their condition without the authority of the tutor but they may not so impair it. And therefore in all cases of mutual obligation as buying, selling, letting, hiring, &c., he who contracts with pupils is bound by the contract, but not the pupils, unless they contract with the tutor's authority. (Inst. 1. 21.)

Referring to Kent, we find "When the court can pronounce the contract to be to the infant's prejudice, it is void, and when to his benefit, as for necessaries, it is good."

At civil law when the tutor invested the pupil's capital for his own benefit, he was compelled to pay the highest rate of interest for the capital so used and when the tutor culpably neglected to allow interest, he was compelled to pay compound interest, the only case in the civil law.

Turning to Kent, we find the common law rule to be, "If the guardian neglects to put the ward's money at interest but negligently and for an unreasonable time suffers it to lie idle or mixes it with his own, the courts will charge him with simple interest, and in case of gross negligence with compound interest." The *protutor* like the executor *de son tort* of the common law who entered upon the duties of tutor *bona* or *mala fide* was bound to the same extent as the *tutor*.

I think, gentlemen, I have shown that the civil law is of practical utility, and you will justify my astonishment that its study should have been almost wholly neglected in our country. Some of the reasons for this shameful neglect are doubtless,

1. The vast amount of labor required to master our common law and the impatience of students to commence its practice.

2. The want of a proper guide like the Lehrbuch placed in the hands of German students in which the principles of the Roman law might be discussed from an American stand-point, and the analogies and dependence of the two systems exhibited. We should rejoice if some competent hand were to supply this want. The 44th chap. of Gibbon's history although used as a text book in certain schools, the instructive lecture of Chancellor Kent and the brief epitome of Mr. Cushing are by no means adequate.

3. The blind devotion to precedent which characterizes our courts tends to discourage the student from the study of law as a science. He therefore becomes a poor Digest, with no conception of *ratio legis*.

Modern international law is the offspring of Grecian philosophy and Roman jurisprudence. Strip off its conventional costume and its Roman origin is at once evident. All scientific systems are founded upon postulates or axioms whose truth is self evident and therefore incapable of demonstration by any process of ratiocination. Law and theology like mathematics stand upon axiomatic bases. Ulpian's famous definition of *Jus Naturale* (Just. 1. 2. 1.) rests upon the postulate that the law of nature can be determined by appealing to an enlightened conscience. There is an absolute and perfect law of equity. It is the *Jus Naturale aut vox Dei*. It finds imperfect expression in the written and unwritten laws of our peoples and ages. It is the perpetual fountain of all jurisprudence municipal and international.

"The grandest function of the law of nature," says Professor Maine, (Ancient Law, pp. 92. 93.) "was discharged in giving birth to modern international law and to the modern law of war. * * wherever there is a doctrine of the juris-consults affirmed by them to be in harmony with the *jus gentium* the publicists have found a reason for borrowing it however plainly it may bear the marks of a distinctively Roman origin." But the Roman jurist had no conception of our grand international system whose germinal idea is his doctrine of the *Jus Naturale* (vid. Woolseys's International Law, p. 27.) Whoever is interested in the rise and progress of the law of nations and is unwilling to adopt the conclusions of modern publicists without independent investigation will study the works of the old civilians. A knowledge of the civil law is therefore indispensable to the statesman. The influence of its political doctrines upon civilization has been immeasurably great. Rousseau's perversion of the civil law doctrine of the law of nature induced the French Revolution. Our Declaration of Independence exists in embryo in Ulpian's potent maxim: *omnes homines natura aequales sunt;* all men are by nature equal. Slavery is *contra naturam*, against nature, (Just. 1. 3. 2.) says the civilian. Had American abolitionists been familiar with Roman jurisprudence they would have therewith possessed an offensive weapon in their long conflict with the slaveocracy no less effective than any found in sacred writ. I refer you to Maine's Ancient Law, chap. iv, and its introduction by Professor Dwight, for a masterly discussion of this branch of my subject.

With regard to the particular period at which the student should undertake the study of the civil law, there are conflicting opinions. It is urged that as first impressions are most lasting, the elementary principles of the common law should first receive his attention and that after devoting two or three years to their acquisition he is better prepared for the philosophical discussions of European professors. Conceding the force of this objection I am notwithstanding decidedly of the opinion that a legal education is properly begun with the civil law, and for these reasons:

1. It is the natural and logical method since the civil law has precedence of time and order.

2. The foreign mode of instruction is essentially, and almost exclusively theoretical and a knowledge of the *ratio legis* should precede that of the law itself.

3. The academician, fresh from the Latin classics is prepared to undertake the interpretation of the formidable *sententiae* of the Roman lawyers, which form his own as well as his professors authority.

4. The study of American or English common law should immediately precede its practice.

5. We have the example of all European nations with whom the study of the civil law universally precedes that of the *lex propria*.

II. The method of study pursued in Europe with special reference to German Universities.

Generally speaking, instruction in civil law in England, France, Germany, and Italy, is given by lectures, recitations being almost unknown. At the Sorbonne in Paris instruction is gratuitous. In the German universities a small fee is paid into the treasury—the Professor receiving his salary from the state. The present flourishing condition of the study of the civil law is mainly due to the industry of the Germans, whose law schools are the foremost in the world. Although the French *savants* in the sixteenth century brought to light the old Theodosian code and the fragments of Ulpian it was reserved for that eminent German historian *Niebhur* to inaugurate a new era in the study of the civil law by the unexpected and most valuable discovery of the Institutes of Gaius. This having been the original work from which Justinian compiled his Institutes, German professors and students hailed its appearance with delight and enthusiasm truly wonderful. Therefore since the year 1821 the lectures of the German civilians have assumed a completeness and importance previously unknown, and the works of Savigny, Gluck, Hugo and Vangerow, mark the progress that has been made.

In 1859 and 60 there were at nineteen German Universities, 3500 law students, including those who devoted themselves to the specialty of political economy, of whom Berlin had 607; Munich 561; Leipzik 353; and Heidelberg 328, more than half of whom were foreigners attracted by the names of Mittermaier and Vangerow as well as by the charming locality of the university.

A German student rarely remains at a single University during his whole course. One object of the change is to secure the benefit of the instruction of the professors of different schools. German jurists are divided into two schools, Romanists and Germanists. The former endeavor to extend the bounderies of the civil law; the latter strive to extend the operation of the Deutsche Recht or German common law. The leading Romanists are Vangerow of Heidelberg and Francke of Goettingen; the most noted Germanists are Gerber of Tubingen and Kraut of Goettingeu. Savigny and Puchta of Berlin chose the middle ground and have endeavered to reconcile and combine the two extreme views into a harmonious whole.

The German Academic year is divided into two semesters, the longer or winter semester beginning in October and closing in March. The summer semester begins April 18th. German universities are also divided into two schools with regard to the relative importance of the

study of the study of the civil law, the historical and the dogmatic. The former contend strongly for the importance of history in throwing great light upon the Exegesis: the latter consider it only necessary to form the accomplished civilian. Hugo is the leader of the historical school, and has contributed more to the present completeness of this department than any other writer except Niebhur. The latter has thrown more light upon the constitutional history of Rome than any of his cotemporaries.

The Pandects are composed of the *dicta* of Roman lawyers from the time of Augustus to that of Severus. They may be termed Civil Law Reports. The course upon the Pandects is generally delivered during the winter semester. It is here that the labor of both professor and student fairly begins. A Lehrbuch is placed in the student's hands containing the subjects of each lecture systematically arranged, with the leading authorities cited from the *Corpus Juris* and a full and exhaustive discussion of all disputed points. This text book also contains copious references to the literature upon each topic. It is designed simply to serve as a guide and what it does not contain renders the lectures indispensable. During the long semester from three to five hours daily, the student follows his professor, recording in his "Heft" the substance of each lecture in the order and language in which it is delivered. This Heft is designed for binding and the student at the conclusion of his course has a series of law works containing all that is most valuable in the acquisitions of the distinguished men whose instructions thus preserved remain a valuable *souvenir* of his university life.

In a German court the object of the advocate is to demonstrate that his position is *theoretically* sound and the conclusions laid down in Vangerow's Lehrbuch are no more nor less binding than the previous judicial determination of the question.

The maxim *stare decisis* has no terrors for a German practitioner. Hence the study of the law in Germany is essentially philosophical, and its principles under the hands of such masters as Savigny, Griess, Martens and Vangerow, possess a logical consistency much more satisfactory than the most formidable array of decisions. Although the English and American courts have doubtless adopted the true rule of practice, since the law incorrectly determined is preferable to the law unascertained the German mode of instruction is in this respect eminently well adapted to make independent thinkers and therefore good lawyers. In one particular we are greatly in advance of Germany. I refer to the moot courts, connected with our best law schools. The only exercise of the German student resembling these is the public discussion of theses which is

however of comparatively rare occurrence. In everything that pertains to the protection of personal liberty and the exercise of free speech we are in advance of Germany, and our free democratic institutions are constantly held up to German students as a model to be imitated.

It is the prayer of every patriot that amid the thick peril that public and private corruption have thrown around us nothing may occur to diminish this confidence in our institutions, for it is that which insures to the American safety at home and respect abroad.

INFLUENCE OF THE CIVIL LAW UPON THE COMMON LAW.

HENRY G. NEWTON.

"Justice is the constant and perpetual disposition to render every man his due."

"Jurisprudence is the knowledge of things divine and human; the science of the just and unjust.

The student must proceed step by step from the easy to the more difficult. The precepts of the law are; to live honestly, to hurt no one, and to give every man his due. (Inst. 1. 1. 2. 3.)

Brave and clear words. They guide the perplexed traveler in a sure path. They form the clue which leads us out of a mazy labyrinth.

Law is a science. The magician's word is spoken and this shapeless, unwieldy mass becomes an organized, compact and well proportioned whole. This confused, disorderly mob has become a disciplined army; each springs quickly to his place; company, battalion and regiment form in their ranks and without disorder or friction the mighty array sweeps steadily on.

"Jurisprudence is the science of the just and the unjust." Fitting prelude to the master's work. Word of hope to the weary, discouraged learner. Step by step in due order and method then it must be learned.

It might be possible for one to learn the propositions of Euclid all by heart, and understand their application simply as rules, with no knowledge of the principles of geometry, and without having traced them from their starting point. But the task would be Herculean.

But take first the simple axioms whence they were deduced, then build with the great teacher stone by stone the wondrous superstructure, and the wearisome drudgery becomes a daily delight.

The maxims of law, if known simply as maxims, no mortal mind could master in a lifetime; but refer them to their few great principles,—to the one grand underlying principle, and the task, still great, becomes a pleasant toil cheered on by hope.

Law is a science. As a science therefore it must be learned. Connect each leaf with its twig, each twig with its branch, and so to the main stock. Carefully note how each remotest application to some practical matter is derived from the grand parent trunk of right and wrong, and so shall you become in the truest sense a lawyer.

No wonder that upon the chance discovery of a copy of the Pandects at Amalphi, in Italy, in the middle of the twelfth century, there sprang up a new zeal for the study of the law; that it was taught in all the universities; that crowded audiences thronged to hear the lectures of Vacarius in England and that a knowledge of the law became a necessary accomplishment of every educated man—indispensable to a clergyman.

The civil law is a science. This is the key note, the primal cause of its grand success. How much it has done toward hastening and fashioning the civilization of this nineteenth century can never be accurately known.

The first great work, then, which the civil law has done for the common law, consists in giving to it a scientific method of arrangement and development; in imparting to its lawyers a scientific mode of study and investigation; in making it a science.

Says Chancellor Kent: "The impression which the science of law in so perfect a state of cultivation made upon the progress of society and the usages of feudal jurisprudence was sudden and immense."

It will be attempted, in the first part of this essay, First: To show that the civil law communicated to the common law its scientific mode of investigation and orderly arrangement, and Second: To illustrate the magnitude of the influence thus exercised.

Any discussion of the general principles and history of the civil and common law, in an essay so limited as to length, is of course impossible.

It may be mentioned that all quotations from Justinian's Institutes herein contained have been taken from Cooper's Justinian.

It will be readily believed that the inhabitants of England, (they can hardly be called an English people,) in the eleventh and twelfth centuries would not be likely either to have a very extensive code of laws or to have them reduced to a very perfect system.

The Danes, Saxons and Normans, successive conquerors of the island, did homage to the stronger right and we may imagine that the Judges would do equity or injustice each after a fashion of his own.

Blackstone, the first legal teacher of the youth of our times, borrowed his method from Justinian's Institutes. Fifteen minutes hasty glancing over the Institutes were sufficient to convince the writer of this fact and the impression has since been confirmed by high authority. Says a learned writer on this subject: (Luther Cushing quoted in Cocke's Common and Civil Law, p. 138,) "We shall find on comparison of the two works that there is an exact correspondence between them as to the order and treatment of their respective subjects. Thus the introduction of Blackstone corresponds to the preface, and the first and second titles of the first book of the Institutes; the first book of the

commentaries to the third and following remaining titles of the first book of Justinian",—and so he goes on to show their agreement throughout.

The predecessors of Blackstone doubtless adopted substantially the same general divisions and methods of treatment of their subjects. Very true, Blackstone often takes occasion to compare the civil and the common law much to the disadvantage of the former. He leaves upon the mind of his reader the impression that the two are in stern antagonism, but it is not a whit the less probable that he drew deeply from those rich stores of ancient wisdom. It is a pleasure to read Blackstone ; it is a greater pleasure to read the Institutes.

The writer has had the fortune to stumble on a book printed in 1724—some fifty years before Blackstone wrote his commentaries—entitled, "The History of the Roman or Civil Law." It is a translation from the French by one John Beaver, appended to which is Dr. Duck's treatise on the use and authority of the civil law in England. Neither the said John Beaver nor Dr. Duck exhibits any trace of Blackstone's prejudice against the civil law. John Beaver says of it in his preface : "T'is in this treasure, and no where else, you may find the most perfect collection of natural reason and equity applied to the various transactions and intercourses between man and man." He earnestly recommends its study to all gentlemen.

But the facts recorded in the appended treatise of Dr. Duck are most to our purpose.

Of the times of Roman rule in England he says : "The Government of Britain was under Roman laws. The British children were subject to paternal authority *ex jure Romano, &c.*"

Concerning matters in the reign of King Stephen immediately after the discovery of the Pandects he writes :

"But forasmuch as almost all the clergy and laity in King Stephen's time applied themselves to the study of the Civil Laws, and the number of students became incredible, the Divines and Masters of Arts * * * * prevailed with King Stephen by an edict to forbid the teaching the Civil Law in England and making use of law-books ; so Vacarius was silenced. But Stephen's prohibition was of little signification, for John of Salisbury, who was famous in those days, writes that the greater opposition the study of the law met with from the wicked, the more it flourished and grew into repute ; and immediately after King Stephen's death the study of the Roman laws began to revive and Becket was made Chancellor.

"In those days every one that affected learning, both civil and ecclesiastical persons, eagerly pursued the study of the Civil Law as the high road to rewards and the writers of those times all show that they

were skilled in the Civil Law, &c." Further on he says: "But the lawyers of other countries relate, that our King Edward I, out of his care to have the civil law taught in England, (a circumstance omitted by our own authors) invited Francis Accursius to teach it at Oxford." Again: "Another remarkable monument is the letter of King Henry the Fifth to the other university of Cambridge wherein he commands the students in Civil and Canon Law diligently to attend the public lectures in their respective faculties."

"Edward the Sixth gave orders to the Universities to use all their power to revive and encourage the Civil Law."

How great the influence of the universities and the clergy was upon the mode of legal study in that early period we may judge from the remarks of Blackstone on that subject. See 1. Blackstone, p. 17. where he says that the common law was preserved "in the monasteries, in the universities and in the families of the principal nobility. The clergy in particular were peculiarly remarkable for their proficiency in the study of the law. The judges therefore were usually created out of the sacred order as was likewise the case among the Normans, and all the inferior offices were supplied by the lower clergy, which has occasioned their successors to be denominated clerks to this day."

When the clergy suddenly got possession of the civil law so great was the change made that Blackstone says the ruin of the common law was near to being completed.

King Stephen's injunction against the use of law books may help us to a shrewd guess as to what the common law would have been without the universities and clergy.

The statements of the before mentioned Dr. Duck in regard to Bracton, Fleta and other authors, quoted further on, confirm what has been said and similar statements might be given from later authors if space would permit.

No more need be said on this point for it cannot be doubted that the common h is borrowed from the civil law its scientific character.

That the influence thus exerted is of the last importance is evident. The science or the art of law is, like any other science, the knowledge of the application of certain natural principles to certain facts.

Two different laws upon the same subject among the same people at the came time cannot both be right. Of course there is uncertainty in regard to the application of legal principles to particular facts. There is discussion and difference of opinion. Mathematics is called an exact science. It is not a whit more so than law. Two judges may differ as to the correct decision of a case. Two engineers may differ as to the best route for a railroad. But it is evident that a correct method of

analysis and investigation, correctly applied to any set of facts can lead to but one result and that the correct one. A correct result once reached will be confirmed by experience and will remain. A correct method therefore is the desideratum of every science.

Francis Bacon added no new facts to the world's stock of knowledge, yet he is said to have revolutionized scientific systems and to have been the forerunner of our present age of scientific discovery. He gave to science the correct method of procedure and the grand and ever growing results followed as of course.

Suppose that all memory of the facts and theories of the science of geology were suddenly blotted from the minds of its students and professors, still leaving them their present tastes for study, disciplined intellects, and present habits of thought and investigation, how long before the whole would be restored in its completeness? The time might be considerable but the result could not be doubtful.

And so we say that although the learned men of England had deliberately purposed in their hearts that they would not adopt the maxims of the civil law, yet its study and the adoption of its methods could not fail to lead them, so far as the altered state of society would permit, to similar results.

But it is manifestly impossible that England's lawyers and learned men should have made the study of the civil law their delight without incorporating into the common law many of its maxims. A cursory review of the Institutes, (for the writer does not pretend to have made a thorough research into the Code, Digest and Novels), is sufficient to convince any one of the justice of Lord Holt's remark in *Lane* v. *Cotton*, 12 Mod. 482, where he says: "And this is the reason of the civil law in this case, (which though I am loth to quote), yet inasmuch as the laws of all nations are doubtless raised out of the ruins of civil law, it must be owned that the principles of our law are borrowed from the civil law and are therefore grounded upon the same reason in many things."

The treatise of Dr. Duck before mentioned after speaking of the writings of some famous lawyers, viz: Glanvil, Bracton, Briton, Thornton and Fleta, goes on to say:

"All these common lawyers were excellently well versed in the civil law from whence they have borrowed a great deal both to explain and illustrate the law of England.

Bracton was Professor of civil law at Oxford and Briton Doctor of Laws. Both Granvil and Bracton began their books in the same words and method as Justinian begins his Institutes. Their treatises often quote the civil law and apply the authority thereof.

So much was the study of the civil law in fashion for the space of

two hundred years between the reigns of Stephen and Edward III that it was frequently cited not only at the universities but at the bar in pleadings, reports, and judgments of causes. Under Henry II there were many famous for their skill therein who were also Clerks many of whom were advanced to be Judges in the Supreme Courts of Justice.

The 118th Novel is said by Kent to be the ground-work of the English and American Statutes of Distribution. Kent's Com., 543. In support of this against Blackstone's denial he quotes Lord Holt's statement that the statute was penned by a civilian, and is to be governed and constituted by the rules of the civil law.

Very many points of this kind cannot fail to catch the eye of even the casual reader of the Institutes. Let us cull out a few illustrations.

The Roman law like the Grecian is divided into written and unwritten. Inst. 1. 2. 3.

"The unwritten is that which usage hath approved, for daily customs, established by the consent of those who use them, put on the character of law." Inst. 1. 2. 9.

The Institutes boldly avow that this division is taken from the Greeks. No less likely is it that our common law took it from the civil.

The law of emblements however seems to be directly opposed to that of the common law. Inst. 2. 1. 36.

The law in regard to him who paints a picture on the canvass of another, (Inst. 2. 1. 34.) seems quite familiar as well as that of him who has the usufruct of a flock.

Indeed Blackstone plainly says that "the doctrines of the Roman law in regard to accession were implicitly copied and adopted by our Bracton and have since been confirmed by many resolutions of the Courts." 2 Black. Com., 404, 405.

The common law rule in regard to the confusion of goods follows the civil rule so far as it goes. Inst. 2. 1. 27. 28.

The doctrines of nude pact; of stoppage in transitu, of the necessity of delivery of donations *causa mortis* of the liability of innkeepers are the same in both or nearly so.

The difference between the two in respect of *treasure trove* illustrates the peculiar force of feudalism.

The distinction between things corporeal and incorporeal, (Just. 2 2), is a clear statement of familiar doctrine.

The civil law of *lese majesté*, (Inst. 3. 1. 5.) corresponds to the English corruption of blood.

He who builds on the land of another loses his building; but if the builder was *bona fide* in full possession, the claimant of the land must pay him the value. Inst. 2. 1. 30.

"That ground which a river hath added to your estate by alluvium, becomes your own by the law of nations. And that is said to be alluvium which is added so gradually, that no one can judge how much is added at each moment of time." Inst. 2. 1. 20.

"But if the impetuosity of a river should sever a part of your estate and join it to that of your neighbor it is certain such part would still continue yours." Id. 2. 1. 21.

If an island rise in the middle of a river it belongs one-half to the proprietor of either bank; if near to one bank it belongs to the owner of that bank.

An island rising in the sea belonged by the civil law to the first occupant, by the common law to the king.

In Inst. 4. 6. 39. we find clearly declared the doctrine of set off; in it, 40, is the foundation of modern bankruptcy.

The real owner must not take his property by force from the peaceable possessor. Id. 4. 2. 3.

The foregoing authorities with the examples quoted are ample to prove that the common law is indebted the civil law for many of its most important maxims.

The times, customs, manner of holding property, and the kinds of property in England, all differed widely from those of the Roman empire. The civil law could not then be adopted as a whole. Society was not prepared for it. What it could receive it did.

The old customs and the new law intermingled and the common law was born. The barons were jealous of the influence of the clergy and the king of the claims of the pope. Their opposition to the clergy extended to the system of law which the latter favored. They thought it a means to aid in an intended usurpation of power. The civil law was thrust out of the common law courts. "Truth is mighty and will prevail." The rigid forms and manners of the common law often failed to do justice. Advancing civilization demanded improvement. Wrongs called for redress. The learning, brains and moral power of the nation were still with the clergy. A new power arose. Equity was administered by the Chancellor and by dint of clear-headed decisions maintaining always the cause of right against wrong step by step it grew in strength and gained the confidence of the nation.

In the Inst. 2. 23. 1 *et seq.* the subject of trusts is considered and it is there observed that "anciently all trusts were weak and precarious, for no man could be compelled to perform only what he was only requested to perform." Testators who desired to leave a legacy to some person to whom it could not be directly given were compelled to depend solely on the honor of the trustee.

"The emperor Augustas having been frequently moved with compassion on account of some persons and detesting the perfidy of others commanded the consuls to interpose their authority. This being a just and popular command gave them by degrees a continued jurisdiction, and in process of time trusts became so common and were so highly favored that a praetor was purposely appointed to give judgment in these cases and was therefore called the commissary of trusts."

No one can read this without feeling that here is the peculiar power of a court of equity interposing to oblige a man to do that which it is his duty to do.

We find another instance of this same power in forcing an heir to disclose on oath whether he had received any trust or not. Just. 2. 23 12.

Says Bouvier's Law Dic. (Article Civil Law), "All admit that the system of equity jurisprudence prevailing in Europe and America is mainly based on the civil law.

Story in his treatise on Equity, says: "From the moment when principles of decision came to be acted on and established in Chancery, the Roman law furnished abundant materials to erect a superstructure at once solid, convenient and lofty, adapted to human wants and enriched by all the aids of human wisdom, experience and learning."

The same author in his work on Equity Pleadings, makes a plea, protestation, answer, and other parts to be derived from the civil law. But it is well known that in the form of actions, the manner of examining witnesses and in the decision of matters of fact by the judge chancery follows the civil not the common law.

Perhaps a disproportionate amount of attention has been given to the influence of the civil upon the common law in its early history. Influences exerted during the forming time of the common law may be supposed to have been more powerful than any brought to bear at a later period. But let no one suppose that the influence of the civil law ceased to increase upon the firm establishment of a Court of Equity.

Through and by means of Equity Jurisprudence the harshness and rigor of the common law have been gradually abated. Little by little the principles of Equity have been admitted into its practice.

The Common Law Procedure Acts of Great Britain have transferred much of equity jurisdiction to the common law courts. In America changes come more rapidly. In many of the States law and equity powers are vested in the same tribunal. New York now recognizes no distinction in administering law and equity. The time when this shall be the general rule seems to be manifestly approaching. The civil law although nominally banished for a time from the common law courts, has

always exercised much influence there and its use and authority are now steadily increasing.

During the late war when a detachment of regulars was stationed along-side of volunteers the discipline of the latter perceptibly improved. The principles of the civil law, "the perfection of reason," were known to the judges, were acted upon in Europe generally—in later times have been enforced in two of the United States. It could not but have its influence. On the subject of sales, for instance, the common law has approached the civil law so that a learned writer has declared the doctrine of *caveat emptor* to be but the shadow of its former self. To-day the civil law is again quoted in our courts. Our great commentators on different law subjects quote compare and discuss it at every step. Our national courts, occupied as they are with matters which come especially within its scope, with disputes between states, with matters of bankruptcy, with admiralty jurisdiction, cannot but give it especial prominence.

Of course it does not necessarily follow in every case in which a similarity is observed between the civil and the common law that one is derived from the other. Right reason may draw both toward the same goal. Possibly a thousand years hence the common law might have attained to its present excellence without external aid. And here is another source of influence. Good laws well administered are the necessary conditions of the prosperity of a people or an age. But for the timely discovery of the civil law, the English nation might even now be slowly toiling out of their semi-barbarous feudalism. Good laws promote civilization. Civilization makes good laws.

The civil law did not annihilate the common law in its infancy only because such a revolution would have been too sudden. A nation cannot be lifted in a year or an age into a new mode of existence merely by a change in its jurisprudence. It was better so. The common law was thus able to cull from the civil law the good and refuse the rest. The influence of the civil law has therefore been good and only good. It's political system, the absolute power of an emperor, could never be accepted. True the civil law made the will of the emperor only a mode of expressing the will of the people and absolute only because the people willed it so. Some things we shall never receive because our society will never be like theirs. The civil law itself was changing all the way down to Justinian's time and even then it was not quite perfect. Had the Roman empire remained till now it would have changed still more. The early severity of the parental power was almost done away. That of the common law is milder still. The laws in regard to slavery, God be thanked, are obsolete, all but the glorious declaration that by nature

all men are free. The trial by jury in criminal causes we still retain though in civil matters our lawyers look longingly toward the civil law method of a hearing before a judge. The law which the barons rejected legitimizing children born before wedlock upon the after marriage of the parents we shall probably never accept. *Nolumus leges Angliae mutari* is a noble sentiment, as they meant it, against the usurpations of foreign priests. We hold to it ever save where the laws can be bettered.

Pausing now at the present, let us glance backward over the history of the past and endeavor to glean from its page some prophecy for the future. The causes which have worked will work. Wherever the civil law is founded in reason and justice it will work its way to the courts. The history of the common law thus far rises singularly parallel to that of the civil. The civil law, commencing with rude customs, advancing with the progress of society, enriching itself from the more cultivated Grecian systems, admitting the decisions of prætors, and the opinions of learned authors, 'till with its minute ramifications it became a bulk too large and unwieldy for use and finally condensed and finished in all but the last point is the true type of the common law. The civil law, accumulated through fourteen centuries, scattered through two thousand books was collected into one systematic code.

Shall the parallel be completed?

The necessity, the use and the authority as well of text books is increasing. Why should we not have an authoritative compend? Why should not the opinions of Kent, or Story, or Parsons, formed after a long life of experiences with abundant leisure for consultation, comparison and choice, be as authoritative as their decisions from the bench, often hastened by the pressure of present business. Justinian's law could not remain the same, for law will grow, but at the least it provided a starting point, good for five hundred years.

To do this work for the common law would be a giant's task. Attempts at imitation are already made. The example is before us and stimulates to endeavor. Some mighty intellect may yet complete the parallel and the world behold the greatest legal triumph since Justinian's time.

LEGAL REFORM.

The direct appeal in capital causes from the Oyer and Terminer to the Court of Appeals proposed in The Brooklyn Eagle and Mr. Clinton's suggestions, respecting the crime of murder in the second degree and the disposition of insane homicides, are worthy of the careful consideration of the Legislature. The people reasonably expect that the pro-

fession will initiate and advocate measures of legal reform. This expectation has hardly been realized. That something further must be done for the protection of the lives of our citizens from homicidal assaults is universally conceded. The disgraceful carnival of crime which characterises the last year's history of the cities of New York and Brooklyn has appalled and nearly silenced even the opponents of capital punishment. The divine instinct and necessity of self-preservation are the law's justification in demanding a life for a life. To satisfy this just demand with absolute certainty is however impossible. The extreme penalty must *always* be inflicted upon the guilty and never upon the innocent. The process must be deliberate though not unnecessarily prolonged. The ministers of justice must be deaf to private appeals and public clamor. In their tribunals the accused pauper and millionaire are equal. Impartial justice does not discriminate between the lives of the virtuous and the vicious. Both classes though not equally valuable to society are equally entitled to its protection. It punishes not to avenge the dead but to shield the living. The prisoner is entitled to the legal presumption of innocence. The juryman's mind is a *tabula rasa* and his conscience is quickened by a solemn oath. The prosecuting officer is content with presenting the people's case and does not seek to convict upon insufficient evidence. The counsel for the prisoner does all for his client that is consistent with his official oath and his obligation as a citizen. The accused must have the benefit of a reasonable doubt.

Such in brief is the theory. Alas for the imperfection of human devices! At best the practical working of our judicial machinery can but approximate the perfection of its theory. As the mechanic must make due allowance for friction, atmospheric influence, &c., in computing the effective power of an engine so the legislator must anticipate the effects of human error and weakness upon the administration of the laws. These considerations should temper the criticism of the press and the people upon our courts. The suggestion of mercenary influence being brought to bear upon our courts in capital cases is horrible. If money has debauched the ministers of justice may be it never be known! When the people shall have ceased to trust their courts social chaos will have come! We call upon the bench and the bar to unite in restoring popular confidence in their integrity. The first step is to deserve it. The great majority do. Let our best criminal lawyers carefully mature bills more clearly defining the various kinds of homicide and embracing such other provisions as they can commend to the favorable consideration of the Legislative Judiciary Committee.

The grand jury system should be abolished. All preliminary criminal investigations should be public. The accused should have counsel

before the coroner and be represented on *post mortem* examinations. Indictments should be found by the District Attorney upon the return of the committing magistrate. The citizen empannelled for jury duty should not be disqualified by having formed an impression from newspaper or other reports provided he will swear that, notwithstanding, he can impartially serve. The jury should consist of thirteen and seven should render a verdict. If the prisoner is acquitted he should be indemnified from the public treasury. The convict's appeal for error should be directly to the Court of Appeals. The question of a prisoner's sanity should be decided by a Board of Experts before trial.

The law should discriminate between homicide with malice aforethought and killing in the heat of passion, or from loss of reason from any cause whether temporary or prolonged—that is between murder and manslaughter. The deliberate assassin and the drunken homicide are not equally guilty. The former should forfeit his life, the latter his liberty for life. The juryman should not be compelled to determine what can not be ascertained,—the intent to kill the instant next preceding the fatal blow. The intent cannot be determined solely from the effect. We fully endorse Mr. Clinton's propositions to define the crime of murder in the second degree and provide its penalty.

We have, at present, neither time nor space to maintain the foregoing propositions. We believe the changes therein indicated, if enacted, will prove to be reforms. The school, the press and the pulpit must do the rest.

Our readers will observe that the leading articles of this number are in some degree identical, both with respect to the views therein advanced and the authorities by which they are supported. It being proposed to publish in THE AMERICAN CIVIL LAW JOURNAL a systematic course of lectures or essays upon the Civil Law repetition could not be wholly avoided in this issue without mutilating either Mr. Newton's admirable paper or the first lecture of the series.

The biographical sketch of the late Professor von Vangerow of Heidelberg from the pen of Dr. Tompkins first appeared in the English *Law Magazine and Review*. It has excited much interest in this country where many pupils of von Vangerow lament his loss. We reprint it from *The Albany Law Journal*. Dr. Tompkins' works entitle him to the first place among the disciples of the great German teacher.

Mrs. Lydia Sherman has confessed her murder of three husbands and four children. "It is curious," says the Hartford Courant, "that the only death for which she cannot be held accountable according to her story, should be that for which she has been convicted."

ADOLPH CARL VON VANGEROW

The students of Roman jurisprudence in Great Britain and the United States of America will learn with deep and unfeigned regret of the demise of Professor Adolph Carl von Vangerow, of the University of Heidelberg.

Within the last few years the old Ruprecht university has suffered irreparable losses in the removal by death of Mittermaier, Rothe, and Von Vangerow. Not only were these professors great scholars, but they were pre-eminently gentle and good men. As a criminal lawyer, upon whom Professor Feuerbach, of Bavaria, casts his mantle, no man has, perhaps, ever obtained to so high a position as Mittermaier. His countenance was stamped with benignity, and his life furnishes an example of what a man should aim at who is desirous of being a true patriot and a friend of the human race. Rothe was a model theologian. His quiet calmness, his unaffected piety, and his beaming countenance, transfused almost with celestial ardor, when delivering certain parts of his lectures on the "*Leben Jesu*," can never be forgotten by those who have been his pupils, and enjoyed his friendship. But Von Vangerow was a strong man; strong in frame and muscle, and one can scarcely believe that he has passed away years before attaining the allotted span of human life. As one looks at the accumulated memoranda obtained at his lectures, and remembers that his allotted two hours daily for lectures on the pandects were sometimes extended to upward of three, one cannot but feel that the life of the great man has been shortened through the waste occasioned by the enormous physical energy consumed in his inimitable addresses.

The successful German professor is a despot, but his despotism is of the divine type, for he sways his scepter in the domain of intellect by the force of his inflexible purpose and his superior mental power. As one has often quietly walked by the side of Von Vangerow, in the old Plockstrasse in Heidelberg, and received his friendly, kindly greeting, one easily realized that he was a strong man in every sense, but no one would have guessed from his appearance that such hidden fires of eloquence lay smouldering beneath that quiet and repose. But it was so, for von Vangerow was a man of a lion-like nature, and all his movements were like the tramp of a Titan. Mittermaier was, in his lectures colloquial, fragmentary, suggestive, lacking system and completion; Rothe was chaste, finished and exquisite; but Von Vangerow had a power of utterance and of eloquence, with a voice like the tone of a trumpet and the melody of a harp, that no other professor we have ever heard possessed. This is no exaggeration, as those who have known the lamented German will admit. There is a marked distinction between a German professor, of the first rank, and many public teachers in our own country. The German, impressed by his theme and dominated by his subjects, gives you the result of his craft in a finished and carefully planned piece of workmanship. The very "chips from the workshop" of such a man are valuable. The Englishman too often forgets that he is an investigator; he speaks as if he knew everything, and as though it were an act of condescension to treat upon the subject he has in hand. Such men could never occupy the first rank in a German University. The *genius loci* requires something different, and the professor can only hope to obtain success when he is natural in his manner, and when he is in himself so interested in his subject as to command the lively interest of others.

But to return to Von Vangerow. He was born in the south of Germany, at Shieffelbach, a village in Kurhessen, not far from Marburg. In the beautiful country where Luther met and contended with Zuinglius, he spent his youthful days. The current conviction with his Heidelberg students used to be, that he was not particularly industrious in his early life; and it was even hinted that he was once plucked. However that may have been, it is certain that from his sixteenth year, now nearly half a century, he has devoted his noble energies to the study of jurisprudence. On January 23, 1830, he was advanced to the degree of Doctor of the Civil and the Canon Law, and the following Easter he commenced his professional career as Privatdocent in the university of Marburg. It is not a little remarkable that Savigny, Puchta and Von Vangerow were at different times associated with the Hessian University of Marburg. Savigny commenced his student life there in 1795, and took his doctor's degree in

the same legal school on October 31 1800. Puchta was a professor at Marburg in 1837, and Von Vangerow was for ten years identified with this seat of learning as student, tutor and professor. He was appointed professor extra-ordinarius at Marburg in the year 1833; in 1837 he was appointed, in the same university, ordinary professor, that is, one of the principal professors of the law. Upon the death of the distinguished professor Thibaut, in the autumn of 1840, just thirty years ago. Von Vangerow was invited to the University of Heidelberg, where he remained til his lamented death, the most popular professor of the Roman law in Germany.

In Germany it is usual to mark distinguished literary and scientific ability by court favor. Thus, two years after Von Vangerow's settlement at Heidelberg, he was appointed a court councilor in the Grand Duchy of Baden; in 1846 he was made a privy court councillor; and in 1849 he became a "*gheimrath*" or privy councilor in the same state. He was a Knight of both German and Russian orders.

No man's writings could possibly give less idea of his flowing and rich eloquence in his class than those of Von Vangerow. In this country a man writes a lecture, polishes it and touches it up, not for the benefit of his class, for they may doze or scribble while he is delivering it, but because he has the publication of a book in view. It is quite different in Germany. There is no compulsion to attend lectures, no register of attendance is kept, and hence the student's life is the freest period in a young man's course. The student may wander about with his dogs, or he may spend his time by bawling songs from his "*Commerz Buch*" or by fighting duels on the far side of the Neckar. If he is to be won and rivited to his class it must be by the power and eloquence of the professor. It is a remarkable fact that with all this freedom men sometimes "*hospitiren*" to learn what is going on in other classes, but they rarely forsake their own favorite professors. The secret of a German professor's popularity is not merely to be traced to his great stores of learning, but to the unfettered use he learns to make of his voice.

Göethe himself, a prince among writers, has said: To write is to abuse speech and perusal is but a sad substitute for the living energy of language." But Von Vangerow himself shall be heard upon this point, as it will explain his own marvellous success:

"I hold it to be an essential requirement of lectures on the modern Roman law that the verbal discussions of the lecturer should not only comprehend in a fragmentary manner the general distinct parts of the law, but should present for the contemplation of the auditors the entire system as an organic whole. Of course, I here presume a free and characteristic delivery, one in which the professor is, at the time of his lecture really self-active. Lectures that are dictated or read ought, in common justice, never to be given, for they are only destructive to the intellect of the professor, tending to convert his avocation into actual misery, while they lack the penetrative vitality which give to a spoken lecture its real value."

Such men as Savigny, Puchta and Von Vangerow would never have obtained their world-wide reputation if they had confined themselves to the *ipsissima verba* of their MSS. The ready utterance, the keen, quick eye, kindly glancing at the student and ascertaining at once whether the statement was understood; the courteous demeanor and sympathy of these great men, all brought to a focus, powerfully ministered to the advancement of their students and to their own well-deserved European fame. Powerful and fascinating as were the addresses of Von Vangerow, he was a true and faithful disciple of the school of Savigny. Not only did he talk of the original sources of the law, but he constantly led his students to refresh and stimulate their research at the fountain head. The great revival in the study of jurisprudence that the present century has witnessed in Germany has been the result of the careful and loyal study of the sources of the law, contained in the "*Corpus Juris Civilis*" and the other writings of the jurists and scholars of antiquity.

Von Vangerow's inaugural address, delivered at Marburg in 1830, consisted of a commentary on I. 22 Cod. "*De jure deliberandi*" (6 30). This address was succeeded by the following works: A treatise upon the 'Latini Juniani,' Marburg, 1833; "De Furto Concepto ex Lege XII Tabularum," Heidelberg, 1845; his great work entitled 'Leitfaden für Pandektenvorlesungen,'—elementary work for lectures on the modern civil law—was first published at Marburg in three volumes, 1837, and the following years. This work has

passed through several editions; the seventh was published only last year. Almost his last work was a monogram on the difficult questions connected with the Senatus Consultum Neronianum. Von Vangerow has also written in Reichter's "Jarbuch" several critical works, and in the "Archives for Civil Practice," of which he has been co-editor since 1841, a great number of articles have appeared from his pen.

In contrasting the great civilians of Germany of modern times, it may be observed that Puchta was a compact and philosophical writer, who, if he had lived at the time of the early Roman jurists, when the luminaries of the legal science were grouped in two constellations of surpassing brightness, would have been found marshaled with the Proculians, the sect or school that treated the law with philosophical freedom, deriving its arguments from the appropriateness and the utility of the law itself. Arndts, formerly of Vienna, is preëminently a plain able, and practical writer. But Von Vangerow possessed a critical acumen that amounted to genius. His arguments are so striking and cogent, he is so fair to his opponents, combining the clear common sense of the best English controversionalists with the learning and acenteness of a German.

The Pandekten of our great master is a work upon the modern Roman law altogether unique. To the general student it would be regarded as lacking the completeness and finish of Puchta. To the advanced student, Von Vangerow presents, in his extracts from the authorities and his discussions on the controverted points of the law, a mine of wealth and treasure not to be found in any modern treatise on the Roman law. In this three volumes containing almost as many thousand pages, we possess the most acute discussions on the controversies of the Roman law, found either in modern or ancient writers. These volumes, however, give no adequate conception to a mere reader, of his well-rounded and perfectly spoken lectures. His works resemble a vast workshop stored with materials, and containing things in various stages of completeness. Their great value can be only appreciated by those who have used them as text-books for his spoken lectures. During the winter-session of the University of Heidelberg, for five months of the year, hundreds of students flocked to his class. They came from all parts of Germany, from France, Holland, Belgium, England, Italy, Spain, Greece, Russia and the United States of America. Full and systematic, microscopically correct and accurate in his authorities and his definitions, his students never wearied of listening to him, and even grew enthusiastic in there devotedness to the professor, and to the branch of the law of which he was so great a master. In his lectures there seemed to be revived the fluency, the beauty and promptness of the great Roman jurist, Ulpiane.

One of the best informed of our daily journals recently printed the following able, truthful and pertinent remarks on the great jurist.

"While French journalists have been circulating fictitious stories about the mysterious death of an illustrious German officer one of the most noteworthy among German professors has suddenly passed away. By the death, in his sixty-second year, of Professor VonVangerow, at Heidelberg, Germany loses one of her greatest jurists, and the students of Roman law one of their most accomplished teachers. SinceSavignydied, ProfessorVonVangerow has had no superior in the world as an authority upon Roman law. For the last twenty years his lectures have attracted students to Heidelberg from all parts of the globe. In his class room, students from every State in Germany, from England, Scotland and America, attentively listen to the exposition of the principles of Roman law, and to an explanation of the points which had been the subjects of controversy and doubt. There was not a pamphlet relating to the law which the professor had not read, and to which, in his work entitled 'Pandekten' he did not make some reference. He had the gift, possessed by few of his countrymen, of being exhaustive without being exhausting. His lucidity of exposition was as great as his learning. This contributed to make him renowned as a teacher. Indeed, his fame as a writer is out of proportion to his capacity. Had he devoted himself, like Savigny, to the production of some comprehensive work on Roman law, he would, doubtless, have made a greater mark in the voluminous literature of which Roman jurisprudence is the theme. He might have done this, however, without rendering a more important service to the students of jurisprudence. Those who profited by his

teaching will be able to accomplish that which he had not the time to undertake.

We hope and believe that the closing words of this writer may be verified in the future.

Many years ago, Mr. Chittenden, of the American bar, was sitting by the side of the writer of this sketch, at the close of Von Vangerow's course of lectures on the Pandects. All the class were in a state of exhaustion; but it was felt to be exhaustion after a mighty victory. Never will the plaudits with which those lectures were concluded be forgotten. Mr. Chittenden retired with the writer, to the building now known as the "Hotel de Russe, and while the present writer was penning an article on Lord Palmerston for the *American Press*, Mr. Chittenden wrote on a piece of paper, still preserved, the following account of that closing lecture: "Dr. Von Vangerow was deeply affected, for his students had faithfully clung to him till his last utterance. His face was flushed and his glorious voice trembled with feeling. When he closed, thunders of applause testified the admiration of his students, and many a tear was brushed away from manly cheeks. 'Gentlemen,' said Von Vangerow, 'we have attained our object, and I have now only a pleasant duty to perform. Though, during the long months that have fled, I have given your patience a severe trial, I still hope that the recollection of the labor my instructions have cost you will not cast too deep a shade upon the lectures themselves. You will, I know, remember that the labor has been mutual. I am confident that the investigations of the past session have demonstrated to you that the study of the Pandects is, and will be, the only sure basis of a scientific knowledge of the law. I am quite sure that your further researches in jurisprudence will be facilitated by the attention you have paid to this subject. One who knew well has said, and said correctly, "*bonus pandectista, bonus jurista.*" and the experience of every age confirms the assertion. I trust you will regard the notes of my lectures, which you will carry away with you, as a friendly souvenir of the past session. But my time fails; I thank you heartily for your kind and studious attention. It is a guarantee to me that you have acquired a correct idea of the full significance of the principles and doctrines advanced. I shall not, however, blame you, he pleasantly observed, 'if you rejoice somewhat at the thought, that—instead of listening to the voice that has so long resounded in this lecture hall—you are about to enjoy a pleasant *ferien*, in the homes of your friends. Farewell.'" Several have been the communications since that "Farewell," which have come from the kind-hearted and noble professor on the banks of the Neckar to the old student on the banks of the Thames. On the 18th of October last a letter came with the Baden impress. It told his former pupil and friend that the excellent professor, Dr. Von Vangerow, was dead, and that on the previous Friday he had been laid in his last resting place—his "quiet bed," as the Germans call it—not far from Umbreit, and Mittermaier, and Rothe, and that a distinguished professor from Munich had been already invited to occupy his chair.—*Law Magazine and Review.*

BOOK NOTICES.

GAIUS' ROMAN LAW: By TOMKINS & LEMON. 8vo. 278, extra cloth.

TOMKINS' INSTITUTES OF ROMAN LAW. Royal 8vo. 128, cloth. (To be completed in Three Parts). A Compendium of Modern Roman Law founded upon Treatises of Puchta, von Vangerow, Ardts, Franz Moehler and the Corpus Juris Civilis: By FREDERICK J. TOMKINS, Esq., M.A., D.C.L., and HENRY D. JENCKEN, Esq., Barrister-at-Law of Lincoln's Inn. Butterworth's, 7 Fleet Street, London, Eng.

The foregoing works, copies of which we have received from Dr. Tomkins, our former classmate at Heidelberg, mark an era in English Law Literature. We hope, hereafter, to give the time and space to their review which their importance demands. At present we can only add that they deserve a place in every law library in the land.

MISCELLANEOUS.

Mr. R. H. Chittenden proposes to publish a monthly CIVIL LAW JOURNAL devoted to a discussion of the principles of the Roman law as taught in the universities and applied in the courts. Some of the most distinguished civilians of Europe and America will contribute to it. The first number will appear in January. The study of the Civil law is beginning to attract considerable attention in this country, and the CIVIL LAW JOURNAL will help to foster the good tendency.—*Albany Law Journal.*

THE ORIGIN AND DEVELOPMENT OF THE CIVIL LAW.

It is proposed in this and the next succeeding paper of this series to briefly sketch the history of the Roman Law from its origin to its final codification. The Civil Law did not spring forth like Minerva from the head of Jove fully developed, but reached perfection by the slow growth of centuries. To trace this progress from the crude simplicity of the twelve tables to the learned decisions of Scævola Paulus, or Papinianus, is one of the most interesting features of this department.

The Pandects are made up of fragments of the *dicta* of Roman lawyers from the time of Augustus to that of Severus. The Code is a collection of the rescripts of Roman Emperors extending through several centuries. It is a knowledge of the history of the Civil Law which enables its student to trace through this interval the origin and development of any given rule of law and to distinguish the obsolete from the actual.

In pursuing this investigation the student must resume his classics already laid aside. Cicero and Tacitus, from whose works the historian derives his most valuable materials are studied for a far more nobler and profitable end than a "rush" at a college examination. Passages of Horace and Juvenal which the mere philologist is in no condition to explain, now become real treasures, and the thorough civilian is not content until everything which can contribute to his knowledge of the constitution, government, public and private life of ancient Rome, has been pressed into his service and made to illustrate her jurisprudence. Moreover the study of the history of the Civil Law is an indispensible pre-requisite to a full understanding of its principles, and at every step in the investigation, the American will be strongly reminded of the growth of the English Common Law, and of the lessons to be learned from the struggles, failures and triumphs of that wonderful people whose precious legacy is the property of the civilized world.

I.—ITS ORIGIN.

The original source of the Civil Law is found in the early Latin intellect and conscience. Religion does not spring from revelation, nor law from positive legislation. Both have a common origin, the law of nature, *i. e.*, the law of God, develop simultaneously and

are inseparably dependent one upon the other. The Civil Law in its infancy existed as a part of the law of nature, found expression in the early Latin usages and customs, and assumed the form denominated in the *Corpus Juris Civilis*, *lex non scripta* or customary law. When a certain legal principle becomes grounded in the national conscience it germinates in the form of customary law, and finally assumes the shape of positive legislation. Thus the custom is evoked from the pre-existing legal principle. Therefore custom is not so much the parent of *lex non scripta* or unwritten law, as its material manifestation and the evidence of its recognition. The legal principle or natural sense of justice found in the popular conscience is the parent of custom and the practical application of this legal principle is only first introduced by its use. This is precisely analagous to the publication of the *lex scripta* or statutory law, and as we say a statute arises through its publication, so we may say that the *lex non scripta* originates in customs. Thus we finc that civilians use the term *jus moribus constitutum* or *introductum*,—law constituted or introduced, through customs, and it must not be inferred from such or similar expressions that their true significance and relation is ignored. Vangerow's Pand., Vol. 1. § 14.

If this exposition of the origin of law be correct it will be seen that Blackstone's theory of the implied social compact falls to the ground. This theory, though formed from the Civil Law, is untenable.

"But those laws which have been confirmed by long custom and have been observed for many years are no less binding as a tacit contract of the citizens (*velut tacita civium conventio*) than the written laws." l. 35, *de legibus senatusque consultus et longa consuetudine.* (I. 3.)

We might as well denominate the maternal sentiment, the recognition of an implied contract between the mother and child, as to seek for the origin of society in a tacit civil compact. Cod, VII. 53. *Quae sit longa consuetudo?*

II.—ITS DEVELOPMENT PRIOR TO JUSTINIAN.

When we gaze down the long vista of ten centuries from Romulus to Justinian through which the Civil Law slowly grew from its simple beginnings to its full perfection, our attention is arrested by certain jural monuments which stand to mark the successive stages of its developement. As they recede in the dim perspective their inscriptions become less legible but enough remains to enable the civilian to read intelligibly their history. These monuments which mark the progress of Roman jurisprudence are—

1. *Jus Civile Papirianum* or the Royal Laws of Papirius.
2. The XII Tables.—The Roman *magna charta.*
3. *Senatus Consulta et Plebiscita.*—Decrees of the Senate and the People.

4. *Jus Civile Flavianum* or the Civil Code of Procedure.
5. *Jus Honorarium* or Civil Equity.
6. *Responsa Prudentum.*—Opinions of Jurists.
7. *Edicta Magistratum.*
8. *Constituta Principis.*—Rescripts of the Emperor.
9. *Gregorian Code.*
10. *Hermogenian Code.*
11. *Theodosian Code.*

These are the sources of the Civil Law. That part of the Civil Law extending over a period of 300 years until the establishment of the twelve tables is denominated the ancient.

Jus Civile Papirianum.—The earliest records of ancient Roman jurisprudence of which we have any account are the *leges regiæ* or royal laws collected by Papirius, a priest of the time of the last Tarquin and known as *Jus Civile Papirianum.* This work, as its name indicates, was a collection of the laws and usages of the ancient Romans under their kings. Its history was written by Pomponius, a celebrated jurist in the second century of the Christian era, and is found in the Digest. *'De origine juris.* (I. 2.)

This work of Pomponius is the principal source of our information respecting the constitution and laws of ancient Rome. From this book we learn the division of the Roman people into three tribes and thirty *curiæ* or wards, that the establishment of the patrician order and of the senate were contemporaneous, and that these institutions were ascribed by tradition to Romulus. The government was a mixed monarchy. (Cic. Tusc Quest. lib. IV. 1. de repub. II. § 9. 10. 14.) The senate, consisting of three hundred patricians nominated the king and the people in their *comitia curiata* or ward meetings elected him. But the division of the Romans into six classes and one hundred and ninety-three centuries by Servius Tullius whereby the first class consisting of patricians, knights and rich men contained a majority of the centuries, practically deprived the common people of any share in legislation. This device seems to be almost worthy of Tammany and in some respects to resemble the charter of New York City. Like the good American citizen of our time the Roman plebeian was relieved from all trouble in the selection of candidates for public office. The "slate" was arranged by the patricians and when the consuls or senate saw fit to call a general election or *comitia centuriata*, the *century* to which the plebeian belonged could vote to ratify the choice of the nobles. Finally a more democratic system prevailed. The whole people, irrespective of birth and riches, were convoked by the consuls, who presided over their elective assemblies, counted the votes, and published their decrees, which were binding upon the entire community.

The establishment of the *comitia tributa* or tribal assemblies which were held by the Plebs independently of the patrician magistrates and influence marks the beginning of a struggle between the upper and lower orders of Rome which culminated in the *Lex Hortensia*, a great popular triumph, for by this statute, the decrees of the *comitia tributa* were binding equally upon patrician and plebeian. l. 28, (I. 2.) *Gravina de ortu et prog*, J. C. § 23. 1 Kent 517 *et seq.* The Hortensian law abolished the senator's veto upon *plebiscita.* A *senatus consultum* could continue only one year, unless ratified by the people and the tribunes could at any time veto any senatorial project. It is with some reason that Niebhur considers the Hortensian law the commencement of the destruction of the Roman constitution. But Niebhur was an ardent democrat.

The *Lex Valeria* granted by the consul Valerius after the expulsion of the Tarquins marks increasing respect for human life, for by this law the right of appeal from the judgment of the consuls to the people was granted to persons accused of capital crimes. Kent compares the Valerian law to the *habeas corpus* act of England.

2. *The Twelve Tables.*—We now come to the famous twelve tables, the *magna charta* of ancient Rome, and the corner stone of her jurisprudence. Twenty years had passed since the last Tarquin was driven from Rome. The royal laws collected by Papirius were not adapted to the republic and had become inoperative or obsolete, and the second time the Roman people were left to the uncertainty of customs within the city and the arbitrary power of the consuls without its walls. l. 3, (I, 2). *Incerto magis jure et consuetudine quam per latam legem.*

The demand for written law came from the common people and was resisted to the last by the senators and magistrates. Finally a commission of ten persons was appointed by the senate and tribunes jointly to form a legal system. This commission, the famous *Decemviri*, was sent to the Grecian cities to inquire into their laws and institutions. Says Pomponius referring to the uncertainty of the law at this period, "*Postea ne diutius fieret placuit auctoritate decem constitui viros, per quos peterentur leges a Graecis civitatibus ut civitas fundaretur legibus; quas in tabulas eboreas perscriptas pro rostris composuerunt ut possint leges apertius percipi!*" l. 4, de orig. juris. (I, 2.) "Afterward in order that this uncertainty might continue no longer, ten men were commissioned by a public decree to inquire of the laws of the Grecian States, in order that the Roman State might be established upon statutes which, inscribed upon ivory tables, they placed before the *rostra* in order that the laws might be publicly inspected." During that year they were invested with the highest civil authority in the State to correct and interpret the laws as might be necessary without appeal as in the case of the other magistrates, who themselves

supposed there was something wanting to these first laws, and so the following year they added two others to these same tables and from this circumstance they were called the twelve tables. Gibbon discredits the accounts of the embassy of the Decemviri to Greece, as improbable, and says that a wise Ephesian exile Hermadorus imparted his knowledge to the legislators of Rome, in honor of whom a statue was erected in the forum. Hist. Rom., vol. IV. p. 303. Cic. Tusc. Quest. v. 36. Pliny, Hist. Nat. XXXIV. II). A much more important question is whether the twelve tables included in fact laws imported from Greece.

Cicero says that the tenth table relating to funerals was translated from the laws of Solon. Cic. de Leg. b. 2. c. 23 & 25. But the negative opinion is maintained by Gibbon, Niebhur, Hugo and Savigny. The twelve tables are essentially declaratory of ancient Roman laws and usages, a restoration of the ancient Roman law under Romulus, Numa and Servius Tullius. New York Review, Oct. 1839. Kent, vol. 1, p. 520. Cic. de leg. II, 23.

The twelve tables in process of time secured from the Roman lawyer that partial reverence which we bestow or ought to bestow upon our constitution. In Cicero's time their ancient Pelasgic idioms had become nearly obsolete and the halo of long continued use surrounded every word of the remotest text. Says Cicero: "They amuse the mind by the remembrance of old rules and the portraits of ancient manners. They inculcate the soundest principles of government and morals, and I am not afraid to affirm that the brief composition of the Decemviri surpasses in genuine value the libraries of Grecian philosophers. How admirable is the wisdom of our ancestors. We alone are the masters of civil jurisprudence and our superiority is the more conspicuous if we deign to cast our eyes on the rude and almost ridiculous jurisprudence of Draco, of Solon, and of Lycurgus." Cicero's praise must be taken *cum grano salis*.

The twelve tables were committed to memory by the young law student and commented upon by the old. They escaped the ravages of the Gauls, existed in the time of Justinian, and though subsequently lost, have been partially restored by modern critics.

The student may consult the following literature:

Cooper's Institutes, p. 656, Phil. 1812, Eng. Tr. 1 Kent, note pp. 521 to 526, inclusive. Hugo's Histoire du Droit Romain, Berlin, 1815. In French, by M. Jourdan, Paris, 1825. Savigny's Geschichte des Römischen Rechts im Mittelalter 6 Baende, Heidelberg, 1815. Dirksen's Manual of the Latin Sources of C. Law, Berlin, 1837. And especially a French Translation of Gibbon, 44th Chap., by Prof. Warnkönig at Liege, 1821, with notes which are borrowed by Dean Milman, and incoporated in his edition. Tomkins' Inst., Part I. Sec. 5.

3. *Senatus Consulta et Plebiscita.*—Notwithstanding the political triumphs of the plebeians to which we have adverted the patricians by their superior intelligence learning and wealth continued to control the administration of justice, and the *senatus consultum* before the Augustan age became a most important source of the Civil Law. Inst. 1. 2. 4. Dig. 1. 2. 9. Hist. du Droit Romain par Hugo, § 174, 175, 176.

Cf. Horace, L. I. E. VI. p. 41, Epistle to Quinctus, where, in his admirable portraiture of the hypocrite he refers to the decrees of the senate or *consulta patrum* as sources of law.

Vir bonus est quis?
Qui consulta patrum, qui leges juraque servat?
Quo multæ magnæque secantur.

4. *Jus Civile Flavianum.*—One of the most effective means whereby the patricians controlled the Court was the introduction of forms of pleading or *legis actiones.* l. 6, de orig. juris (I, 2). Gravina, *de ortu et prog. J. C.* § 33.

These forms were established by the ancient lawyers partly for their convenience but chiefly to add to the awe with which every well regulated layman should contemplate the mysterious processes of the law! The *pontifices* or priests seem to have conspired with the lawyers, for they regulated the calendar, had the custody of the laws and public records, fixed the lawful days for business, claimed the exclusive right to interpret the laws and finally refused to admit any but patricians into their sacred order. These law forms, *actiones legis*, remained undigested for a long period until a priest, Appius Claudius Caecas, having collected them, his secretary, one Cnæus Flavius, purloined the book together with the calendar or *facti* and published them to the Roman world, for which theft and publication he was magnificently rewarded by the grateful common people, for they made him tribune, senator and curile ædile, in quick succession. Dig. 1. 2. § 7. Livy's Hist. 9. 46. Gravina 533. Cic. Nat. Jure, 11, § 79. 80.

But in the course of time, special pleading became the bane of the Roman Courts and an object for the ridicule of men of letters. "*Legulejus quidam cautus et aculus praeco actionum, cantor fabularum auceps syllabarum.*" Cic. Pro. Murena § 11. De Orat. 1. 55. Code 2. 58. Some wary and sharp pettifogger and bawler of technicalities, a canter of fictions and catcher of syllables.

5. *Jus Honorarium or Prætorian Edicts.*—We have now reached a point in our rapid survey of great interest to the jurist, the passage of the Licinian Law in the year of Rome 384, and the consequent rise of the *Jus Honorarium* or Praetorian Edicts. Arnold's History of Rome, Vol. 2. 33–61. By the *lex Licina*, the high office of consul was no longer limited to the patrician order, but was brought within the reach of the com-

mon citizens. A plebeian consul was therefore elected in the centuries and confirmed by the curiae. But as a compensation for this great concession to the democracy of Rome, the patricians demanded that the judicial should be separate from the consular office, and that a *praetor* should be instituted who should always be a patrician. Fortunately for Roman jurisprudence this demand was conceded and the *edicta prætoria* became of so great importance and authority that they were denominated the *Jus Honorarium* or Honorable Law. A *praetor urbanus*, or City Judge was created instead of the ancient *praefectus urbis*, or city prefect. Dig. 1. 1. 7. 1. 2. 10. 1. 2. §26. §28. A *prætor peregrinus* was also elected to attend to the causes of foreigners. The Roman *prætor* in many respects resembled the English Chancellor. While the edicts of the *praetor* were generally declaratory of the *lex non scripta*, or customary law of Rome he was permitted to exercise an equity jurisdiction, and to administer justice untrammeled by special pleading and technicalities so long as he adhered to the edict promulgated upon taking his seat upon the bench.

Hugo dwells upon the remarkable analogy existing between the *Jus Honorarium* and English equity jurisprudence. As the provinces of Rome increased in number, *prætors* were appointed therefor, until under the Emperor Augustus, they numbered sixteen, and in the time of Pomponius, there were eighteen. Warnkonig's note, 4. Gibb. Hist. pp. 310, 311. Tomkins' Inst. Part I. p. 57. "These praetorian edicts," says Kent, "were studied as the most interesting branch of the Roman law and they became a substitute for the knowledge of the twelve tables, which fell into neglect, though they had been regarded as a *carmen necessarium* and the source of all legal discipline."

MARRIAGE AS A CIVIL CONTRACT.

JOHN F. BAKER.

Dare jura maritis. *Hor. Ars Poet* 398.
Plus alæs meHis habet. *Juv. Sat. VI.* 180.

In almost every state and nation of christendom troth-plighting and marriage have been celebrated by some form of solemnization to herald and distinguish the event. It is well that this should be so, for the contract of marriage is the most important of all human transactions; the very basis of the whole fabric of civilized society. The beneficent social relation resulting from marriage—which rests on the fundamental principles of our being—has vouchsafed to mankind the true primary and substantial elements of order and domestic equilibrium, and these have wrought out a scheme of civilization comparatively perfect.

Marriage, though in one sense a contract—because, being both stipulatory and consensual, it cannot be valid without the spontaneous concurrence of two competent minds—is, nevertheless, *sui generis*, and unlike ordinary or commercial contracts, is *publici juris*, because it establishes essential and most important domestic relations.

Fanatics and pseudo philosophers have preached against the institution of marriage, but man's attempts to violate or change the infinite and consummate order of nature have ever been unavailing. The forms of marriage have been varied and interesting.

The Romans had, in a legal sense, three different ways of concluding a marriage,—*cœnitio*, *confarreatio*, and *usus*,—of which the *confarreatio* was the most solemn and conclusive; much care always being taken not to fix upon one of the *atri dies*—unlucky days. The betrothed pair, in the palmy days of Athens, ate a quince, probably in allusion to Proserpine, after which followed festivities.

Fustel De Coulanges, the Professor of History in the faculty of literature at Strasbourg, in his late work on the institutions of Greece and Rome, shows us that in Greece the ceremony began before the altar of the father, who, surrounded by his family, and in the presence of the suitor, offered up a sacrifice. At its close he declared, in pronouncing a sacramental formula, that he gave his daughter to the young

man. This was requisite to release her from the obligations of her maiden religion. Then she was transported to the mansion of her husband, either by him or the herald, who was clothed with sacerdotal functions. The maid was ordinarily placed in a chariot. She had her face covered with a veil, and on her head wore a crown which was used in all the ceremonies of worship. Her robe was white, as was the color of the vestments in all religious services. She was preceded by one who bore a nuptial torch. Throughout the route was chanted a religious hymn, which had as its refrain, *O hymen O hymenora.* This chant was called Hymen, and the importance of it was so great that it gave its name to the entire ceremony. Arriving at her new home, it was necessary that her husband should feign to carry her off without her consent, that she should resist with cries, and that the women who accompanied should pretend to defend her. Why this rite? Was it not to mark with force that the wife who was about to sacrifice at the altar had no right there herself, that she did not approach at the instigation of her own will, and that it was necessary that the representation of the locality and of the deity should introduce her to it by an act of his power? This was the prelude to the ceremony. The pair approach the altar; the bride stands in the presence of the domestic divinity; she touches its emblem, the sacred fire; she is anointed with the purifying liquid; prayers are said. Then the bride and groom between them ate a simple cake (*panis farrius*), and the partaking of the sacred communion together united them with each other and with the domestic gods so indissolubly that nothing but a ceremony performed with equivalent solemnities could dissolve the relation.

The phraseology of the jurists is now intelligible, they define marriage thus: *Nuptiæ sunt divini juris et humani communicatio;* and again, *Uxor socia humanæ rei atque divinæ. Vide* 11 Am. L. Register, 475. This work of de COULANGES might well become the basis for the study of Roman jurisprudence.

The Lacedæmonians had an altogether different custom of honoring the solemnity. Ancient Celtic and German tribes had another and widely dissimilar form; while the Mohammedans in their marriages adhered to the civil contract principle, which, as a natural consequence, ultimately proved injuriously lax.

Since the twenty-fourth session of the Council of Trent, marriage in the Roman Catholic Church has been regarded as a sacrament, and is dissoluble only by the pope.

In some of the States of America marriage is legalized as a civil contract. The Statute of New York expressly provides that, "marriage so far as its validity in law is concerned, shall continue in this State a

civil contract," to which of course the consent of competent parties is necessary. 3 Rev. Stat., 5th ed., 221. If the marriage be solemnized before a minister or magistrate, there shall be at least one witness present at the ceremony. Thus, in that State, a marriage may be valid without any formal solemnization—unlike the rule under the ancient law, which regarded marriage as a sacrament, and which to be valid for any purpose must have been celebrated *in facie ecclesiæ*. From the time of that wonderful social upheaval, the Reformation, down to the middle of the last century, marriage, in England, was legalized as simply a civil contract; the deliberate consent of competent parties entering into an agreement *in presenti* being the only requisite. Since Lord Hardwicke's Act (1753), however, which required all marriages to be solemnized in due form in a parish church or public chapel, with previous publication of the bans,—marriages not celebrated in conformity to the act, have been considered at law void *ab initio*. That is the most famous of the English Statutes. As New York adheres to the principle that the marriage contract may be entered into between the parties *sans ceremonie*, and is provable like ordinary contracts it has often occurred to us that there is a singular and marked contrast between the facility with which such a contract may be made and its indissolubility when made.

One of the differences between a marriage under formal ceremony and one not so celebrated is, that, in the one case, the regular celebration is conclusive evidence of the mutual consent requisite to the validity of the marriage; while in the other, it is competent to rebut the proof of the marriage by proper evidence.

The policy of the law on this subject in New York has been considered decidedly questionable. The institution of marriage in the United States is not a Federal question, but is subject to State regulation, immemorially understood, or through special legislation. *Jewell's Lessee* v. *Jewell*, 17 Peters Rep., and 1 Howard N. S. Reports. In those cases also no opinion could be given as to the necessity of a ceremonial as essential to a valid marriage. *Vide* 3 Am. L. Register, N. S. 129.

We belong to that class of thinkers who believe the law should do everything to bind husband and wife in closer bonds of union, and we consider that theory pernicious and damaging to society which allows a laxity in entering into this important relation.

One of the evident consequences of the loose system under the New York marriage law is, that improvident and incompatible alliances are formed, and distress follows. The solemnity of the vow given in marriage and the formality to be observed in entering upon that relation, we maintain, should be commensurate with the difficulty of dissolving it.

A reasonable and natural result of great laxity in consummating a contract is, that there is demanded on the other hand equal freedom in annulling the same. Fortunes easily made are soon squandered, and that principle insinuates itself into every department of our domestic economy. Thus we find to-day in our midst a largely prevailing sentiment that the obligations of marriage should cease so soon as an incompatibility is realized and considered adequate on the part of the one party or the other to disregard the vow which was given, or the pledge made when the parties launched their matrimonial barque upon that untried sea.

Several editorials, endeavoring to illustrate that principle, appeared not long since in a journal of large circulation, and one which pretends to be based upon religious maxims. When such sentiments are ventilated in a medium of that character, and are verified by frequent occurrences—deflections from the marriage union, by a multiplicity of law suits growing out of this laxity—it seems to be fitting that the question as to whether the contract of marriage ought longer to remain a civil contract, should be discussed, so that the people may realize the danger under the present law of New York.

We think it will be admitted in the outset that, where a certain form of solemnization is necessary in entering upon the marriage contract, less improvident unions would be formed, as there would then be "a making haste slowly." If no form be necessary in solemnizing marriage, the sexes inherently feel less legal obligation to remain together, and as a natural consequence, separate upon trivial causes—as "Faults in the life breed errors in the brain"—despite the domestic disaster which may follow. There is nothing in the will of the parties that gives the *lex loci* any particular force over the marriage contract, or that impedes the course of the *jus publicum* in relation to it. Other contracts are modified by the will of the parties, and the *lex loci* becomes essential; but not so with matrimonial rights and duties. They cannot be dissolved by the will of the parties. 2 Kent's Com., 115.

The obligations arising from so important a contract, says an able Scotch Jurist, should not be left to the discretion or caprice of the contracting parties, but should be regulated in many important particulars by the laws of every civilized country. *Duntz* v. *Leoctt*, Ferg. 385.

In his excellent translation of the Institutes of the Civil Law of Spain, that able jurist, Lewis F. C. Johnstone, says, on the subject of the necessity of a formal solemnization: "We consider matrimony as a contract which is celebrated between those who have contracted espousals (*los desposados*), and from which it derives its force and efficiency, but authorized by the church, which gives it a

worthy place among its sacraments by reason of its dignity, mystical signification, and its ends." And again, he says: "A solemnity testifying the will of the contracting parties ought to precede marriage."

Clandestine marriages are expressly prohibited under the Code of Spain, and those entering upon them are not only liable to banishment and a confiscation of their property, but their children are made illegitimate. C. L. of Spain, title VI.

In the earlier stages of society the publication of bans gave reasonable protection to all, but under the existing state of society in thickly-inhabited towns and cities, a proclamation by bans has long since ceased to operate as a notice. We believe that some similar notoriety should be given to all marriages, and thereby restore to the publication of bans something at least of their original character.

The accurate law writer, Phillimore, in a speech delivered in the House of Commons, 1822, on moving for leave to bring in a bill to amend the Marriage Act (of 1753), considered the act valuable in this, that it "swept away forever all marriages *per verba de presenti*, and expunged from the matrimonial code the whole law of præ-contracts which were the scandal and disgrace of the times in which they flourished;" and valuable for the institution of the registration of marriages.

The opinion of Lord Stowell in *Dalrymple* v. *Dalrymple*, 2 Hag. Con., 542 is an admirable exposition of the law of informal marriages, or those entered into in violation of the act, and a masterpiece of judicial eloquence and careful research.

Judge Story observes in his Confl. Laws, § 108, that marriage is "something more than a mere contract." So Fraser, in his Domestic Relations, 87: "Unlike other contracts, it is one instituted by God himself, and has its foundation in the law of nature. It is the parent, not the child, of civil society." And Bishop (1 Bish. Mar. and Div., 4th ed, 108, et seq.) after pronouncing in favor of this doctrine, "ascribes the chief embarrassment of American tribunals in questions arising under the conflict of marriage and divorce laws, *to the custom of applying the rules of ordinary contracts to the marriage relation.*"

The question as to the validity of a marriage without religious ceremony, under the common law, has been widely discussed. In 1844 the question went to the English House of Lords, and resulted in an equal division—(*Reg.* v. *Millis*, 10 Cl. and F. 534). And such was the fate of a similar adjudication in this country before the highest tribunal in the land. (*Jewell* v. *Jewell*, 1. How. 219.). A full discussion of this topic with authorities may be found in 2 Kent Com. 87 note; also in Mr. Bishop's excellent work on marriage and divorce.

We are aware that Chancellor Kent and Professor Greenleaf substantially hold that the intervention of one *in holy orders* is not essential at common law. But what we contend and plead for is, the establishment of some form in the consummation of marriage by which the matrimonial obligation will be deemed greater, and the bond of marriage more sacred by throwing around it safeguards and solemnities in its inception. Common sense points out the apparent evils and suggests a way of reform.

We have collected some of the many authorities showing the necessity of making the validity of the marriage contract depend upon the observance of certain solemn forms, as well as the consent of the parties. This most important of all human obligations should be attested by the most sacred of ceremonies. It should be in writing, subscribed by the parties and witnesses, and recorded.

In this State the official who solemnizes a marriage is not obliged to furnish a certificate of such marriage unless requested. The filing and entry of the certificate is not compulsory but optional. The act of 1847, § 21, makes it "the duty" of the solemnizing official to keep a registry of the marriages celebrated by him, and to allow the town clerk of the school district in which he resides to inspect the same,—but no penalty is provided for the non-performance of this duty.

Unless we misapprehend the doctrine enforced by some recent decisions in this State, persons may contract marriage without intending so to do. Moreover, legitimacy of children and the validity of titles, whether claimed by descent or purchase, demand a reformation of the law of marriage in this State.

LIBEL AND BAIL.

In the case of *Britton* vs. *Richards*, pending in the City Court of Brooklyn wherein the defendant is charged with publishing a libel against the plaintiff in his official capacity, the court held the defendant to bail in the sum of ten thousand dollars, and on motion refused to reduce the same. With all respect to the justly eminent jurist who decided the motion, we believe he has enunciated and enforced the reverse of the true principle, which should control the court, in that and similar cases and which has been incorporated in the constitutions of most of the states.

His Honor says "that the bail claimed to be excessive, might well be so regarded, but for the fact that the charge was made against the plaintiff in respect to his office, and that, if the facts existed it was the duty of the defendant to plead them forth upon the motion," and further,

"If this publication had related to a private citizen, some of the gravest charges, imputing acts which he had no power to perform would have seemed innocuous * * * but applied to one entrusted with the performance of grave duties in connection with the administration of justice, as in this instance, the charges have great significance and imply or directly impute fraud, corruption, perjuries." As the supposed case of a private person being charged with official malfeasence is intrinsically improbable it may be disregarded in this connection. Assuming that the plaintiff has been libeled in respect to his official conduct by an editor was the requirement of ten thousand dollars bail excessive?

That is the real question, and upon its determination the public are more deeply interested than the parties to the action.

We have read law to no purpose, if either the criminal or civil code punishes a libellous criticism upon the public conduct of an official as severely as a libel affecting a private citizen. For the purpose of fixing bail upon the *ex parte* application for an order of arrest, the judge must assume the charges made in the plaintiff's affidavit to be true, and the amount in his discretion must depend upon the nature of the libel, and the probability of the defendant's, failure to respond to the process of the court. Although in theory bail is required solely for the purpose of securing the appearance of the defendent in person pursuant to final process, yet inasmuch as he must remain in jail in default of bail, it is in *effect a penalty inflicted by the court ex parte*, and where the right to arrest is based upon the cause of action, the Court rarely grants the motion to vacate the order. We can cite a notable instance in our own practice. During the late war, an officer in the Union army by order of his superior captured a number of horses and mules for the use of the army, from the citizens residing within the lines of the enemy. Having served during the war he entered a law school in New York. One of his fellow students, an ex-rebel soldier, who proved to be the owner of one of the captured horses, applied to Judge George G. Barnard upon a complaint containing the usual formal allegations in trover, and obtained an order directing the defendent to be arrested and held to bail in the sum of $1500. The defendant was taken from his class room by the deputy sheriff and lodged in jail. The motion to vacate the order made upon papers showing all the facts of the case was denied by Mr. Justice Ingraham on the ground that the Court will not try the cause upon affidavits. And this ruling is sustained by the precedents. Ought not the fact, that such is the law relative to the discharge of orders of arrest be borne in mind by the Judge when he grants the order fixing the amount of bail?

Is the nature of the libel in the case of *Britton* vs. *Richards* such as to justify the bail required?

Says Chancellor Kent, vol. 2, p. 17, of his Commentaries, "The liberal communication of sentiment and entire freedom of discussion in respect to the *character and conduct of public men, and of candidates for public favor* is deemed essential to the judicious exercise of the rights of suffrage and of *that control over their rulers*, which resides in the free people of the United States." The cases of *Dudcombe* vs. *Daniel*, 8 Carr & Payne 21 3; and *Thorn* vs. *Blanchard*, 5 Johnson Rep. 508 sustain this position.

The *bona fide* publications of a journalist respecting alleged acts of a public officer are communications made in the discharge of a public duty. They are privileged and should be protected, not punished by the courts. If the purveyor of news must be able to prove the truth of every report unfavorably affecting the reputation of a public official under penalty of imprisonment in default of heavy bail, journalism is a more perilous vocation than ballot-box stuffing. If he charges official malfeasance *maliciously* let him be punished, but the question of malicious publication must be left to a jury and ought not to be presumed against an editor upon the *ex parte* application.

A public man's best shield against the shafts of malicious libel is the faithful performance of his official duties. Upon this and not upon the successful prosecution of his defamers must his reputation depend. "*Mens conscia recti*," is a better medicine for his wounded susceptibilities than a verdict in his favor. Congress in 1798, owing to the shameful libels perpetrated against George Washington, made it an indictable offense to libel the President, but we are not informed that we ever had a President who thought his reputation could be improved by the prosecution of his libelers.

THE BAR ASSOCIATION.

Three years ago, the Bar Association of New York, formally organized for the purpose of maintaining the "honor and dignity of the profession of the law, to cultivate social intercourse among its members, and increase its usefulness in promoting the due administration of justice." As a medium of legal reform, the Association has wrought most beneficent results. At the preliminary meeting, held for the purpose of forming the Association, Mr. Emott said: "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." Mr. Tilden, observed: "For itself nothing: for that noble and generous and elevated profession of which it is the representative, *everything.*" Mr. Evarts, in descanting upon its mission, remarked: "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."

The *Sexviri* of Athens were commissioners who did watch to discern what laws waxed improper for the times, and what new law did in any branch interfere with the former one, and so, *ex officio*, propound their repeal upon the wise maxim *salus populi suprema lex*. The Bar Association has in a degree exercised the duties of the *Sexviri*, but has in a larger sense, pointed out the honor and dignity required on the Bench, and the necessary elements for the proper administration of justice. We cordially commend its labors to the Bench and the Bar of other states and cities throughout the country; and we point with pride to the judicial cleansing which has been effected through its efforts. Three years ago, the judiciary and the bench of New York City stood before the country at low ebb: to-day they are recognized as comparatively purified of their unfortunate evils. Three years ago, there were judges sitting on the bench of our higher courts, who have since been proved to have corrupted the ermine in ways and times without number; to day, the honor and dignity of the Bench and Bar is rising to a higher plane. Three years ago, the municipal affairs of the metropolis were cankering to decay, mainly through vampirism in high places; to-day the judicial and municipal currents in the several departments of government are well nigh cleansed, and once more we feel that the palmy days of Hoffman, Oakley, Duer, Beardsley and Bronson in their judicial grandeur and purity, are being restored to us. This association formed the nucleus around which concentered all that was ennobling and pure, and, as conservators of the people's good, deserves a meed of praise. Had not some organization of this character been inaugurated at that time, it is fair to presume that the reforms which have been accomplished, would have developed slowly to their consummation. "No step backward," has ever been the motto of this Association. and the zealous and generous efforts of those far-sighted and right-minded lawyers who have in part achieved such judicial and municipal revolution will be long remembered, for they have not spent their time "In dropping buckets into empty wells, and growing old in drawing nothing up." We but express the sentiment of all law-abiding citizens in saying, it is hoped and believed that the benign influence which has emanated and is still emanating from the Bar Association of New York may be transmitted to succeeding generations.

B.

The Albany Law Journal, in it issue of February 8, devotes considerable space to the reviewal of the proceedings against Mr. D. D. Field by the Bar Association of New York, and after quoting at length from Mr. Field's speech, and commenting freely upon the action of the Association, closes as follows :

"Thus ends—for that it is the end there can be no doubt—one of the most extraordinary attacks ever made in this country upon the professional character of a lawyer, involving in its bitterness, the celebrated attack made years ago in England upon Charles Phillips, and, as this report shows, quite as groundless. Started by a little ring of young men without professional experience or position, kept alive by them, through newspaper appeals to passion and prejudice, it has at last returned to die on their hands and to drag them down with it in the estimation of the intelligent and unbiased portion of the community."

We presume that distance from the field of action has led our Albany frien d to doubt the good faith of the Bar Association. Certainly, the profound interest felt in having a purification of the Bar of New York, is by no means confined to "young men without professional experience," and in the proceedings in question, the oldest and ablest members of the bar of the city took no small part in sifting the matter to ascertain the truth.

The Nation, in an article upon the result of the attempt by the Bar Association to punish Mr. D. D. Field, censoriously says :

"They assume that a 'charge' is nowadays felt as a wound, and that anybody against whom one is made will, all business excuses being laid aside, give himself heart and soul to searching out its author and meeting it, when the fact is that the air is full of charges, nearly everybody has a few hanging over him, and the first concern of a man accused of bribery or blackmailing is not to defend himself, but to get up stories of worse bribery and blackmail about his accuser. In short, after reading the report of the Judiciary Committee, one feels that if the account it gives of the machinery of the Association is correct, the sooner all expectation of doing much for the purification of the profession under that machinery is abandoned, the better. It was made for the days of stage-coaches, when lawyers lived over their offices."

Five of the eight judges of the court of appeals can render a judgment upon a question of law which affects all subsequent parallel causes, why should not seven of thirteen jurymen be authorized to render a verdict upon a question of fact which effects only the parties to the single action. With such a jury there could have been no disagreement in the Tweed case.

JAMES HADLEY.

Prof. James Hadley was a man of letters. He was pre-eminent among those who are in themselves, a living argument for maintaining the present high rank of philological and literary studies in our college curriculum.

It is the growing fashion for the devotees of the natural sciences to sneer at the classics, and lament the waste of life in the early years of Academic study. The cry is for a practical education. Sheffield is gaining upon Yale; the university upon the college.

But Prof. Hadley carried into his philological and historical studies, a spirit and method truly scientific. Not Agassiz or Tyndal could show a keener appreciation of what true science demands of investigators. Born into the world of letters, bred to the profession of a scholar, he received with avidity the intellectual stimulus constantly at hand. Had he had the opportunity he would have become what the world calls a self-made man. As it was his instructors could direct, but scarcely aid the movements of his wonderful genius; wonderful alike for its quickness, its power, and its universality.

Commencing the study of languages in still early childhood he had already passed through a wide range of study when he entered the Junior class of Yale at nineteen. From this time his history becomes a part, and no mean part of the history of Yale. A graduate of Yale at the age of twenty one, he remained in New Haven, engaged in University studies during most of the succeeding three years, until he entered the service of his Alma Mater, as a tutor at twenty-four. At twenty-seven Assistant Professor of Greek, principal Professor at thirty; since that time growing steadily, by untiring industry in intellectual acquirements, till at the time of his death at the age of fifty-one, no one would hesitate to style him the first Greek scholar in the country.

His clear and comprehensive grasp of any subject which he undertook to examine formed one conspicuous element of his intellectual greatness. He was always the master of his own learning, and was never mastered by it. His Greek Grammer now in general use is in itself, a clear analytical table of the Greek language. Surely the man who has thus helped to educate the human mind, who has aided to train our youth to logical and methodical habits of study and thought, is as practical a benefactor of mankind, as the builder of a railroad, or the inventor of a cotton gin. His vast and varied study was just beginning to yield its appropriate fruit for the benefit of his fellow students. He would write upon no subject which he had not thoroughly examined, and what he said, did not need to be unsaid, might not be disputed. His work will endure.

His careful study of the Roman Law, recently led him to the preparation of a course of lectures, which he delivered before the Law Schools of Yale and of Harvard; and which, when published, cannot fail to secure for him, high honor from all lovers of the legal profession. This course consisted of twelve lectures. The first four were devoted to the history and progress of the Roman Law, the next two, to the laws of the family relations, even more important in the Roman, than in the Common Law; the next two treated of the different kinds of property; then he considered the laws of obligations, the strength and glory of the Civil Law; and devoted the last two lectures to the consideration of the laws of inheritance, the foundation of the laws on this subject of modern England and America. These lectures were received by the students of Yale Law School, most of whom then listened to Prof. Hadley for the first time, as the exponent of the man They were as remarkable for what they left unsaid, as for what they said. They taught as much by what they left to be inferred as by what they directly inculcated. Nothing for ornament, nothing for literary display. No calling our attention to the matchless glories of Roman jurisprudence, no enthusiastic eulogies of the long enduring laws of truth, worked out through the experience of centuries. His lectures were simple statements of facts, carefully illustrated, and stated in the fewest possible words, consistant with clearness. Not so much as one adjective of admiration.

Sentence by sentence, lecture by lecture, the course took shape and form. Beginning at the foundation and stopping at the capstone, he placed before us a fabric, comely in its proportions, admirable in its architecture, yet all for use. Perhaps he relied upon

the intrinsic beauty of his subject, "When unadorned, adorned the most." Certainly as he proceeded, the admiration of his hearers for the ancient system of truth, the perfection of right reason, grew as he advanced. He did not stop to draw comparisons between the Civil and Common Law, but all the more clearly, as he unfolded the Roman view of the different classes of property; the varieties and force of obligations, the nature and use of testaments, did his hearers perceive whence the venerable founders of the Common Law had drawn their inspiration, and they longed to whisper in the ear of the old plagiarist Blackstone, that older law: "Thou shalt not bear false witness against thy neighbor."

The first glance at Prof. Hadley was disappointing. Plain and unpretentious in appearance, he sat quietly waiting for the hour to strike. When he spoke, his manner was well suited to the matter of his discourse. He read slowly and carefully, enunciating every word with the most conscientious distinctness. He seemed to say that every word was worth listening to, and no rhetorical artifice was neccessary to chain the attention of his hearers fast to his subject. Thus by wasting no time or space, in preface, in by-play, or in eulogy, he was able in a short course of lectures, to present the main points of private Roman Law, faithfully illustrated, in such a manner, that the general harmony and completeness of its developement could be appreciated. But his lectures were beneficial in another way and to an extent far beyond that of the mere instruction they afforded. They were a stimulus to further labor in that field. The first great principle of the Roman Law, viz: Law is a science, was embodied before us. Prof. Hadley did not tell us that, he showed it to us. He did not tell us to search the Civil Law for the sources of our own, he showed us the source that we might see if we had drank of those waters. His points were apparently selected so as to be a continual commentary on the common law without ever hinting at any intended illustration of a relation between them.

Unless the writer is much mistaken, every one of those young men, will, all through the legal studies of their lives, have a higher ideal in view and learn more of the fundamental principles of law, for having listened to Prof. Hadley. There will be many a leisure hour spent with the Roman lawyers; many an argument will be fortified by precept and illustration drawn from this ancient mine; Justinian's name will appear in many a brief as a consequence of these lectures. The pleasant genial smile, the ready answer with which any question was received, the apparent desire to aid and to stimulate the inquirer to further inquiry will come up in the mind as a pleasant memory at each mention of Prof. Hadley's name.

His undisputed intellectual greatness, and his exhaustive knowledge of his subjects, combined with his unaffected manner and simplicity of statement, acted as a charm to cast out sham and cant, and pretence of profundity from those with whom he was associated. Who would dare to seem learned or profound in Prof. Hadley's presence? Who could know him and not despise pompous assumptions of dignity? Admiration of the scholar was almost lost in admiration of the man.

The influence of his character upon the thousands of young men, who have gone out from Yale during the thirty years of his instruction there, can scarcely be overestimated. This exertion of personal influence is not the less important as a means of education, because its results are not so directly apparent. This personal intercourse with truly great men, may well be the best part of a university education. The true scholar is the highest ideal of a great man. He is no true student who does not study for the sake of knowledge. Prof. Hadley's highest mission was as a leader, and an example, great in himself. The scholars of the country have taught the people to mourn his loss, and his death was felt as a national calamity. His civil law lectures are soon to be published and will be a valuable guide to lawyers in the study of this branch of law, which is yearly growing in popularity. Had he lived to three score and ten, as his tastes naturally lead him in this direction, he would doubtless have signalized himself among legal scholars, of whom there are too few. He would have been the man to have made a digest of the common law.

Prof. James Hadley was born in Fairfield, Herkimer County, New York, March 30, 1821. He died November 14th 1872.

Honor to whom honor is due.

THE HONORED JURIST.

The Bar of the United States Circuit Court for the Southern District of United States, lately held a meeting, which was responded to by hundreds of the leading members of the profession, for the purpose of giving expression to the universal sentiment of praise to Justice SAMUEL NELSON, who has recently retired from the Bench after a most meritorious service of nearly fifty years. Truly observed Mr. O'Connor: "The golden age of our jurisprudence, when Wells and Emmet argued the causes which Kent and Spencer decided is happily connected in history with all that is now recognized as the best and purest by the period which NELSON adorned." The following admirable address to Justice NELSON was read by Hon. E. W. Stoughton.

THE ADDRESS.

To the Hon. SAMUEL NELSON.—*Sir:* Your retirement from the Bench of the Supreme Court of the United States, after a judicial service of more than 49 years, is an event which the members of the Bar of the Federal Courts cannot allow to pass into history without connecting therewith the expression of their profound sense of the solid benefits conferred by your labors and example upon the bar and the people of this country. Appointed at an early age to the Bench of the Circuit Court of the State of New York, you commenced your judicial career under a system which pledged to you a long and independent tenure; in return for which you devoted to the discharge of your responsible duties faculties and acquirements which singularly fitted you to administer justice among men. You brought to this work great energy, a noble ambition, an earnest love of justice, absolute impartiality, an elevated conception of all the duties of a magistrate, united with a judgment of unsurpassed soundness. Acknowledging responsibility only to your conscience, to the law and to your God, you early won the confidence of a bar, among whose members were numbered some of the greatest lawyers of the last generation. From the Circuit Court of the State you were advanced to the Supreme Court, and there you proved yourself worthy to sit in the place of the great masters of jurisprudence, who had preceded you and whose reputations will endure forever. Again you were advanced, and the bar with pride saw you robed as Chief Justice of the State. As such you presided for many years, and had your judicial career terminated with your resignation of that office, the records of jurisprudence would have transmitted your name to posterity, as that of a great and just judge.

Your labors were not thus to end. You had administered justice for a period of 22 years. During that time you had mourned the departure of many members of that illustrious bar which had greeted your entrance into judicial life. Around you had grown up a younger bar, to whom you were an object of admiration and reverence. You had served the State of your nativity well, and well had you maintained the State and even national fame of the court over which you presided. Your opinions there delivered will long stand as examples of the right application of established legal principles, exact learning, and sound common sense to the cases presented for judgment. More than 27 years ago, in full maturity of your powers, you were appointed an Associate Justice of the Supreme Court of the United States. There and at the Circuit, you encountered new and untried questions. The law of nations, of admiralty, of prize, of revenue, and of patents you mastered, and, as those who now address you can bear testimony, administering with unsurpassed ability. With critical accuracy, you studied and applied a vast amount of legislation and a multitude of rules comprised within the special branches of jurisprudence you are compelled to administer.

The benefits you conferred did not consist solely in bringing, as you did, to the investigation and decision of causes, a deep insight, a judgment matured by long and varied experience, and solid learning—the fruit of a life study and reflection. Your kind and generous treatment of young lawyers ever encouraged them to renewed exertion, and in struggling to deserve your approval they were inspired by worthy ambition, for they knew that your standard of professional excellence was high and that to win your approval was an earnest of future distinction.

Beyond all this, you have afforded to the Bench of this country an example by which the wisest and best of its members have profited, and by your long and spotless life as a magistrate you have added dignity and luster to the history of our jurisprudence; for while the degredation and corruption of the Judges of a nation inflict upon it an offensive, a revolting blot, their independence, their purity, and their learning have ever written the proudest annals of national life.

There are among those who now address you many who have so long been accustomed to your presence upon the Bench that they will never be quite reconciled to your absence. They will sometimes earnestly wish that you could have remained to steady them in the performance of their duties until the close of their professional career. Nevertheless, all who now address you will never cease to be thankful that, upon your retirement to your family and home, it can be said of you, as was said of Lord Mansfield, "It has pleased God to allow to the evening of a useful and illustrious life the purest enjoyments which nature has ever allotted to it—the unclouded reflections of a superior and unfading mind

over its varied events, and the happy consciousness that it hath been faithfully and eminently devoted to the highest duties of human society."

Earnestly hoping that these blessings may be enjoyed by you for many years, the members of the bar who unite in this imperfect tribute to your worth remain forever your friends.

The following is a copy of the letter which was drafted by Hon. John V. L. Pruyn, and which received the signatures of all the Judges of the Court of Appeals, in open court. Mr. Pruyn, Wm. M. Evarts and Dudley Burwell were appointed a committee to present the tribute to Judge Nelson. The letter was beautifully engrossed and bound in an elegant quarto volume.

To the Honorable Samuel Nelson, late Senior Associate Justice of the Supreme Court of the United States:

Sir — Your professional brethren of the bench and of the bar of the State of New York, beg leave, on your retirement, after nearly fifty years of service in the Courts of your native State and of the United States, to express to you their warm regard for your personal character, and their sense of the integrity, the learning, the usefulness and the dignity which have marked your entire judicial life. During this long period, you have been called upon to take part in the decision of points of great interest and delicacy in international law, and in settling questions of profound importance in our Constitutional jurisprudence, many of them under anomalous and exciting circumstances.

To these we may add your patient and well directed industry in expounding our Patent Laws, in passing upon questions of personal rights, and in disposing of the great mass of litigations growing out of commercial and business transactions, which uniformly pressed upon you for judicial determination. In the discharge of these duties, you have at all times enjoyed the confidence of your professional brethren, of the litigants who were before you, and of the public, to an extent never exceeded by any judge who has presided in a court in which the principles of constitutional liberty were respected and enforced.

You have illustrated by your example that careful and discriminating judicial labor, unswerving integrity, and learning joined to common sense, the conceded qualities of a great Judge, thoroughly harmonize with courtesy and kindness to the members of the bar and with fearlessness and firmness in the discharge of duty. How much you have thus made the practice of the courts in which you have presided an agreeable duty, is impressed upon many grateful memories, and it is gratifying to feel assured that, after we all shall have passed away, history will preserve in its strongest colors the record of your judicial labors, and will pronounce its "well done" in the warmest terms of approval.

Our best wishes are with you in the retirement you have chosen, and our prayer to the Final Judge of all is, that your future days may be as peaceful and happy as your past life has been useful and honorable.

We are your brethren and friends.

JANUARY, 1873.

A few days ago, the several committees, and a very large delegation of the members of the Bar of the state, proceeded to Judge Nelson's home, when most impressive and interesting interchanges of friendship followed. The occasion will be long remembered as a happy reminiscence by all who participated in it.

THE LATE DR. LIEBER.

The death of a great man always seems sudden. But the death of Dr. Francis Leiber, who for many years was Professor of Political Science in Columbia College, and eminent as a writer has caused more than surprise and grief among scholars, men of science, and jurists, in Europe and in this country.

In a late number of the *Revue de Droit International*, his friend, M. G. Robin-Jacquemyns, begins an interesting sketch of him as follows;

"The preceding number of this review had scarcely appeared, with a new article by Dr. F. Lieber, when we had the grief of hearing of the death of that eminent man. There is no one of our readers, if he only knew of Francis Lieber from his contributions to this review but was struck with the honesty and solidity of his talent, the interesting originality of his views and of his language; his faith in and devotion to the progressive steps of science and humanity; the ingenious art with which he was able to draw from the most simple propositions the most fruitful results. But among those who have followed with some attention the juridic literature of late years, there is no one who can be ignorant of the active and influential part which Dr. Leiber took therein. He had a great and elevated spirit which conceived the right in its highest and at the same time most truthful form, namely, as a perfect image of our social life, a logical result of our manners, our civilation and our knowledge. Thus his influence was grounded not alone on pure theory; it made itself felt in the most beneficial manner among his fellow citizens of America in the solution of a multitude of political, social, economical and religious questions."

It is intimated at the close of the article that a longer review of the work done by Dr. Lieber may be given at another time.

At a meeting of the Trustees of Columbia College, in the City of New York, the following resolutions were adopted:

Resolved, That the Law School has met with a severe loss in the death of Francis Lieber, LL. D., Professor of Constitutional History and Public Law. While the topics upon which he lectured lie beyond the ordinary course of legal instruction they are considered by this Board to be of grave importance, as lifting the student beyond the range of technical law to a wide field of vision and research. To the great themes of Political Science and Constitutional Law, Dr. Lieber brought profound thought, fullness of illustration and earnestness of exposition. and left, as we believe, on the minds of students who carefully followed his teachings, lasting and most valuable impressions. It should be added that Dr. Lieber's studies have not been confined to the duties of the class-room, and that some of the most important of his published works, received by leading jurists with marked favor. have been produced during his connection with this College as one of its Professors.

Resolved, That the Board records with satisfaction Dr. Lieber's adherance to the great principles of Christianity, not only as the basisof his political views.but as a rule of individual life. While he gladly recognized throughout the civilized world the general growth of nationalism,he had full faith in the brotherhood of man and in his sublime destiny. Personally he was an earnest patriot. In youth he was ready to shed his blood in defence of his native land; in his old age he rendered efficient service with his pen and voice to his adopted country during its late struggle. He was a man of sterling integrity. clear and decided in his opinions, and bold and outspoken in their advocacy. His excellences were so great and manifest as to justify the statement that a great thinker. a genuine Christian, a true patriot and an estimable citizen in all the relations of private life, has departed, and has left a name long to be remembered and valued in connection with Columbia College and its law school. Wherever his works are read and his character is known, it will be felt that the principles of Christianity, which lie at the root of the history and dicipline of the college are well illustrated by his life and labors.

Resolved. That a copy of the foregoing resolutions be sent to the family of Dr. Lieber.

WILLIAM BETTS, Clerk.

EDWIN JAMES.

The *Law Times*, in commenting upon the petition of Mr. Edwin James, to be restored to the bar, says: "During his absence from England he resided in the States of New York and New Jersey, and he states that he has endured eleven years of mental suffering, and upon some occasions actual want, that he has never been able to pay the expenses of a voyage to this country nor of his residence here until the month of March, 1872, when he left America by the proceeds of a little furniture he had sold, and by the assistance of one friend. He is authorized by Lord Westbury to state that Lord Westbury's act in cancelling his patent of queen's counsel, which took place on proof of the order and resolution of the benchers, was only ministerial, and that his lordship never had submitted to him, and never saw the evidence, nor any of the proceedings taken before the bench, and therefore formed no judgment on them." The petition concludes by giving nine reasons why the order of the benchers was not just, and ought to be reversed.

UNREPORTED CASES.

N. Y. SUPREME COURT.—SPECIAL TERM.
Before Fancher, J.

B. C. Gray. et al., v. *The New York and Virginia Steamship Co., et al.*

The complaint in this action was demurred to by separate demurrers. One demurrer was interposed by the N. Y. and Virginia S. S. Company, another by the Old Dominion S. S. Company; another by the defendant Von Post, and another by defendants Skiddy, Heineken, and Heineken and Palmore as Agents. The substance of the demurrers being that, the plaintiffs had not legal capacity to sue for the relief demanded in the complaint; that several causes of action had been improperly united in the complaint; that the complaint did state facts sufficient to constitute a cause of action against the demurring defendants.

The complaint alleges that the N. Y. and Virginia Steamship Company is a corporation created April 10, 1850, by an Act of the Legislature of the State of New York, for the purpose of building, &c., vessels to be propelled solely or partially by steam, &c., between the City of New York and the City of Richmond. That a certain amount of stock was issued. That the Old Dominion Steamship Company was, January 30th, 1867, created a corporation with powers similar to those of the former corporation.

The complaint then sets out certain acts of fraud or alleged fraud, on the part of certain

of the directors in causing certain steamships of the company of which the plaintiffs were stockholders, to be transferred to the defendant the Old Dominion Steamship Company; that said sale or transfer was made fraudulently; that the acts of the said directors were *ultra vires* of the corporation. It is distinctly charged in the complaint that the company which purchased the vessels knew of the want of authority to make the sale, and that the same was made and consummated under some secret and fraudulent agreement between the parties acting in the transfer.

The learned Judge Fancher, in his elaborate opinion, says: "Whether the plaintiffs will be able to establish such alleged conspiracy and fraud, is not the question, but when alleged, whether a cause of action is stated." The cases are numerous where the stockholders have been allowed to maintain bills in equity for fraud of such nature. I shall only refer to some of them by their titles: *Robinson* v. *Smith* 3 Paige, 283: *Angel & Ames* on Corp. § 312: *Cunningham* v. *Pell*, 5 Paige, 607: *Mack* v. *Eastern R. R. Co.*, 4 N. H., 548: *Peabody* v. *Flint*, 6. Allen 52. In the last of these cases it is decided that directors of a corporation may be held responsible in equity at the suit of the stockholders for a breach of trust, and "if other parties have participated with the officers in such proceedings, they may, according to the established principles of equity pleading, be joined as parties."

"Where the acts complained of are capable of being released or confirmed by the corporation, it is itself the only proper plaintiff, as several cases in England have held, but they are not regarded as holding that shareholders cannot maintain an action against illegal or fraudulent acts of the directors. *Gray* v. *Lewis*, Eng., Law Rep. 8 Eq. Cases 561: *Hoole* v. *Grant*, Western R, R. Co., Law Rep. 3 ch. Aff. 272; and see the very able opinion of Blatchford, J., in *Heath, et al.* v. *Erie Railway Co.*, where the above and other authorities are commented on.

The complaint alleges mismanagement and fraud against all the directors, and especially are all the directors included in the allegation of the fraudulent sale of the four thousand shares of stock. Sufficient is alleged in the complaint, therefore, to constitute a cause of action against the directors, and the steamship companies and their several demurrers must be overruled, except as to the agents."

John F. Baker, for the plaintiffs; Owen, Nash & Gray, for the Old Dominion Company, defendant; Smith & Woodward, for other demurring defendants.

GENERAL TERM, SECOND DISTRICT.

September, 1870.

Before Justices Barnard, Hogeboom and Tappen.

Selah J. Abbott, vs. *The Metropolitan Fire Ins. Company.*

Same, vs. *The Star Ins. Company.*

Same, vs. *The Globe Ins. Company.*

In each of these cases the defendants appealed from orders of Mr. Justice Pratt, allowing the plaintiff to serve a "supplemental and amended complaint." The actions were founded upon policies of insurance containing a stipulation whereby the plaintiff was debarred from bringing actions thereupon for loss after the lapse of one year from the time thereof.

The complaints set forth an assignment of the policies to one Doris as collateral security and a power of attorney to collect the amount due thereon in the name of the plaintiff. The complaints did not contain a sufficient allegation of non-payment. The defendants demurred and in one of the above cases judgment absolute had been ordered on demurrer by Mr. Justice Barnard, upon papers showing that subsequent to the commencement of the actions, Doris had executed a re-assignment of interest to the plaintiff, the orders appealed from were granted upon terms. The papers on appeal did not disclose the fact that new actions were barred by the lapse of the time limited in the policies. Upon argument the plaintiff's counsel maintained that the Court at General Term will in furtherance of justice and in persuance of the equity powers conferred by sections 173, 174, 175. 176 and 177 of the code permits a party to supply proof *nunc pro tunc* and asked leave to file an affidavit showing the fact of the limitation and the expiration of the specified time.

The Court ordered the filing of the proposed affidavits, and affirmed the orders below upon payment of costs by the plaintiff without prejudice to the defendants right to demur to the amended complaints. The de-

fendents thereupon appealed to the Court of Appeals, and the Court of Appeals dismissed the appeal.

R. H. CHITTENDEN,
of Counsel for plaintiff at General Term.
VARNUM & TURNEY,
Attorneys for Defendant.

OPINIONS OF THE PRESS.

THE AMERICAN CIVIL LAW JOURNAL is the name of a new monthly publication, conducted by Mr. R. H. Chittenden. It is devoted to the discussion of the principles of the Roman Law, which its Editor regards as the only sure basis of a legal education. Its first number is a creditable one, and we are promised a series of interesting articles by prominent jurists.—*N. Y. Tribune.*

THE AMERICAN CIVIL LAW JOURNAL.—As "Managing Editor," Mr. R. H. Chittenden, has started THE AMERICAN CIVIL LAW JOURNAL, and the first number has appeared. It is well printed and arranged folio sheet of thirty pages and is occupied with articles in elucidation of the Civil Law, historically and analytically, and in the bearing of it upon the Common Law. Other matter of interest to the Profession appears and more is promised. —*Brooklyn Daily Eagle.*

THE AMERICAN CIVIL LAW JOURNAL, a Monthly Magazine. Devoted to the Discussion of the Principles of Civil Law and Legal Reform. Thirty pages, Royal octavo. The first number of this journa January, 1873, is received, Among the contents of this issue are: "The Study of the Civil Law; The Influence of the Civil Law upon the Common Law; Legal Reform; Adolph Carl Von Vangerow; Miscellaneous," etc. The AMERICAN CIVIL LAW JOURNAL is finely gotten up, and reflects credit upon the editor. We wish it success. Subscription, $3 per annum.—*Industrial Monthly.*

The AMERICAN CIVIL LAW JOURNAL (New York), made its appearance last month. It is of the size and style of the *Albany Law Journal*, contains thirty pages, and will be issued in monthly numbers. Mr. R. H. Chittenden, the managing editor, was a student of the civil law at Heidelberg, under the late Dr. Von Vangerow. The first number has the following contents: "The Study of the Civil Law;" "The Influence of the Civil Law upon the Common Law;" "Legal Reform;" Adolph Carl Von Vangerow;" "Book Notices;" and "Miscellaneous." THE CIVIL LAW JOURNAL begins most admirably, and we commend it to the attention of our readers.—*Albany Law Journal*, February 8, 1873.

"AMERICAN CIVIL LAW JOURNAL" is the name of a new monthly whose first finely endowed number lies before us. The object of the periodical, as its title indicates. is the extension in wider circles, of a knowledge of the Roman Civil Law and therefore the articles as far as possible are rendered popular.

The first number contains a discourse upon the Study of the Civil Law which is of great interest, especially to German jurists since it is connected with the lectures of the celebrated Pandectist von Vangerow, also a bigraphical sketch of this Professor, an essay on the Influence of the Civil upon the Common Law, and other lesser articles. (Translated from the *New Yorker Staats Zeitung.*

THE following will serve as a specimen of the many encouraging letters we have received from members of the profession.

Dear Sir:—A careful perusal of the first number of your AMERICAN CIVIL LAW JOURNAL, has afforded me decided pleasure. In your "prolegomena" it is announced that this magazine will be devoted to the discussion of the principles of the Roman Law, with special reference to the Common Law. I believe that such a work has long been needed in the profession and in the community, and this fills the niche and supplies the want most admirably. By a proper devotion to legal reform it must become a popular and powerful medium of good.

The leader on the Study of the Civil Law can but be of general interest, for, as it truly says: "The *Corpus Juris Civilis* stands to-day the most wonderful monument of intellectual greatness that has survived the darkness of the middle ages; and it will ever endure as a living proof of the superiority of mind over mere physical force."

Your magazine is certainly very promising and interesting, and with care in selecting proper and varied matter, must not only be successful, but will exert a wide and beneficent influence.

THE JURY LAW VALID.

In the case of William J. Barclay, in which an appeal was taken on the ground of the unconstitutionality, of the new Jury law, the General Term of the Supreme Court has decided that the law was constitutional, but granted the prisoner a new trial and reversed the judgment on the ground that some of the jurors had acted on the trial previous to the last one. Judge Ingraham delivered an exhaustive opinion, saying in the main :

It is objected that the act in relation to challenges of jurors in criminal cases (Laws 1872, chapter 475) is unconstitutional and void, for the reason that the Constitution (Act 1, Section 1) declares that trial by jury shall remain inviolate forever, and Article 1, Section 6 provides that no person shall be deprived of liberty, &c., without due process of law. The construction of the 6th section was passed upon by Bronson (Taylor agt. Porter, 4 Hill, 140), where he says : "The meaning of this section seems to be that no member of the State shall be disfranchised or deprived of any of his rights or privileges, unless the matter be adjudged against him upon trial had according to the course of the common law. It must be ascertained judicially." And again : "The words 'due process of law' cannot mean less than a prosecution or suit instituted and conducted according to the prescribed forms and solemnities for ascertaining guilt."

In Wynehama agt. The People (13 N. Y., 446), (Judge Selden says : "The clause in question was intended to secure every citizen the benefit of those rules of common law by which judical trials are regulated, and to place them beyond the reach of legislative subversion.") Hubbard, J,, defines "due process of law," as meaning an ordinary judicial proceeding ; in a criminal case an arraignment, formal complaint, confronting of witnesses, trial, regular conviction, and judgment. Such trials, therefore, are to be regulated and conducted according to the common law, by indictment, trial by jury, proof of guilt, unanimous verdict of the jury, and those rules which the defendant at common law had a right to insist upon in his defence. These requisites do not control the Legislatures as to the rules or evidence, the qualifications of jurors, the nature of crime, and the punishment to be inflicted for its commission. All these are matters left to the descretion of the Legislature. Any other rule would prevent the Legislature from changing the qualifications of jurors, altering the age at which they should be excused from serving, prescribing who may and who may not be witnesses, and many other regulations in regard to trials which do not necessarily violate that provision. In Walker agt. The People (32 N. Y , 147, 159) Wright, J., says in regard to these constitutional provisions : " There are no limitations or restrictions upon legislative power except as to the right guaranteed—a Jury trial in all cases in which it had been used before the adoption of the instrument. Trial by Jury cannot be dispensed with in criminal cases, but it is obviously within the scope of legislation to regulate such trials."

If these views are correct, then there is no force in the objection that the act referred to is in violation of the constitution in regulating the right of challenge to jurors and providing the necessary qualifications, even if it does alter the rule of the common law on that subject. * * * * The act of 1872 makes no different provision, and takes away no qualification which existed previously. The rule which is incorporated in this statute has been repeatedly adjudged by the courts and adopted for years previous to its passage.

The other point raised was that jurors who tried the accused previously were sworn in on this trial, and on this the Judge says :

As we are of the opinion that the judgment was erroneous on account of the admission of the jurors who were sworn on the first trial being on the jury by which the prisoner was first convicted, it is unnecessary to examine the other exceptions in the case. Judgment is reversed and a new trial ordered.

LIMITING DELAY IN MURDER CASES.

An act relating to motions for new trials and writs of error has been drawn by Recorder Hackett, and will be sent to the Legislature with a request for its passage. As it applies only to this city the projector believes that it will meet with no opposition from members from other counties. It differs from all other propositions, as it forces limit to delay in murder cases, by obtaining opinions before sentence day arrives.

A part of Section 2 reads as follows :

No writ of error to review any judgment upon any conviction had after the passage of this act, in the Court of Oyer and Terminer of the First Judicial District, or the Court of General Sessions of the Peace for the City and County of New-York, shall hereafter issue as a writ of right and only according to the provisions of this act. Such writ of error shall only issue when allowed by a Justice of the Supreme Court of the First Judicial District, or by a Judge of the Court of Appeals, whether in or out of court, or in or out of term, as the contingency may arise and may issue with or without stay of proceedings. But no stay of proceedings shall be allowed on said writ, except when ordered by such justice or judge and indofsed on said writ. When allowed, whether with or without stay of proceedings, such writ shall be made returnable directly to the Court of Appeals, and with the same effect of return and precedence as appertain to writs of error heretofore allowed to remove judgments of the Supreme Court at General Term to the Courtof Appeals.

HABEAS CORPUS.

In the case of the *United States* vs. *Susan B. Anthony*, which came before Judge Hall in Albany, a few days ago, on *habeas corpus*, Hon. Henry R. Selden made an exhaustive argument upon the right of women to vote. The defendant was in custody of the marshal upon a warrant of commitment made by a commissioner of Rochester, requiring her to be kept in custody, to answer at the district court, in the northern district of New York, to the charge of having "knowingly voted" at the late presidential election "without having a lawful right to vote;" the only alleged want of right resting in the fact that "she is a woman." Counsel rested his argument substantially upon the two points, (1) that if she had a constitutional right to offer her ballot, and, (2) that if she had not that right she believed that she had it. He cited from the constitution of the United States, §§ 2 and 3 of Art. 1, § 1 of Art. 2, § 2 and 4 of Art. 4, the 13th amendment of Dec. 18, 1860; the 14th amendment of July 28, 1868, and the 15th amendment. He defined what "citizen" meant under the constitution, and during the argument the cases of *Corfield* vs. *Coryell*, 4 Wash. C. C. Rep. 380. *Amy* vs. *Smith*, (Littell's Rep. Ky. 326, 2 Dallas 419, 471; *Scott* vs. *Sanford*, 19 How. U. S. 404, (quoting the language of Taney, *C. J.* at length), 1 Abb. U. S. Rep. 397, 402; and the case of *Olive* vs. *Ingraham*, Modern Rep. 263, were cited. Counsel agreed the conformably and declared that, "beyond question, the first section of the 14th amendment, placed the citizenship of women upon a par with that of men, that the privileges and immunities of the citizen shall not be abridged. has secured to woman, equally with men, the right of suffrage, unless that conclusion is overthrown by some other provision of the constitution."

LAW FACETIAE.

In *Gilbert* vs. *The People* (1 Denio R. 41), may be found a singular specimen of pleading. The declaration was in trespass. Two counts ran thus: "Plaintiff further declares against the defendant for this, to-wit: that the said plaintiff had a number of sheep in the county of Columbia, and said defendant did, in the year 1843, if ever, bite and worry fifty of plaintiff's sheep, after the said defendant had noticed that, *he, the defendant, was subject and accustomed to biting and worrying sheep, if such notice be had*, and the plaintiff's declaration, *the said defendant ought to be punished according to the custom and manner of punishing sheep-bitting dogs*, as the plaintiff has sustained great damage by the conduct of the defendant." Plaintiff further declares against the defendant for this, to-wit, that the said defendant *is reported to be fond of sheep, bucks, and ewes, and of wool, mutton and lambs;* and that the defendants did undertake to chase, worry and bite plaintiff's sheep, *as the said defendant is in the habit of biting sheep, by report*, to plaintiff's damage in all fifty dollars; and if defendant is guilty, he should and ought to be hanged or shot."

This case gave rise to an indictment for libel.

Justice Ingraham was presiding in the Court of Oyer and Terminer, in the City of New York, when a prisoner was arraigned for stealing a quantity of flannel, which was alleged to be worth forty-five dollars, and the offense charged was therefore grand larceny. The prisioner listened attentively to the reading of the indictment, and when asked, as usual, whether he was guilty or not guilty, said:

"Not guilty—the flannel was't worth half so much."

He evidently knew the difference between grand larceny, and State Prison, and petit larceny with a short residence on Blackwell's Island.

There was a case in the City Court in which two lawyers, Mr. Lux and Mr. Miller were opposed, arguments were heard on both sides, but it was clear that the former had the better of the latter, on the strength of which Mr. Anthony R. Dyett circulated the following:

The Court wants light, lo! *Lux* appears:
His argument's a fearful killer;
But pity sheds her gentle tears,
To find he's slain a harmless *Miller*.

In the trial of Mrs. Wharton, for attempting to poison Mr. Van Ness, the jury failed to agree upon a verdict, and were discharged. Another illustration of the unwise principle of requiring an unanimity of jurors.

NOTICES TO THE BAR.

COURT OF APPEALS.

The following orders have been made by the Court of Appeals:

Ordered, That this court will take a recess from the 28th day of February, A. D. 1873, to the 24th day of March, A. D. 1873; that a new Calendar be made for the Court, commencing on the said 24th day of March; that all causes upon the present calendar not transferred to the Commission of Appeals or otherwise disposed of, be placed upon the new calendar, without further notice; that other causes may be noticed on or before the 10th day of March, A. D. 1873, and placed upon said Calendar. Causes remaining upon the present Calendar will be called and heard in their order during the present month.

Ordered, That in pursuance of the amendment of the Sixth Article of the Constitution, adopted in the year 1872, five hundred causes pending in this court be transferred to the Commission of Appeals; that such of said causes as are upon the present calendar of this court will be placed upon the calendar of the Commission of Appeals, and heard, without further notice, for the Term commencing on the 4th of March next.

E. O. PERRIN, *Clerk.*

UNITED STATES SUPREME COURT.—WASHINGTON. — Erie Railway Company *vs.* the Commonwealth of Pennsylvania — This is another of the railway cases involving the right of the State to lay tonnage duties on the transportation of railroads. The questions in this case are exactly the same as in the case of the Philadelphia and Reading road, except as to one point. The company contends that the State, having contracted with it to grant the franchise of a right of way through her territory, in consideration of the payment of an annual tax of $10,000. and a stipulated tax upon its stock, cannot subject it besides to those taxes imposed by general laws on other companies, without impairing the obligation of such contract.

The State contends that the intention of the Legislature to surrender the general power of taxation will not be implied—it must be express; and in this case such an express intent does not appear.

We take pleasure in announcing that the AMERICAN CIVIL LAW JOURNAL meets with general favor where ever it goes. Professors of law schools and law writers in Europe and and in this country congratulate us upon our enterprise. In a complimentary letter, an able civilian says, "such a journal is one of the wants of the American Bar, and by supplying it you will deserve the thanks of the profession." The pages of the JOURNAL will always be open to the discussion of questions appertaining to legal reform and the Civil Law, and we are happy to state that Frederick J. Tomkins, Esq. D. C. L., of England, Prof. Washburn, of Cambridge, Prof. Dwight, of New York, and many other able writers are to contribute to the columns of this Journal. We give two additional pages this month, and it is our intention to increase the number of pages from time to to time.

MISCELLANEOUS.

FALSE REPRESENTATION IN LIFE INSURANCE. —The Gresham Life Company of London, one of the leading life companies of England, has recently succeeded in avoiding the payment of £1.200 upon the life of a man whose policy had been obtained by the use of barefaced fraud. The claimant was an assignee named Wigens, and the insurant was named Bowles. The latter stated to the company that he had good health, had not an habitual cough, and was sober and temperate, whilst his wife, his servant and his friends proved his inebriety. It was also proved that the deceased had been an inmate of a sanatoriun for the inebriate at Bath. With such evidence the jury did not hesitate to pronounce a verdict for the defendant.

The charge of Judge Brady to the Grand Jury of the February Term, was comprehensive and decisive, he said: "The best mode of decreasing crime is to punish speedily. Diligence and energy in the prosecution of wrongs upon society are the best safeguards against crime. Delay is dangerous. It creates impressions that the authorities are indifferent and makes the lawlessly inclined bold and fearless. This Court, with your assistance, will endeavor to teach the desperate characters, who seem to be increasing in numbers and effrontery, that the power of the State is not to be defied."

INCREASED SALARY BILL.—The bill reported by Mr. Butler, of Massachusetts, from the Committee on the Judiciary, to adjust the salaries of the Executive Judicial and Legislative departments of the government, fixing the salaries as follows:—President of the United States, $50,000 per annum; Vice President, $10.000; Chief Justice of the United States $10,500; Justices of the United States Supreme Court, $10,000; Cabinet Officers, $10,000; Speaker of the House, $10,000; members of Congress, $8,000, was voted down by 119 nays, 81 yeas.

MUNICIPAL UNION.—The proposed consolidation of the cities of New York and Brooklyn under a single municipal head, the first step toward the consummation of which was the meeting of Brooklyn citizens at the house of Mr. S. B. Chittenden, a few days ago, has been generally well received.

THE BANKRUPT LAW AND LIFE INSURANCE POLICIES AS SECURITY.—Judge Blatchford has decided in a case of bankruptcy that when a debtor, at his own expense, effects an insurance on his life as security to a creditor, the representative of the debtor is entitled to the surplus after the debt is paid.

THE NATIONAL LIFE INSURANCE COMPANY.—The Excelsior Life Insurance Company, having contracted with the National Life Insurance Company of the United States, for reinsurance of their risks, they have transferred their policies accordingly.

The sheriff is only entitled to such fees as are expressly allowed by statute. See the important decision of Judge Robinson, in Crofut *vs.* Brandt, 13 Abb. Pr. N. S. 128.

William. M. Howland has been appointed one of the Judges of the Marine Court to fill the place made vacant by the death of Hon. William H. Tracy.

The TRIBUNE a few days ago, had a well considered article on the subject of the bankruptcy law, from which we extract the following:

"It is too expensive for an honest bankrupt; for a dishonest one it is too expensive to his creditors; and at least one of its provisions gives opportunity for infamous blackmail. But with proper revision and alteration a bankrupt law is possible that shall be a benefit instead of an injury to the community."

OBITUARY.

Robert Emmet, eldest son of the Irish patriot, Thomas Addis Emmet, and nephew of the celebrated Robert Emmet, died at his home in New Rochelle, a few days ago, in the eighty-first year of his age. Mr. Emmet was for many years a prominent member of the New York Bar, and a most esteemed citizen.

William H. Tracy, one of the Judges of the Marine Court, died on the 25th, ultimo. Judge Tracy was admitted to the Bar in 1857. He was of genial nature, with fair legal abilities. In 1866, he was elected a member of the Assembly. Under the law of 1870, which provided that six justices instead of three should compose the court, Mr. Tracy received the Democratic nomination and was elected one of the justices, which office he held to the time of his death.

BOOK NOTICES.

Abbott's new edition of the New York Digest, which is soon to appear, commends itself to every lawyer. It will be more compact, correct and comprehensive than anything of the kind ever issued. A complete table of cases affirmed, reviewed, overruled or otherwise critically examined is prefixed to the work. The causes have been redigested and the law restated in three or four hundred cases. The edition will be in six royal octavo volumes.

We have received from Ruswelsh, Law Publisher, Pa., advanced sheets of "an Analysis of Blackstone's Commentaries" by Frederick S. Dickson. Some Frenchman has wisely said "That which is well classified is half known." This work is highly commended by Chief Justice Thompson and Judge Sharswood. Every student of the English common law should use it.

THE NATIONAL BANKRUPTCY REGISTER REPORT: By AUDLEY W. GAZZAM and WILLIAM A. SHINN. Vol. 1., New York J. R. McDivitt & Co, 1873.

This volume is a reprint of vol. 1. of th Bankruptcy Register, (in octavo), besides containing many additional cases and decisions of importance. The head notes are carefully drafted and the statement of facts concise and perspicuous. We commend it to the favorable consideration of the profession.

LEGAL EDUCATION. WHY?

EMORY WASHBURN.

Though the public attention has been frequently called, of late, to the subject of legal education, there is little danger of exhausting or overdoing it by restating the considerations which give it its importance. It has been the pride and glory of the American bar that, as a body, they have held a position of power and influence in the community, which has reflected honor upon the individuals composing it, and bespoken for them, as it were, the favor and confidence of the public. Their education, the delicacy and importance of the trusts confided to them, the opportunities they have enjoyed of reaching the public ear and influencing the public judgment, while they have helped to establish for them a high social position, naturally brought with it a consciousness of wielding a moral power which they willingly accepted as something more than an equivalent for the wealth which they might have won in other occupations, but which was rarely within the reach of the profession. This was particularly true during the Revolution and for thirty or forty years after it. Large fortunes were rare in the country. The few who sought a collegiate education did so in reference to some professional pursuit, and as the want of learning, ability and political sagacity was felt to be a necessity to be supplied in establishing and developing the capabilities of a new form of government, the public naturally looked to men trained to the bar, to supply the requisite qualifications as leaders and guides in perfecting the great experiment in which the country was involved. In this way, for many years after the affairs of the government and its general policy had become settled, a kind of prestige attached to the name and profession of a lawyer, often indeed but indifferently sustained, which gave them a consequence within the localities in which they were scattered through the country, which continued rather by force of tradition than any special learning or capacity which they possessed as individuals. The doctor, the minister, and the lawyer of the village were the organs and oracles of the village opinion, and the lawyer was content with an income of a few hundred dollars a year, because it enabled him to live as comfortably as his neighbors, while he was superior to most of them in the respect paid to his judgment and opinion.

In such a state of things, legal education was a secondary matter. Any man would have the mechanical trade of a lawyer by two or three years' work in an office, drawing writs and deeds from forms, collecting debts and reading his law out of his statutes, or picking up at the sessions of the courts, hints and data from the judge and leading counsel,

and the rest was taken for granted by the people, who did not trouble themselves to question the capacity of whoever had been admitted to the bar. In the mean time, a few at every bar became, from choice as well as a kind of necessity, expert managers of cases, and able and often studious and learned jurists and advocates. The higher courts were graced and dignified by wise and upright judges holding their places by an independent tenure, and the prestige of the profession was sustained by the respect and admiration which its leaders won for it.

But in process of time a marked and permanent change came over the country and the bar. Education, especially of the colleges, became more widely diffused. It was no longer limited to the professions. As party politics succeeded to statesmanship, and noisy partisanship took the place of tried patriotism and sound judgment, public office came to be sought for as a source of profit and the means of livelihood. In such a state of things, money became more and more the chief end for which men labored, since it was made the test and measure of a man's social position, influencing and controlling politics through the press and the caucus, and giving consequence to men, who without it were of no account in the community. There was a reason, therefore, why it became an object with young men to gain an early admission to practice at the bar with a view to making money, rather than take time to perfect themselves in the studies which would fit them to deal with its graver and more important duties. In those states where formerly a term of from three to five years was required, preparatory to an admission to the bar, the student may now, in many of them, by going through the form of an examination, be licensed and accepted as a counsellor at law in half that time.

For many years the more sober and discreet members of the bar in the country have felt that something must be done to sustain its character against the downward tendency which it was taking, from a liberal science to a mechanical trade. They hoped to do it, among other things, by offering greater facilities for systematic courses of study. Law schools began to be substituted for the routine of offices. The experiment of Judge Reeves at Litchfield met with great favor, and became a decided success. That of Harvard University followed, and has done much to illustrate the value of thorough training as a passport to professional eminence. Other schools have multiplied in various parts of the country, till the instruction they offer has become accessible to a large proportion of professional students. Much has been done in this way towards keeping the bar from retrograding. This is indeed a great point gained, when it is remembered how much more is required than there ever before was, for it to hold its relative rank and position with others and, especially, the practical departments of business. Every art now has its corresponding science which occupies the study and attention of

correct and active minds, and schools of technical learning train young men who resort to them, in all that is requisite to honorable success in practical and manual industry, as thoroughly, though it may not be as broadly aud liberally, as was ever done by our American colleges. Our law schools, in the mean time, are in danger of losing the fine spirit with which they started in the eager haste of their students "to get into practice," and by reducing the requirements of their courses of study to the mechanism, rather than the science of the law.

In the generous competition which may arise between these different schools, there may occur mistakes in what should be the test of excellence in what these schools ought to aim at, by the comparative exhibit in numbers which schools making the lowest requirements may offer in contrast with those whose course of study is broader and more extended, and whose teaching has more reference to principles and a systematic course of intellectual training, than the details of office business. Instead of any of our schools requiring too much elementary training, our belief is that, regarded as a means of bringing up and sustaining the profession where it used to stand, in the front rank of liberal callings, there must be a new departure in the training which is to fit young men for admission to it, corresponding, in some measure, to the advance made in educating students in our technical schools and institutes of science. In another article we hope to explain some of the points wherein we are behind in what should be the subjects taught, and the purposes aimed at, in the instruction of these schools.

It is enough for the present, that we protest against degrading the profession to a mere money-making business. Let the rich shoemaker build and enjoy the best house in the village; let the manufacturer of patent pills manipulate county caucuses, and John Morrissey play the game of politics till he wins a seat in Congress; but let the profession still have a right to boast that it has, as of old, a class whose ambition is above mere outside show and the honors which fawning and flattery can win; and who, standing in the foremost rank of culture and civilization, are able to guide the public mind in the great political inquiries of the day, to help solve the moral problems upon which the progress of the race depends, and at the same time to act as the safe counsellors and fearless advocates in upholding the cause of private justice, and thereby to inspire new confidence in all men in the protection which the law holds over them.

But while we would have the aims and purposes of the profession of this high order, it is not to be concealed that to attain them requires something more than generous motives and good intentions. The lawyer who is to make himself felt at the bar, must have an early and thorough preparation for it. He must start on the right course, and pursue

it with all the aids of vigorous training, and all the light of careful experience. He must, in other words, be educated for the work, and thus be prepared to grapple with and overcome the difficulties which lie in his way to success. There is no royal road to the learning of the law any more than of any other department of human knowledge, and therefore it is that we are the more encouraged to offer, in another article, a few familiar suggestions bearing upon that most interesting question, *what* a student should study, as well as *why* he should study it?—*A. L. R., Feb.*

ROMAN JURISTS AND CODES.

In our last paper we briefly sketched the origin of the Civil Law, found its original source in the early Latin intellect and conscience, saw it assume definite form in the ancient Roman usages and customs and appear in the shape of positive legislation in the XII. Tables, and of judicial expositions by the prætor from the bench. Two important sources of the Civil Law remain to be discussed. They are *Constitutiones principis*—Imperial Constitutions and *Respona prudentum*—opinions of jurists. The discussion of the latter division will naturally lead us to consider the eminent jurists who, by their opinions illustrated Roman jurisprudence and their digests thereof which having survived the ravages of pagan Vandals and Christian priests, remain to attest their learning and industry.

I. *Constitutiones principis.*—An Imperial Constitution was defined by the old civilians to be an exercise of legislative power by the emperor originally authorized by law. Inst. 1, 2, 6, (4, 6) 1, c. 1, 17, 1. Says Gaius (6, Inst. 1, 2.) A *constitutio principis* is what the emperor has established by decree, edict or epistle, nor should it ever be doubted that it has the force of law, since the emperor himself derives his authority from the law, c. 7, 23, 11, Hugo Hist. vol. 2, p. 24. The history of the growth and recognition of the doctrine of imperial sovereignty found in the authorities quoted is one of great interest to the lawyer and statesman, and properly belongs to this introductory series, but our limits admit of only a brief glance at this branch of the subject. The early Cæsars added to their consular dignities those of the magistrate, and in their latter capacity were wont to issue decrees, with the approval of the senate. Gibbon is wrong in supposing that the edict of Hadrian, found in the Digest, was the first imperial constitution.

The Pandects contain many imperial constitutions promulgated from the time of Julius Cæsar and the *acta* of the dictator Sylla, approved by the senate, were in effect imperial constitutions. It is foreign to our

purpose to discuss the causes of the overthrow of the Roman Republic. They may be all summed up in one word, "Corruption;" and we may well imitate our forefathers in learning the lessons of Roman history. In 724 A. U. C., the senate and people made Augustus tribune for life three years later they exempted him from the coercion of the laws; four years later they made him perpetual consul, and in 735 authorized him to make or amend the laws as he might think proper. In this ruler imperial usurpation culminated. He suggested the proposed law in an oration to the senate, which complacently deemed his suggestions to be law. These decrees being renewed upon the succession of a new emperor were finally called *Lex Regia; Senatus consulta* were termed *jura orationibus principium constituta,* "Laws established by imperial orations." The *leges plebiscita* and genuine *senatus consulta* had now ceased to be. The senate no longer originated laws, and from Hadrian to Justinian, a period of four centuries, the will of the emperor was supreme. Cases of difficulty were submitted to the emperor by the provincial prætors, and his epistles or rescripts were conclusive and without appeal. Augustus and Claudius frequently held court in person and pronounced judgment. These imperial constitutions in the course of time became very numerous and conflicting. They were, as we shall see, digested for the use of the profession and the courts, and we find so excellent a lawyer as Tribonian incorporating into the Institutes of Justinian (Inst. 1, 2, 56, Liv. lib. 34, c. 6,) the following:

"The pleasure of the emperor has the vigor and effect of law, since the Roman people by the Lex Regia have transferred to their prince the full extent of their own power and sovereignty. Whatever, therefore, the emperor has by rescript established, or, after hearing decreed, or, by edict commanded, is law. These are what are called constitutions. Some of these are personal and not to be drawn into precedent, for if the prince hath indulged any man on account of his merit, or inflicted any punishment, or granted some unprecedented assistance, these acts do not extend beyond the individual. But other constitutions, being general, are undoubtedly binding upon all." Nothing more repugnant to our democratic principle of popular sovereignty can be conceived. Chancellor Kent has special reference to this doctrine of imperial sovereignty when he remarks: (1 Kent Com. sec. 547.)

"The value of the civil law is not to be found in questions which relate to the connection between the government and the people, or in provisions for personal security in criminal cases. In every thing which concerns civil and political liberty, it cannot be compared with the free spirit of the English and American common law."

But when the learned chancellor in his note goes still farther, and states that he should infinitely prefer the fundamental English statutes

and the English common law to the civil law with respect to the protection of property he contradicts himself and proves his want of familiarity with its principles, confessed in an earlier part of his celebrated twenty-third lecture.

It is not within the scope of this paper to consider the influence of this dogma of the civil law upon modern civilization. It is the origin of the old English doctrine of the divine right of kings, is the basis of all monarchial governments, and was the salient point of attack by the English judges in their famous dispute with the civilians in the time of King James.

II. *Responsa Prudentum.*—We now come to the remaining source of the civil law, and most interesting monument of its growth, the *Responsa Prudentum*, or Opinions of Jurists, which may be compared to the decisions of our court of appeals. Our earliest authoritative definition of the term *Responsa Prudentum*, as used in the *Corpus Juris*, is found in the Instituts of Gaius, (Gai. Inst. c. 157,) as follows:

"The *Responsa Prudentum*, are the decisions and opinions of those to whom it is permitted to declare the law. If they all concur, their opinions have the force of law, if they disagree, the judge may follow whichever opinion he may choose; and this is the purport of the rescript of the divine Hadrian." When we reflect that the Pandects which are embraced in the *Corpus Juris*, are a vast abridgment of the decisions of prætors and the opinions of Roman jurists, we perceive how much interest has been attached to the above quoted definition of Gaius During the period of the growth of the civil law from the promulgation of the twelve tables to the Augustan era, the practice of the law was open to all persons.

The most ancient interpreters of the law were the priests, whose example was in time followed by statesmen and private citizens, and their answers put to questions by their constituents were gradually adopted as law in the forum. On public days the jurist was seen walking in the market or forum ready to impart instruction to those whose votes he might need to enable him to climb the ladder of civil promotion. Ordinarily, prior to Augustus, the responses of the jurists were verbal, but in time they were committed to writing. When the jurist became old in years and honors, he received his clients at home, who, at the dawn of day, began to thunder at his door. The early consultations of the Roman lawyers are alluded to by Horace, where he says, (Hor. Serm. I, 1, 10.; Epist. II, 1, 103,) the counsellor learned in the law, praises the farmer, who, at the crowing of the cock, knocks at his door for advice.

The son of the juris-consult availed himself of his father's instructions, and thus it came to pass that certain families became noted for their legal skill and acquirements. The Mucian family, for many generations, were devoted to legal pursuits. The chief splendor of the Roman law-

yers is traced from the birth of Cicero to the reign of Severus. During this period a system of law was formed and schools were established. The practice of the law during the Augustan age was the natural stepping stone to the highest public honor. The young Roman of good family, having completed his studies at Athens, was expected to make his *debut* in the forum. The Romans were ever great admirers of eloquence, and that of the forum had especial attractions.

The winning of an important cause by a young advocate would almost always insure his election as questor. Cicero practiced one year at the bar and won the famous cause of the comedian Roscius, when he was elected questor or treasurer, which made him eligible to the senate. The law compelled a questor to wait two years before becoming a candidate for the office of ædile or superintendent of public works, and two years longer before he could be made prætor. No person under forty-three years of age could aspire to the consulship. Thus the ambitious Roman lawyer was compelled to devote at least eight years to the bar before he could be eligible as prætor. De. Orig. Juris.

Titus Pomponius, the school-fellow of Cicero, enumerates the names of the principal lawyers who became professors of the law. During the republic the practice of the law was wholly gratuitous. The client was simply expected to vote for his patron in the tribal assemblies in return for legal advice; but at length the profession became demoralized until finally a *senatus consultum* in the reign of Claudius, allowed and regulated the fees of advocates. Tac. Ann. 6, 11, c. 5, 6, 7, § 5, 10, 12. (L. 13, 1).

The provincial prætors were authorized to allow the advocate a reasonable compensation for his services. Here we find our oldest precedent for "allowances."

The perfection of legal science was ascribed to Servus Sulpicius, the friend of Cicero and disciple of the Scœvolas, who left behind him nearly 180 volumes. Ci'c de Orat, l. 45, de leg. c. 1. Quinctil. Inst. b. 12, c. 11. Gravina orig, jur. civ. c. 1. The body of the Roman law at this period had become enormous, for few of the eminent jurists could deliver their opinions in less than a hundred volumes. Labeo wrote 400 volumes, Capito, his rival, wrote at least 250 volumes, and Namusa digested the writings of ten of the pupils of Sulpicius in 140 books. The long line of ancient jurists was closed by the celebrated names of Papinius, Paulus, Gaius, Uelpian, and Modistinus. The Emperor Valentinian III, by a constitution established the authority of these five great lawyers. In case of a difference of opinion a majority decided the case; where they were equal, the opinion of Papinius, the judge where he was silent.

It is not surprising that differences of opinion should have arisen between the masters of the law, for even in our time as we mentioned in

our first paper, German civilians are divided into two schools upon the relative importance of the history of the civil law. From the time of Augustus to Hadrian the disciples of Labeo and Capito continued their legal warfare upon the questions whether a fair exchange was a legal sale, and whether the age of puberty was 14 years or an indefinite period.

(*To be Continued*).

USURY.

JOHN F. BAKER.

The expediency of abolishing the usury laws of New York has been largely discussed during the past decade, and recently several lengthy petitions have been presented to the legislature recommending their modification or repeal. Thus it is evident that opinion obtains in the thickly inhabited districts of the state, at least, that interest should be regulated by voluntary contract.

Says Governor Dix in his message to the legislature: "Should you not be prepared to follow the example of Massachusetts, Rhode Island, Connecticut, and other states, by an absolute repeal of the usury laws, I can conceive no possible objection to their modification, so far as to leave the rate of interest to be fixed by agreement of the parties on commercial paper, and on loans secured by the mortgage or hypothecation of personal property."

We propose to consider the commodities and incommodities of usury, and present some reflections upon the policy of allowing the borrower and lender to contract between themselves in regard to money loans, governed only by existing circumstances. Though not sticklers for the maxim *stare decisis*, we still believe it necessary to exercise no little judgment and discretion in weeding out the tares, lest in the act of reform we root up also the wheat.

Under the Mosaic law, the Jews were prohibited from taking usury from their own race, but could exact it of strangers. Deut. xxiii.: 19. Some theorists have held that the usurer is the greatest Sabbath breaker because his plow goeth on the Lord's day.

The late Henry Thomas Buckle, who was one of England's brightest intellects, descanting upon the theory of Aristotle, that no one should give or receive interest, remarks, that if his idea had been adopted, "it would have stopped the accumulation of wealth, and thereby postponed for an indefinite period the civilization of the world." Thus, upon

Buckle's philosophy, the receiving a reward for the use of money, has not only not made the world more corrupt, but has produced a healthy zest in trade, yielding all the desirable elements of true civilization. In fact, there seems to be no foundation in natural or revealed religion, inhibiting a person from realizing profit on money as upon articles of merchandise. And certainly it is a commodity which never can be controlled by monopoly as goods and merchandise, so that such a reason will not be urged in support of usury laws.

It is observed by Dr. Adam Smith, in his "*Wealth of Nations*," that if interest be fixed at a high rate, "the greater portion of the money of the country would be lent to prodigals and projectors." And Lord Chief Justice Best, in delivering the opinion of the twelve judges in the House of Lords, observed: "That the supposed policy of the usury laws, in modern times, is to protect necessity against avarice, and enable industry to employ with advantage a borrowed capital, and thereby promote labor and increase the national wealth."

Here we remark, that the lender, unless simpler minded than is characteristic of that class, would never lend to prodigals without security. If adequate security could not be furnished he could not borrow, and, in any event, the risk taken should justify the excess of interest.

With respect to the efficacy of protecting men against themselves, it is, in this respect impracticable, that those who require such protection are comparatively few, and therefore would not warrant a rule affecting the majority of mankind. As for the argument that the government could borrow money on better terms where the rate of interest is fixed, it may be said, that whatever rate be established, capitalists will uniformly lend upon the best paying investment.

"Money is an universal commodity," says Mr. Locke, "and is as necessary to trade as food is to life, and everbody 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 horses or of ships, as money." And those who will consider things beyond their names, will find that money, like other commodities, to a certain extent, is liable to the same change and inequality, and the rating value 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 considered, that money may be carried in or out of the country or state, while land cannot.

One of the objections to the repeal of the law comes from the rural and agricultural districts. Men say to us: "If you repeal the usury laws the farmer will be unable to pay the interest demanded. Farms do not pay over seven or eight per cent. profit, and if capitalists in the country can get more for their money in the larger cities they will invest

there. The farmer cannot pay the interest which will be demanded, and consequently the mortgages on their farms will be foreclosed and small farmers be broken up."

Those who make these objections lose sight of the principal fact that, the men who lend their money to farmers to-day might take their capital to the adjoining state where usury is abolished and lend it at a higher rate if they could. But the reason this is not done, is that in the non-usury states it is found that the repeal of the law not only did not injure the farming districts, but on the contrary money became more abundant, and, governed by the supply and demand, never averages above the former legal rate. The agricultural districts should understand that fact, and also that it is the worth of money and not the law, that makes the money market fluctuate.

Lord Bacon somewhere observes, that it is vanity to suppose there can be borrowing without profit. He recommended two rates of interest, a less and a greater. 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 Bentham, and he considered the idea of fixing one rate of interest for all kinds of security at every period as absurd as if the law were to fix the same price for all horses or sugars.

Lord Brougham, in a speech delivered as far back as 1816, considered the repeal of the usury laws perfectly safe and calculated to afford the greatest measure of relief. At least one objection to the present law is, that it establishes an uniform rate of interest for all risks, no matter under what exigency or condition. A man will not lend money upon *bottomry* or *respondentia* at the same rate as upon real estate security, even if these risks were not excepted under the statute, from the fact that the hazard is supposed to be greater. To establish a just and proper medium, so that capitalists will lend their wealth, and thereby quicken trade, is the more politic principle. Some modification of the usury law of New York is deemed desirable, but in what particular manner is the problem.

FIRST: We hold the question is resolved into that of demand and supply, and that these terms have the same signification in matters of money as of merchandise, and

SECONDLY: That the rate of interest will naturally be such as to equalize the demand for loans with the supply of them. If more be offered than demanded, interest will fall; if more be demanded than offered, it will rise; and in both cases, to the point at which the equation of supply and demand is established. Money is a commodity which, in large commercial districts, widely fluctuates. "The fluctuations in other things," says Mill, "depend on a limited number of influencing circumstan-

ces; but the desire to borrow, and the willingness to lend, are more or less influenced by every circumstance which affects the state or prospects of industry or commerce, either generally or in any of their branches."

There should be, as in other cases of values, some rate which, in the language of Smith and Ricardo, may be called the "natural rate," about which the market may oscillate, and toward which it will always tend.

To establish a legal rate as the natural one, with the privilege of allowing parties to contract for more, with or without limitation, would seem to be better adapted to the wants of this state, particularly in the great centers of trade, than the present law. Knowing full well the needs of commerce, the courts have uniformly deprecated the plea of usury.

Prior to May 15, 1837, the laws against usury had greatly relaxed, but by an act of that date, the rigor of this prohibition was restored to the fullest extent, and usury was made a penal offence. In the case, *Curtis* v. *Leavitt*, 15 N. Y. 151, Judge BROWN in passing upon the usury act of 1837, observed: "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."

Although the sentiment expressed by that able jurist is positive and strong, we are led to believe that many of the judges of our state view the law in similar light.

The law is practically a nullity. Fortunes are daily made in Wall Street by money begetting money in spite of this law, and no one rails on the man now-a-days who loans his money at the highest rate he can get, as was the wont years ago, against which old Shylock is represented as having retorted.

There are, we believe, but four states that have the same law governing usury as that of New York, and those are New Jersey, Virginia, North Carolina and Florida, and in each of them shifts and devices are constantly being propagated to avoid the penalty. It is confidently believed, by those who have considered the question, that if usury were repealed there would be more thrift in trade, as there would then be capital employed in numerous avenues where now is naught but inactivity. Perfect freedom to buy and sell promotes thriftiness in every department of commerce.

The statutes of some states, Michigan and Illinois, for example, have wisely provided, that a greater rate than the simple interest may be recovered if specified in writing between the parties, which law proves to be far more advantageous to business than that of our state. And in California, where there is no penalty for usury, but parties are left free to contract for money as for merchandise, commerce thrives beyond measure. If a usury law be necessary at all in New York, we believe

that the present one is illogical, and that it works indubitable evils. The laws are founded on erroneous principles and are at variance with the commercial spirit of the age.

Since the action taken by the legislature of Massachusetts in 1834, the people of that state have been growing up to the belief that their usury laws were injurious, and having repealed them in March, 1867, they realize that their total abolition works a commercial benefit.

The law now in force in that state took effect July 1, 1867, and is substantially as follows: When there is no agreement for a different rate of interest, the same shall continue to be six per cent. per annum, and at the same rate for a greater or less sum than one hundred dollars, and for a longer or shorter time. It is lawful to contract, or pay, or reserve discount *at any rate*, and to contract for payment and receipt of *any rate of interest*, provided that no greater rate of interest than six per cent. shall be recovered in any action except the agreement be in writing.

Observation and experience have led us to recommend that interest be legalized at seven per cent. as the *natural rate*, but that individuals be at liberty to make such contracts relative to money loans and advances as they may agree upon in writing. The laws to contain provisional remedies for punishing impositions or circumvention in such contracts. Thus, upon our theory, interest will regulate itself on the principle of supply and demand. We believe by repealing the usury laws, inactivity will be superceded by activity in new and various avenues of trade.

The reform we propose would doubtless work many benefits There would then be no corrupting business schemes to evade the law, and every lawyer knows it is wiser and better for the people at large, to have a rule governing interest which would be respected and supported, than a law on the statute books which is constantly evaded.

IMPLIED PROMISE OF MARRIAGE.

However much the wisdom of the rule may be questioned, there seem to be many adjudications in New York and other states, holding that long bestowed and particular attentions, having apparently an honorable object, furnish sufficient evidence from which the jury may imply a promise of marriage. On this point, *vide Southard* v. *Rexford*, 6 Cow. 254; *Wells* v. *Padgett*, 8 Barb. 323; *Hubbard* v. *Bonesteel*, 16 Barb. 360; *Willard* v. *Stone*, 7 Cow. 22; *Hilton* v. *Munsell*, 3 Salk. 16; *Hotchkins* v. *Hodge*, 38 Barb. 117; 1 Parsons on Con. 545; *Butler* v. *McCauley*, 5 Abb. Pr. n. s. 29, these authorities seem to support the proposition that a

promise to marry may be implied from the surrounding circumstances of the case. By the statute of New York, promises to marry need not be in writing. 3 Rev. Stat. 5th ed. 221. It being a civil contract under the law of New York no form of solemnization is necessary. 8 Barb. 323; *Mercein* v. *Andrews*, 10 Wend. 461. In the late case of *Van Tuyl* v. *Van Tuyl*, 8 Abb. Pr. Rep. n. s. 7, GILBERT, J., in an exhaustive opinion, says: "As the law stands, a valid marriage, to all intents and purposes, is established by proof of an actual contract, *per verba de presenti*, between persons of opposite sexes, capable of contracting, to take each other for husband and wife, especially where the contract is followed by cohabitation." *Clayton* v. *Wardell*, 4 N. Y. 230; *Cheney* v. *Arnold*, 15 N. Y. 345; *Canjolle* v. *Ferrie*, 23 Id. 106, and cases cited; nor need the contract be made before a witness.

It may fairly be presumed that so long as the lax system continues of adjudging marriage contracts by the same standard as ordinary contracts, the courts will allow proof of the circumstances and character of the attentions in breach of promise cases, for the jury to say whether there was a meeting of the minds of the parties or not— same as in the proof of any other contract.

The most recent case in which the question of an implied promise of marriage was directly adjudicated upon, was the well known case of *Homan* v. *Earle*, which was tried in the city court of Brooklyn some months ago, before the learned Judge Neilson. The testimony adduced showed that the defendant began his attention with an apparently honorable object soon after his wife died, and continued them for a period of several months, when it was discovered that he was about to be married to another lady. The plaintiff testified that he never asked her in words to marry him, and he never promised in words to do so. The jury were charged as matter of law that, if there was a meeting of minds of the parties, as an engagement, from the attentions, demonstrations and circumstances, the implied contract had been proved.

Vide Button v. *McCawley*, 5 Abb. Pr. N. S. 29. This ruling has been somewhat commented upon as going too far in such cases, but the authorities above cited seem to support that view in such contracts. We should be glad to have the question further discussed.

PRETENCE OF FALSE MARRIAGE.

The following is the gist of an elaborate decision rendered by Judge Ludlow, of Philadelphia, in the court of Common Pleas, in the case of the *City* v. *Williamson* on the question of desertion:

This case presents a number of questions, all of them interesting, and in view of the facts proved, somewhat novel. The real plaintiff here is a woman who alleges that she married defendant, lived with him as her husband for sixteen years, and was mother by him of seven children, all of whom are now dead except two, and one of the survivors appears with his mother in court. The defendant does not deny that he went through the ceremony of marriage with this woman, and that the ceremony was performed by a Catholic priest in a private room at Antrim, in Ireland, at or near the place of the then residence of the parties. The cohabitation and birth of children during the period of sixteen years is admitted, but the defendant declares he is, and always has been, a Protestant, and interposes as a flat bar, to this motion an English statute passed in the nineteenth year of the reign of George II., which declares (chapter 13, section 1), "That every marriage that shall be celebrated after the first day of May, 1746, between a Papist and any person who hath been or who hath professed him or herself to be a Protestant at any time within twelve months before such celebration of marriage, or between two Protestants, if celebrated by a Popish priest, shall be and is hereby declared absolutely null and void to all intents and purposes, without any process, judgment, or sentence of law whatsoever." As a consequence it has been argued that the children of these parties are bastards and their mother nothing more than a concubine. STORY in his "Conflict of Laws," pp. 85, 87, 91 and 92, in substance, maintained that whenever the laws of a foreign country are in violation of the laws of God, sound principles of morals, or settled principles of public policy, they will not be recognized. We shall not be told that a husband and father may come into this jurisdiction, make it his domicile, and then when followed by his wife and children shall deliberately turn them all out upon the cold charity of the world, proclaiming that every right has been destroyed by virtue of an antiquated statute. The evidence here seems to be at best, in doubtful condition upon one point, but the weight of it seems to establish the fact that this defendant considered himself a good enough Catholic to contract this marriage, to live unmolested by any legal authority, to become the father of seven children by this wife, nor did the defendant discover how thorough a Protestant he was until it became convenient to abandon his wife, establish a denial here and contract another marriage with another woman in

this country. "It gives me great judicial satisfaction to be enabled, upon the facts before me, to render a decision in favor of this wife; to make this faithless husband and father, who did not hesitate to brand his own offspring in an open court of justice as a bastard, to understand that justice is administered here, and that his conduct does not fail, in the most unequivocal manner, to meet with the sternest and most uncompromising judicial condemnation. The court orders the defendant to give security for the maintenance of his wife."

NOTES OF CASES.

In the case of *Kountz* v. *Kirkpatrick*, supreme court of Pennsylvania, the learned Judge Agnew substantially held that the common law rule as to the assignability of choses in action, no longer prevails, but in equity, the assignee is looked upon as the true owner of the chose He may set off the demand as his own. *Morgan* v. *Bank of North America*, 8 S. & R. 73. Ramsay's Appeal 2 Watts, 228. The assignee takes the chose, subject to the existing equities between the original parties before assignment, and also to payment and other defences the instrument itself, after the assignment and before notice of it; but he cannot be affected by collateral transactions, secret trusts, or acts unconnected with the subject of the contract. *Davis* v. *Barr* 9, S. & R. 137; *Beekley* v. *Eckert*, 3 Barr. 292; *Mott* v. *Clark*, 9 Barr. 399; *Taylor* v. *Gett*, 10 id. 428; *Northampton Bank* v. *Balliott*, 8 W. & S. 318; *Corsen* v. *Craig*, 1 Wash. C. C. R. 424; 1 Parsons on Cont. 193, 196; 2 Story on Cont. § 396, n.

In *Leighton* v. *Sergeant*, 31 N. H. 119, the court set aside a verdict because brandy was furnished to the jury and drank by several of them, who complained of slight illness, while deliberating upon the cause after retiring to form their verdict. The court said: "The quantity drank was probably small, but we cannot consent that that fact should make a difference. We fully concur in the remarks made by the learned judge in *People* v. *Douglass*, 4 Cow. 36:" "It will not do to weigh and examine the quantity which may have been taken by the jury, nor the effect produced." So in *State* v. *Bullard*, 16 N. H. 139, a verdict was set aside because some of the jurors, while they were deliberating on their verdict, took a little rum for their stomach's sake. It was not claimed that they were intoxicated, but the court said: 'We are of the opinion that the use of stimulating liquors by a jury deliberating upon a verdict in a crim-

inal case, without first showing a case requiring such use, and procuring leave of court for that purpose, is a sufficient cause for setting aside the verdict found against the prisoner in such circumstances, whether the use was an intemperate one or otherwise.' "

The ground on which a party is precluded from proving that his representations on which another has acted were false, is, that to perm it it would be contrary to equity and good conscience. This has been sometimes called an *equitable estoppal*, because the jurisdiction of enforcing this equity belonged, originally and peculiarly, to courts of equity, and does not appear to have been familiarly exercised in law until within a comparatively recent date; and so far as relates to suits at law affecting the title to land, it is understood that in England and in some of the United States, the jurisdiction is still confined to courts of equity. *Storrs* v. *Barker*, 6 Johns Ch. 166; *Evans* v. *Bicknell*, 6 Ves. 174; *Pukkard* v. *Sears*, 6 Ad. & Ellis, 469; *Hunsden* v. *Cheyney*, 2 Vernon, 150, 499, 2 id. 239, 264; *East India Company* v. *Vincent*, 2 Atk. 83; 3 id. 693; *Story* v. *Ellsworth*, 26 Vt. 366; *vide Andrews* v. *Lyons*, 11 Allen 349; 5 id. 384; 9 id, 455, and 10 id. 437.

Pennsylvania will probably pass the act before the legislature of the state, to allow persons charged with the commission of crimes, to testify in their own behalf. The rule works well in Maine, Massachusetts and New York.

Judge Daniel Martin Smyser, who died a few days ago at his residence in Adams County, Pennsylvania, was a man of profound legal knowledge, judicial firmness, and unbending impartiality and integrity and he justly commanded the confidence and respect of the bar and the public. He graduated at Dickinson College in 1827, and afterward entered as a student at law in the office of Hon. Thaddeus Stevens. He was eminently fitted for the profession of which he was a most valuable member

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Right Hon. Stephen Lushington, was the second son of the late Sir Stephen Lushington, Bart., and born in London, January 14, 1782. He graduated at Eton and Oxford, and received the degree in 1807. In 1828, he was appointed judge of the Consistory Court, and judge of the High Court of Admiralty in 1838. He was in Parliament as representative from Winchelsea, Yarmouth, the Tower Hamlets and other boroughs, from 1820 to 1841, and retired from the bench in 1867. He is frequently alluded to by Mrs. Stowe in her book on Lady Byron's History, as he was the legal adviser of that unfortunate lady.

LAWYERS FOR POLICE JUSTICES.

Every lawyer at all acquainted with the manner in which offences are daily tried and disposed of by the Police Justices in the City of New York, must be impressed with the injurious results of having laymen uneducated in the law as dispensers of justice in these courts. The evils of the system have been discussed lately. and a bill has been presented to the Legislature to have these wrongs righted. Before the Assembly Judiciary Committee, Mr. Dorman B. Eaton, appeared on behalf of the bill, and presented sound and valid reasons why lawyers in good standing, should preside over these courts. In the course of his argument he said:

"So low has the practice fallen before these courts that respectable members of the legal profession generally refuse to appear there, and a despicable set of knaves, known as shysters, have a monopoly at all these fountains of justice. Nor is this the worst. The public sense has become so debased in regard to criminal administration that not a few worthy people think it is not important that a police justice should be a lawyer at all. The proceedings in these courts have so long been regarded as mercenary, partisan, and arbitrary, that not a few people have ceased to associate the ideas of justice and law with them at all. Nowhere else, however, is there more need of men well versed in the definitions of crime and the principles of evidence and justice than in the police courts.

"It was only when these courts were greatly degraded that any party had the hardihood to put forward rough, ignorant, mercenary fellows for police justices. Butchers, bullies, ignorant party hacks, brutal, uneducated tools of the great party demagogues, made their appearance in those courts as the natural fruits of the system of electing these justices and of using their decisions to aid and screen the party. We must begin the work of reform by demanding both character and instructed intelligence as judicial qualifications. Short of this no reform is possible. No courts so much as these deal with liberty and character, and if they are to be protected, the law of the land must be understood and justly applied by the police magistrates.

"Nothing but the humane principles of law and conscientious intelligence in their application, stands between the liberty of thousands and the cells to which these magistrates may consign any citizen, and especially the poor and the unbefriended. It is frightful to think of the injustice done in the annual disposition of the more than 75,000 prisoners whose cases are adjudged by the uninstructed magistrates who have presided in these police courts. Let any man who doubts it go any morning to one of them and see judgments rendered for an hour or two at the rate of more than one a minute; note the despair of unbefriended poverty as it is led to the cell; the leer of favored villainy as it flaunts unpunished from the court-room.

"I do not ask that these judges be lawyers out of any inclination to favor my own profession, nor because I think there may not be honest and generally intelligent men enough to be found out of it; but because the decisions and practice in these courts should be according to law and in the spirit of the law. Every crime has its definition in the law. No persons have the knowledge needed to apply it but such as have made it a careful study. Lawyers have little enough of this knowledge at the best; and it is nothing less than a public outrage to subject the tens of thousands of the humbler and the destitute annually before these courts to the arbitrary decisions of men ignorant of the law they pretend to apply, and unable to define the crimes for which they send men, women and children, in vast gangs, to prison. It is the disgrace of these courts that a law-book is almost never seen before them, and that a lawless, barbarian, partisan discretion has taken the place of justice and legal reasoning. If a police justice is to be the electioneering agent of a party, certainly he does not need any sense of amenability to legal principles; but if we are to have one uniform rule of right, reason and justice applied to all alike, irrespective of prospective votes and party policy, we must begin with bringing upon the police bench a comprehension of the Criminal law of the land, independence of low influences, and regard for legal principles. If we are not to have those who know the law to preside, we need nothing better than shysters to argue, and nothing higher than the arbitrary will of the magistrate or the interests of his party as a rule of the court.

"Let us then avow freely our purpose, and act upon it. Nothing has given me so much pain and discouragement as the suggestion of some persons of character and intelligence that the clause requiring the justices to be lawyers--to have some real knowledge of the law, they ought to administer—should be omitted. How those who would not engage a cook, a carpenter, or a gardner, without some proof that he had knowledge and experience in his calling, can suggest that a man ignorant of all the definitions of crime, of all the rules of evidence, of all the common principles of justice and legal reasoning, of all intellectual discipline and habits of thought, should be called to preside in courts where he is annually to pass many thousand times upon every variety of crime known to human depravity, is more than I can comprehend.

"We not only need legal learning, then, but a high capacity for applying it with promptness and accuracy, united with integrity of character. It is not the fact that one is a lawyer, which alone makes him fit for a police

justice, but because the study and knowledge of the science he must daily apply is one of the essential condition of fitness. It would be better still if no lawyer could be appointed a justice until he had passed a special examination in all that relates to his duties. It is no less dangerous than disgraceful to any community to have justices in its police courts, who have no adequate conceptions of what is meant in the law by committing a crime wilfully, by premeditation, by malice aforethought, by sudden passion, by probable cause, by the right of self-defense, by overwhelming necessity, by conspiring together, by disorderly conduct, or vagrancy; who cannot define murder, or manslaughter, or larceny, or forgery, or desertion.

"Not a day passes, I venture to say, in which ignorance in the justice does not release those who should be held and hold those who should be released. The counsel for the House of Refuge informs me that nearly a hundred inmates have been discharged in a single year by reason of the defective commitals of Police Justices. The moment the law says to a justice, You need to know no law, the Justice says to the law, My will and my idea of policy are, then, the rules according to which I enter my judgments, open and shut the cells of my prison.

"Let us, then, require that none but upright, well-instructed lawyers shall be police justices. Let them carry into their courts some ambition to deserve the respect of the profession to which they belong, and feel that they are under its observation and criticism. Let no one be allowed to practice before these Justices who is not qualified to practice in the higher courts. In that way a true reform will be inaugurated, and the career of barbarian discretion, general distrust, and partisan and personal favoritism will be arrested; and in no other way. Let any layman who wants to be a police justice be told to first study law until he can pass a respectable examination. It will be a lasting disgrace to any party to desire, and to any Reformer to consent, that uneducated men shall longer preside in these courts, in order that facility may be afforded to party hacks to rise to judicial station, and for party policy to usurp there the place of the law of the land. If this community had any just sense of what is required in these courts it would resent as an insult to itself any proposition to allow an uninstructed policeman, caucus demagogue, or partisan favorite to hold a seat there for a single day.

REFORM IN MURDER TRIALS.

In the last number of this JOURNAL we published part of the bill of Recorder Hackett. "relative to procedure in motions for new trials, or regarding writs of error upon conviction in the court of Oyer and Terminer of the first judicial district, or of the court of General Sessions of the Peace, in and for the city and county of New York, and to regulate in the Court of Appeals the procedure upon such writs of error." Mr. Henry L. Clinton, who has devoted considerable thought to the subject of reform in this regard, and who has himself drawn a bill to correct the errors of the present system, presents the following objections:

This bill, as drawn, contains many fatal objections, among which are the following: It applies only to the Court of Oyer and Terminer and the Court of General Sessions of this county. The powers of the Courts of Oyer and Terminer throughout the State should be the same. There is no reason why the powers of the Court of Oyer and Terminer of the county of New York should be different from those of the Oyer and Terminer of the County of Kings, or of Westchester, or of any other county in the State. There is no reason, why if a person commit murder in Brooklyn, he should have any better opportunity to escape by means of a new trial, than if he perpetrated a similar offense in New York. There is no reason why a convicted murderer should have any better opportunity for obtaining a new trial in one county than in another.

The Recorder's bill contains the following provisions:

"No bill of exceptions upon any conviction in the Court of Oyer and Terminer, or in the Court of General Sessions of the Peace, in and for the city and county of New York, shall be effectual or valid unless settled and duly signed within ten days after a conviction; except that for the cause of illness of judge or counsel, the time for settling may be extended by the order or orders of any justice of the Supreme Court of the First Judicial District, which order or orders shall be filed with the clerk of the court."

This provision would result in great oppression and injustice. The mode of getting a bill of exceptions "duly settled and duly signed" is as follows: After the trial, the counsel for the prisoner prepares a proposed bill of exceptions, and serves a copy on the District Attorney. It is then the duty of the District Attorney to serve a copy of his amendments (if he proposes any) upon the counsel for the prisoner. After that the latter gives notice that on a certain day he will present the proposed bill of exceptions to the court for settlement. At the appointed time he submits his proposed bill of exceptions, and the District Attorney presents his proposed amendments, the court determines what amendments shall be and what shall not be allowed; after which, an engrossed copy of the bill of exceptions, as settled by the judge, must be made, and that copy is signed by the court. In many cases it is absolutely impossible to get this done in ten days. There are

cases where, with the utmost possible speed on the part of counsel for defense, all this cannot be accomplished in less than twenty days. In some instances even more time is necessary. Delays are occasioned by the district attorney, on account of his numerous and pressing engagements. Delays may be occasioned by the court, as in the case of Stokes, by the absence from the city of the judge who presided at the trial.

According to this provision in the Recorder's bill, although the prisoner's counsel should lose not a moment's time, although he should work night and day until he got his bill of exceptions drawn and served, it would be invalid by reason of the neglect—whether intentional or unavoidable—of the district attorney or the court to do their part in getting it "duly settled and duly signed within ten days after a conviction," The Recorder's bill does not provide that the district attorney shall serve his proposed amendments within a given number of days, or that upon his failure to do so the court shall settle the bill of exceptions. By the provisions of the Recorder's bill, the district attorney could prevent any person convicted from ever getting his case before a higher court. After a case gets into the court of appeals, either the district attorney or the counsel for the prisoner should have the right to bring on the case for argument, and my bill so provides. There is no reason why, if the district attorney neglect or omit to proceed, the prisoner's counsel should not be permitted to notice and bring on the case for argument.

The only provision in the Recorder's bill for bringing on the argument is the following:

"At any time after said filing (of the writ and the return thereto) the district attorney of the county of New York, may move the court of appeals to assign and fix a day for an argument upon said writ of error, together with whatever return has been made thereto, whereupon it shall become the duty of the said court of appeals, if the said writ of error is upon a conviction for murder in the first degree, to immediately assign some day for argument, which shall be within ten days succeeding such application."

Under the Recorder's bill, if the district attorney does not see fit to move, there is no way of forcing on the argument. The district attorney can delay as long as he pleases. He can wait six months or a year, or any length of time.

ABSTRACT OF DECISIONS.

GENERAL TERM SUPREME COURT.

MARCH TERM—1ST DEPT.

In the case of *Barnard et al* v. *Campell et al.* decided at the Term 1873.—FANCHER, J., *held*, That where a purchase of goods is made with a design not to pay for them, it is such a fraud as will avoid the sale. *King* v. *Phillips*, 8 Bosw. 603. *Ash* v. *Putnam*, 1 Hill 302. Also, that where a sale is procured by fraud, no title passes to the vendee, but the vendor still retains the legal right in the goods and may reclaim them. *Root* v. *French*, 13 Wend. 305; *Hunter* v. *Hudson*, R. I. M. Co., 20 Barb. 594; *Williams* v. *Birch*, 6 Bosw. 299; *Caldwell* v. *Barlett*, 3 Duer 341; *Beavers* v. *Law*, 6 Id. 232; *Mowrey* v. *Walsh*, 8 Cow. 238; *Hoffman* v. *Carow*, 22 Wend. 318.

The judgment in this case was reversed and new trial ordered.

The American Brass & Copper Co. v. *The New Lamp Chimney Co.*, heard at the present term, was an action to recover some promissory notes made by defendants. The defence was that the defendants had on their own application been declared bankrupts and that plaintiff had proved their claim in that proceeding and received a dividend, and were thereby prevented by the bankrupt act from bringing any action for the claim as proved. On the trial the defendants moved for nonsuit on this ground which was refused and the defendants excepted and brought the appeal.

INGRAHAM, P. J. in rendering the opinion of the court says: It is clear that under the provisions of the brankrupt act when the proceedings in bankruptcy are shown to have been within the jurisdiction of the court, the 21st. section prohibits a party who has proved his debt or claim from maintaining any action therefor. In the present case it is contended that the defendants were never legally declared bankrupts, and that the court had no jurisdiction in the matter. The objection to these proceedings is that the application was not made in a form to give the court jurisdiction. The 37th section of the act, requires in addition to the petition of the officers, a duly authorized vote of a majority of the corporation at a legal meeting called for the purpose. See *Chemung Co. Bank* v. *Judson*, 8 N. Y. R. 254, where it was held that "the power of this court to inquire into the jurisdiction of the district court of the U. S. is undoubted." *Vide Dudley* v. *Mayhew*, 3 N. Y. 9; *McMulson* v. *R.* 47 N. Y. 67.

The court decided in this case that there was no error committed at the Circuit, and that the judgment should be affirmed.

In *Hunter et al* v. *Hook*, BRADY, J. says: The jury were instructed that "if an indorser promises to pay a note after it has been due, it is a waiver of the failure to make that demand and notice which the law says, the holder of the note ought to make. Therefore if you find in this case that Mr. Hook promised to pay this note after it became due, the plaintiffs are entitled to recover for the whole amount. ' This was error. The promise must be made after full knowledge of the omission to make due presentment. If the charge had contained the proposition that a promise to pay after maturity and after full knowledge of the failure to make due presentment was binding, it would have been unexceptionable. The rule is well settled." *Tebbetts* v. *Dowd*, 23 Wend. 379, and cases cited; *Meyer* v. *Habsher*. 47 N. Y. 265. See, also, *Sheld* v. *Horton*, 43 N. Y. 93; *Spencer* v. *Harvey*, 17 Wend. 489; *Bruce* v. *Lythe*. 13 Barb. 167.

It was therefore wholly immaterial whether the defendant promised to pay the notes after maturity. His liability was established by a promise made *before* maturity.

The judgment should be affirmed

UNITED STATES DISTRICT COURT, N. D.—ILLINOIS, FEB. TERM, 1873.

In re Firemen's Insurance Company. This case is important, as deciding that the terms and conditions of an insurance policy, remain binding upon the insured after adjudication of bankruptcy to the same extent as before. The policy holder is bound by the terms of his contract. Though an insurance company may, while solvent, waive the performance of conditions, the assignee has no such power.

A clause in a po' cy limiting the right of action to "one year" from the loss, is valid as a limitation, but proof of the debt in bankruptcy is equivalent to the commencement of a suit. Failure to bring suit within the time limited, bars the claim.

The proper practice, where the assignee wishes to contest such claim, is to ask that the claim be expunged under the 34th rule in bankruptcy. On these questions, see *Wilson* v. *People's Eq. Ins., Co.* 2 Gray 480; 9 Maryland 1; *Smith* v. *Ilavrill M. F. Ins. Co.* 1 Allen 297; 38 Penn. State 130; 2 Greenl. Ev. 406.

For cases as to the "year clause" in policies of insurance, see *Fullan* v. *N. Y. Union Ins. Co.* 7 Gray 61; 31 Penn. State, 448; 24 Georgia, 97; 5 Rhode Island, 394.

What is a tax for a corporate purpose? This question is answered in part in *Taylor* v. *Thompson et al*, 42 Ill. 9, where it was said to mean a tax to be expended in a manner which should promote the general prosperity and welfare of the municipality which levies it.

An able opinion filed Feb. 7, 1873, on this whole subject was rendered by Judge Breese of the Supreme Court of Illinois, in the case of *the Board of Supervisors of Livingston County* v. *Aaron Wieder*.

Judge Breese observes: "The true doctrine is, such purposes, and such only as are germain to the objects of the welfare of the municipality, at least such as have a legitimate connection with those objects, and a manifest relation thereto.

BANKRUPTCY COURT ABSTRACT.

1. The concurrent jurisdiction conferred upon the circuit court by section two of the bankrupt act is limited to cases where there is a controversy concerning the right to, or some interest in, some specific thing between the assignee and a third person, and does not include an action to collect a simple debt.

2. The district courts have original jurisdiction of all cases and controversies between third persons and the assignee in bankruptcy as such. *Bachman* v. *Packard*, 7 N. B. R. 353; see also 5 id. 1, 78, and *Sedgwick* v. *Casey*, 4 id. 161.

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1. Participation in the profits of a business is presumptive or primary proof that the participator is a partner; but such presumption may be overcome by showing that such profits were received by the party simply as wages for services performed.

2. The English and American authorities examined and commented on, touching the rule announced in *Waugh* v. *Carver*, 2 H. Bl. 235, upon the authority of *Grace* v. *Smith*, 2 W. Bl. 298, "that he who shares in the profits indefinitely shall by operation of law be made liable to losses," and the rule denied to be law. *In re Francis & Buchanan*, 7 N. B. R. 379, and see 2 Kent Com. 25; *Champion* v. *Bostwick*, 18 Wend. 184; *Derry* v. *Cabot*, 6 Met. 92; *Berthold* v. *Goldsmith*, 24 How. 542.

As to what fees of registers, clerks, marshals and assignees are legal, and what unwarranted and improper. *Vide In re* Dean, 1 N. B. R. 249, and *in re* Robinson, id. 285.

A debt barred by the statute of limitations of the state where the bankrupt resides, cannot be proved against his estate in bankruptcy. The entry of a debt upon the schedule by a bankrupt is not such an acknowledgment or new promise as will remove the debt *In re* Kingsley, id. 329 ; Ray's case, 2 Bt. 53 ; *ex parte* Dewdney, 15 Ves. 479 ; id. 468 ; Story's Conflict of Laws, sec. 335 ; *Richardson* v. *Thomas*, 13 Gray 381.

The United States district court has power to relieve a bankrupt from arrest, on process of a state court, in an action founded upon a debt that may be discharged in bankruptcy. The question whether the debt be one contracted in fraud, may be examined into and determined by the district court. *In re* Glasser, 1 N. B. R. 326 ; *vide* id. 86, 118, 193, 307, 318.

Where a firm consisting of two partners carry on business in the name of the active partner, a promissory note given by him to the silent partner, for the amount of capital contributed by the latter to the joint stock, is the separate note of the active partner. *In re* Waite, *et al.* id. 373, 464, 495.

LIMITATIONS OF THE PRESS.

Winston v. *English.*

The suit of Frederick A. Winston, the President of the Mutual Life Insurance Company, against Stephen English, the editor of *The Insurance Times*, for libel, has been decided, so far as the decision goes, adversely to the defendant. It will be remembered that an order of arrest was issued against English on which he was locked up in Ludlow street Jail, and an order was also granted for Mr. Winston's examination. A few days ago, however, a motion was made before Judge Freedman, in the Superior Court, to vacate the order of examination, the counsel claiming in his application that he required his examination for the purpose of framing his answer and ascertaining the facts relative to the alleged corrupt acts of the plaintiff regarding the operations of the company. Judge Freedman rendered his decision on the 10th inst, granting the application, which amounts to a refusal to permit the examination of Mr. Winston. In his opinion, the Judge says that the defendant does not bring himself within the rules of the Court authorizing such an examination by his affidavits. nor does he show that such examination is required in order to defend his case, nor that he could not get the necessary information from some other source. After speaking of the defendant's carelessness in not fortifying his position before uttering the alleged libel, Judge Freedman continues :

I am not one of those who believe that unlimited liberty of speech of the press is improper, because, productive in certain states of society of disastrous results. It is to the abnormal condition of the body politic that all evils arising from an unrestrained expression of opinion must be attributed, and not to the unrestraind expression itself. Under a sound social regime and its accompanying contentment, nothing is to be feared from the most uncontrolled utterance of thought and feeling. That which is really contemp ible ought therefore to be exposed to contempt, and consequently derogatory charges of public importance ought to have full publicity. To argue otherwise is to take up the Machiavellian position, that it is right for the Legislature to be an imposture, an organized hypocrisy ; that it is necessary for a nation to be cheated by the semblance of virtue when there is no reality ; that public opinion ought to be in error rather than in truth, or that it is well for the people to believe a lie. For these reasons it is my profound conviction that the freedom of the press, the right of journalists to discuss matters of public concern, can hardly be too zealously guarded, and that in this country, more than any other, the public press has a great mission to fulfil. But in order to accomplish such mission the press must not only remain fearless and independent but on the side of truth and justice. A publication on a subject which, though public affects the character and good name of a citizen, must be fair criticism. If it is such, the publication will be held to belong to the class of conditionally privileged communications. By this I mean to say that the *prima facie* presumption of malice which would exist from the language

used but for the occasion of such use is rebutted. But this privilege is qualified and conditional. It cannot be used for purposes of revenge, nor to gratify personal spite. It is not a privilege to make a statement which the publisher does not believe to be true; and if he volunteers to defame another in a matter in relation fo which he has no duty nor interest as a legitimate part of his business to furnish the news of current events, such officious defamation ought to be presumed false and malicious till he proves its truth, and such is the law.

No benefit can accrue to the defendant's present position from any of these considerations. As the case stands at present, he has not only neglected to bring himself within the rules and practice of this court relative to the examination of a party, under section 391 of the Code before issue, but has failed to satisfy me of the good faith of his application. For these reasons the order and summons heretofore made and issued must be recalled with $10 costs of the plaintiff.

ALTERED CHECK — -DRAWER AND DRAWEE.

In the important decision rendered a few days ago in the case, *Redington* v. *Wood et al*, supreme court of California, by Mr. Justice Crockett, (Wallace C. J. Rhodes and Belcher concurring,) on a case arising upon an altered check, it was in effect held that, the drawee is bound at his peril to know the handwriting of the drawer, and if the signature is forged he must suffer the loss; and that if the drawee, in good faith, and without negligence, pay even to an innocent holder a check which has been fraudulently altered in amount, after it left the hands of the drawer, he will, ordinarily, be entitled to recover back from the person to whom it was paid, the excess over the true amount of the check.

In the exhaustive opinion of the court it is said:

If the rule were otherwise, the drawee could never safely pay a check filled up in a handwriting that was new to him until he had first satisfied himself by inquiry from the drawer whether the check had been properly filled up. This would result in such delay and inconvenience as greatly to interfere with commercial transactions which are so largely carried on by means of checks. The rule is, therefore, now well settled, that if the drawee, in good faith and without negligence, pay, even to an innocent holder, a check which has been fraudulently altered in amount after it left the hands of the drawer, he will, ordinarily, be entitled to recover back from the person to whom it was paid the excess over the true amount of the check. "The rule requiring the bank to know the customer's handwriting is confined in its practical effect to requiring a knowledge of his signature. Neither law nor the ordinary course of business renders it a matter of suspicion that the body of the check or bill is not written in the drawer's hand. Nevertheless, a false or fraudulent alteration in a material point, made in the body of the check or bill, renders the document a technical forgery, just as much as the simulating the signature itself. Knowledge of the drawer's signat re is, of course, no possible guide for the detection of this description of forgery, and, in such cases, a modification of the general rule, that payment on forged paper is no payment, has to be made in deference to the sheer necessities of justice." Morse on Banks and Banking, 300.

In the *Bank of Commerce* v. *Union Bank*, 3 Comst. 234, Ruggles, J., in delivering the opinion of the court, says: "The payment of a bill of exchange by the drawee is ordinarily an admission of the drawer's signature, which he is not afterward, in a controversy between himself and the holder, at liberty to dispute. * * * * The drawee is supposed to know the handwriting of the drawer, who is usually his customer or correspondent. As between him, therefore, and an innocent holder, the payer from imputed negligence, must bear the loss."

In support of his proposition he quotes *Price* v. *Neal*, 3 Burr. 1,384; *Wilkison* v. *Lutwidge*, 1 Strange, 648, and Story on Bills, section 262, to which many other authorities might be added. "But," he says, "it is plain that the reason on which the above rule is founded does not apply to a case where the forgery is not in counterfeiting the name of the drawer but in altering the body of the bill. There is no ground for presuming the body of the bill to be the drawer's handwriting or in any handwriting known to the acceptor. * * * * No case goes the length of saying that the acceptor is presumed to know the

handwriting of the body of the bill, or that he is better able than the indorsers to detect an alteration in it. The presumption, that the drawee is acquainted with the drawer's signature, or able to ascertain whether it is genuine, is reasonable. In most cases, it is in conformity with the fact. But to require the drawee to know the handwriting of the residue of the bill is unreasonable. It would, in most cases, be requiring an impossibility. Such a rule would be not only arbitrary and rigorous but unjust." The same principle is recognized in *National Park Bank* v. *Ninth National Bank*, 55 Barb. 124, in which, after conceding that the drawee of a check is bound, at his peril, "but the liability extends no further, and where the genuine draft has been altered not only in the name, but in the amount to be payable, I do not think that rule should hold the drawee liable for any more than the amount of the original draft; and, for the balance, the plaintiff should recover * * * * . I think the rules, as heretofore settled, viz: The drawee is bound to know the handwriting of the drawer, and is liable for a draft which he pays, although forged; and the other, that where the body of the draft is altered, the drawee may recover the amount from the person receiving it, may both be applied to this case, and should lead to the result before stated." The same case was taken to the court of appeals and is reported in 46 N. Y. 77. In that court, the judgment was reversed, on the ground that the signature of the drawer was forged, and, for that reason, the drawee was not entitled to recover. But there is nothing in the opinion of the court in conflict with the proposition, that if the signature of the drawer had been genuine, and the bill had been altered only in the amount, the drawee would have been entitled to recover.

On Altered Notes.—In *Fulmer* v. *Seitz*, 68 Penn. St. 237, the effect of an alteration of a promissory note without fraudulent intent was adjudicated. It appeared that F. agreed to lend $4.000 to S. at 12 per cent interest, S. paying $240 in advance; S. delivered to F. a note signed by himself and others as his sureties; afterward F. discovered that nothing appeared in the note about interest, and told S., who directed F. to insert that it was with interest; F. did so in S.'s presence. *Held*, that this avoided the note as to the sureties. See *Neff* v. *Horner*, 63 Penn. St. 327. And in *Fay* v. *Smith*, 1 Allen, 477, it was held that the alteration of a promissory note, by the addition of the words "with interest," avoids the note as to such promisors as do not consent thereto, although the alteration is made without fraudulent intent. See *Britton* v. *Dieker*, 2 Am. Rep. 553. But where a note after indorsement was returned to the maker, and the words "with interest" added without the indorser's assent, the indorser was held liable, the alteration not being fraudulent and the added words having been erased before suit. *Kounts* v. *Kennedy*, 3 Am. Rep. 541 (63 Penn. St. 187). See, also, *Murray* v. *Graham*, 29 Iowa, 520. The general principle is, that where the alteration is made to correct a mistake and conform the note to the intention of the parties, the note is not invalidated. *Dunker* v. *Franz*, 3 Am. Rep. 314; *Jessup* v. *Dennison*, 2 Disney (Ohio), 150; *Arms* v. *Colburn*, 11 Gray, 390; *Chute* v. *Small*, 17 Wend. 238. So, where a note having a blank between "eight" and "dollars" was indorsed and the maker afterward filled the blank by adding the words "hundred," it being the intention of the parties to make a note for eight hundred dollars, the indorser was held not discharged. *Boyd* v. *Brotherson*, 10 Wend. 93. The rule is, that where the alteration is without fraudulent intent, the note is not invalidated, except as to those parties whose actual or constructive assent is not obtained.—*A. L. J.*

UNITED STATES SUPREME COURT.

GORHAM MANUFACTURING CO. v. *G. C. WHITE.*

This was an action originally brought in the U. S. Court for the southern district of New York, and appealed to the Supreme Court of the United States. It was brought to recover damages for infringement upon a new design for the handles of table spoons and forks. It has been generally held that, the acts of Congress which authorize the grant of a patent for designs contemplate not so much utility as appearance. Act of Congress 1842. Strong, J. in effect held; that, it is the appearance to the eye that constitutes mainly, if not entirely, the contribution to the public which the law deems worthy of recompense, and identity of appearance, or sameness of effect upon the eye, is the main test of substantial identity of design.

It is not essential to identity of design that the appearance should be the same to the eye of an expert. If, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, and sufficient to induce him to purchase one, supposing it to be the other, the one first patented is infringed by the other. *McCrea* v. *Holdsworth*, 6 Chap. Ap. cases L. R. 418. *Holdsworth* v. *McCrea*, 2 Appeal cases House of Lords 388.

COMMON CARRIERS.—It is a well-settled elementary principle that in the absence of any special contract the obligation of a common carrier of goods is to transport them by the usual route proposed by him to the public and to deliver them within a reasonable time. In *Empire Trans. Co.* v. *Wallace*, 68 Penn. St. 302, this principle was applied, and it was held that where the established route of a carrier was by rail to Philadelphia, and thence by water to Boston, he was not bound to send goods from Philadelphia by rail, when the Delaware river was obstructed by ice. See, as to carrier being excused from liability by act of God, *McArthur* v. *Sears*, 21 Wend. 190; *Railroad Co.* v. *Reeves*, 10 Wall. 176; *Western Trans. Co.* v. *Downer*, 11 id. 129; *Welfare* v. *London and Brighton R. R. Co.*, L. R., 4 Q. B. 693; *Wolfe* v. *Am. Express Co.*, 43 Mo. 421.—*A. L. J.*

SUPREME COURT OF NEW YORK.

DECIDED NOVEMBER, 1872.

Agency—Negligence.

DANFORD S. BARNEY as President, etc., v. *OTTO BURNSTENBINDER.*

GILBERT, J.—The verdict of the jury established the fact that Deveau was the agent of the defendant in shipping the nitro-glycerine in question, and that the same was shipped by Deveau in the due course of his business, as such agent, without giving any notice to the plaintiff of the dangerous nature of the article shipped. The evidence was conflicting. The subject however, was fairly submitted to the jury under proper instructions, and their verdict must be held conclusive. The question is, whether there is an implied duty on the part of the shippers of goods of this description to give notice of the dangerous nature of the goods to the ship-owner or the person who receives the goods on his behalf. We are of opinion that there is such a duty, and that the omission to perform it is an act of negligence, which renders the shipper liable for the consequences.

The Courts of King's Bench and of Common Pleas in England have held, in several instances, that such a duty exists, and we think those decisions rest upon sound principle, and ought to be regarded as enunciating a salutary rule of law. (*Williams* v. *The E. I. Co.*, 3 East 192; *Brass* v. *Maitland*, 6 E & B., 470; *Faucet* v. *Barnes*, 11 C. B. U. S. 553. See also *Pierce* v. *Winsor*, 2 Sprague 55; *Jeffery* v. *Bigelow*, 13 Wend., 18.) A similar principle was affirmed in the Court of Appeals of this State in *Thomas* v. *Winchester*, 2 Seld. 397. The rule of law which makes a principal liable for all the negligent acts of his agent, done in the course of his ordinary employment, is too familiar and too well established to require to be supported by a citation of authorities. It was urged that the agent's omission to give notice of the nature of the goods in this case was a criminal, or, at least, an illegal act, and that, therefore, the defendant was not liable for it. No such distinction exists. (*Thomas* v. *Winchester*, *supra*.) The Court of Appeals held in this case that "although the defendant may not be answerable criminally for the negligence of his agent, there can be no doubt of his liability in a civil action, in which the act of the agent is to be regarded as the act of the principal."

We think no negligence can be imputed to the plaintiff in causing the package to be opened after its arrival at San Francisco. It is true the opening of the package, was the immediate cause of the disaster, for the consequences of which the defendant is sued. But it is quite reasonable to infer that, if the defendant had performed his duty, and given notice of the dangerous character of the package, a different disposition of it would have been made, and the requisite care would have been taken to prevent an explosion. It was the duty of the plaintiff to take care of the package, and, if possible, to stop the leakage of its contents. He adopted the usual method of doing this. He had no reason to apprehend any danger, nor was he warned that it was neces-

sary to use extraordinary care in handling the package. It was the fault of the defendant that such warning was not given. Although, therefore, it was the act of the plaintiff which caused the explosion, yet, for the reasons stated, such act was not a negligent one which disentitles him to recover. (Add. Law of Torts, 20, 21.)

There is nothing in the point that this action is local. The gravamen of it is the negligence of the defendant, whereby the plaintiff has sustained damages. Such an action in its nature is personal and transitory, and may be brought wherever the defendant can be found and served with process. The injury to real estate is only one element of the damages. Our statute relative to locality of action applies only to causes of action arising within this State. (*Smith* v. *Bede*, 17 Wend., 323.)

We have looked into other exceptions presented on behalf of the defendant, but find none of them tenable. Upon the whole case, therefore, our opinion is, that the judgment should be affirmed, with costs.

INGRAHAM, P. J., and LEONARD, J., concurred.

LEGAL NEWS.

THE next session of the Court of Appeals commencing on the 24th., March 1873, will be held in the City of New York.

EDWIN JAMES could not make out a sufficient case to induce the Benchers to reinstate him as attorney in England.

JUDGE DELEHAY, of Kansas, has been impeached, for drunkenness and conduct *infra dig.* Judge Webb has resigned.

The testimony in the case against Judge Sherman, for receiving and using bribes to secure legislation has been referred to the next House.

GEORGE L. TAYLOR, a lawyer of Trenton, N. J., was on the 28ult. sentenced to six months in the State prison and a fine of one hundred dollars, for taking illegal fees from an applicant for pension.

COL. A. W. TENNEY was sworn in before Judge Benedict on the 10th inst, as District Attorney for the Second District.

THE BAR ASSOCIATION.

PUBLICATION OF JUDICIAL DECISIONS.

The members of the Bar Association are constantly suggesting and presenting ways and means of effecting legal reform, and through their labors many beneficent changes have been wrought, which have resulted to the benefit of the public and the profession. The Association may well be said to be in the broader sense, a conservator of the public good. All honor to them. At the meeting of the Association held on the evening of the 12th. inst., Mr. Delafield offered the following resolutions, which were unanimously adopted.

Resolved, That the present system of preparing, editing and publishing reports of judicial decisions in this state requires amendment.

Resolved, That the subject of law reporting be referred to a committee of five, to be appointed by the chair, with instructions to prepare a plan of amendment, and report to a future meeting of the Association.

He called attention to the fact that we have seven series of state reports and three of United States, producing from twenty-five to thirty volumes annually; that two-thirds of the reported cases should not be reported at all; that they are false lights or deciding nothing new; that two series of practical reports are unnecessary, and two of Supreme Court reports, unwarranted by law, which has fixed three volumes annually as the limit of these reports, while the two reporters publish seven; that the multiplication of reports of the same case two or three times in the different series is intolerable, and that the prolixity of some of the Judges in writing opinions was a great evil and in opposition to the golden rule of their English brethren that brevity is the soul of wit. That nine years ago the English bar, suffering from the same evils, found a remedy in the Council of Law reporting, and that since then this Council had published forty-seven volumes, while our reporters had issued one hundred and fifty.

The chair appointed Messrs. Delafield, Nicoll, Tailer, Man and De Costa as the committee.

A LITTLE sally of wit in regard to Rufus Choate, by Oliver Wendell Homes, the "autocrat of the breakfast table," is worth preserving. When Choate was obliged to disappoint Dartmouth College in not delivering a promised commencement address, the little autocrat was sent for as a substitute. Going up in the cars, some one asked, "Who is to fill Mr. Choate's place to-morrow?" The lively little doctor jumped up, and coming forward said, "Nobody's going to *fill* his place; I'm going to rattle round *in it* a little while."

CURRENT TOPICS.

THE FOSTER CASE.—The unwonted sympathy and effort manifested to have Governor Dix commute William Foster's death sentence to that of imprisonment for life (who was found guilty of murdering Avery D. Putnam two years ago,) merits consideration, The petitions and array of letters written by many of the ablest lawyers of the City, to the Executive of the State, recommending such commutation, ought to raise the question intelligibly and squarely whether or not the judgment of death was in accordance with the facts and the law.

It will be remembered that this case was ably and carefully defended in behalf of Foster, and that after a deliberate review of the evidence and exceptions taken on the trial, the Court of Appeals affirmed the judgment. Thus, on the one hand it is claimed that the jury recommended Foster to mercy, and able lawyers—Mr. Evarts, Judge Leonard and others—give it as their opinion that from the whole evidence he should escape the death penalty; while on the other, the fact that he was found guilty upon the evidence and the verdict has been wholly and entirely sustained by the highest court, which at least would seem to imply that the killing was intentional.

Mr. Evarts, who presents a letter to the Governor with reasons why the sentence should be commuted, believes that such commutation would conform "to the justice of his (Foster's) case, and to the highest interest of the law, the administration of justice and the protection of society." Opinions from such men are entitled to candid consideration by the Governor.

No case for years has commanded such an array of applications asking executive clemency.

Capital punishment is the law of the State, and while we do not wholly believe in its efficacy we are still satisfied that it is a great public injury to have the law evaded upon mere sentimental pleas. If such a law be a safeguard and benefit (or not) it ought to be enforced in every case where there is a just and legal conviction, or otherwise there can be no protection to society or public welfare.

The future of the matter rests with the Executive of the State, and whatever his final decision may be it will accord with public honor and even handed justice.

As we go to press a despatch reaches us that Governor Dix has refused to commute the sentence of Foster.

LAWYERS IN PARLIAMENT.—There are many lawyers of mark among the minor celebrities of the House of Commons. The name of Mr. Vernon Harcourt is well known in America. Mr. Harcourt—the "Historicus" of the London *Times*—is a man of forty-five, tall, loud-voiced, self-asserting, brassy in manner; a personage who gets credit for great ability partly by means of an imposing manner and an unbounded confidence. A very rising man is Mr. Henry James, a man whose intellect has a peculiarly fine edge to it, whose speeches are as delicate in style as they are keen, reminding one somehow of a Damascus blade. It is doubted, however, whether he has the breadth and robustness to make a political leader. So he will probably become a law officer one of these days, and then vanish out of politics, and ascend the judicial bench. The Irish Attorney General, Mr. Dowse, is the most successful buffo member of the House of Commons at present, whose broad humor has left Bernal Osborne nowhere, and who can make even Disraeli laugh.

The lawyers in Parliament remain, a distinct class for the most part. They seldom merge into the politician. Brougham did, and O'Connell did; but Brougham was not perhaps much of a lawyer, and O'Connell was swept into politics by a particular cause. As a rule the lawyer enters Parliament only as a means of professional advancement.

LIFE INSURANCE.—It appears by recent statistics that the American life associations number 114. The policies issued by them, and in force, amounted to 834,498. Their assets (including some having capital stock) were $300,616,056. Their present liabilities reached the sum of $243,239,186. Their future or contingent liability, payable on the maturity of their policies by the death of the assured, was $2,263,438,313. When it is considered that the ability to pay the large sum of over twenty-two hundred millions is to be found only in the use of the three hundred and odd millions, with such additions as are made by interest and future payments agreed to be

made by the party, it will be seen that it is only by an actual compliance with the terms of the contract that the association will be able to meet its obligations.

If there is any value in the institutions of life insurance, such value can only be secured by pursuing such course as will make them stable, permanent and enduring. The means to this end are: faithful and honest management on the one side, and an honest and faithful performance by the member of his agreements on the other.

THE SCANNELL CASE.—The trial of John Scannell for the murder of Thomas Donahue, which lasted several days in the Oyer and Terminer, was ended on the 8th. inst. The jury disagreeing upon a verdict they were discharged by Judge Brady.

MISCELLANEOUS.

RUFUS CHOATE'S PERSONAL APPEARANCE.—In appearance he was, though in a different way, quite as marked as Webster. No one who once saw him could ever forget him. That dark, Spanish, Hidalgo-looking head, crowned with thick raven curls, which the daughters of the black-eyed races might have envied; and the flash of his own sad eyes, sad but burning with Italian intensity. What canvas shall ever bid them live again, so that men shall see once more the Prince of the forum?

In the prime and flush of his youth, when first he stood up before the bar and the bench of Essex county, Mr. Choate is described as of fascinating beauty. In his maturity he was not so handsome as he was striking in his aspect. It was then the combination of poetry and power expressed in his looks, which was the source of his fascination rather than any grace of beauty. The lustre lingered in the eye, but his Herculean toils had driven away all bloom from the cheek. Yet still the quick smile of singular beauty illuminated the weary face of the veteran; he was old, but his smile was young; and victor in so many fights, with the story of his conquering life stamped on his jaded countenance, he must have been quite as interesting a being in form and feature as when, in the beauty of his youth, he stood up, and joy and hope brightened his mantling crest.

DISTINGUISHED LAWYERS.—No little research and care is required in preparing the following account of the origin, parentage and wealth of gentlemen of the bar who have become renowned:

Lord SOMER'S father was an attorney at Worcester; Lord Hardwicke's, an attorney at Dover; the late Lord Gifford's, a grocer in the same city; Lord Thurlow's, a poor country clergyman; Lord Kenyon's a gentleman of small estate in Wales; Dunning's, an attorney at Ashburton; Sir Vicary Gibbiss', a surgeon and apothecary at Exeter; Sir Sam'l Romilly was of a refugee family; Sir Samuel Shepherd's, a goldsmith; Lord Tenterden's, a barber at Canterbury; Lord Mansfield and Lord Erskine were men of noble family, but all Lord Mansfield got by his noble connection were a few briefs in Scotch appeal cases. and Erskine, just about the time he was called to the bar, was heard emphatically thanking God that out of his own family he did not know a lord. Sir John Jervis, in 1850, stated that there were then eight gentlemen at the bar making annual incomes of more than £8,000 each from their professional labors.

LAW FACETIÆ

The late Ogden Hoffman, some years before his death, visited Europe, and on his return, was one day summoned by a group of lawyers to whom he descanted. with much vivacity, upon the note-worthy things he had observed abroad; the wonders of nature and art, society, manners, and so forth. A gentleman present abruptly inquired: "What did you see that struck you with most surprise?" Mr. Hoffman replied: "Well, that which impressed me more than any other one thing, was the deference which the English judges pay to the barristers."

This eminent and polished advocate, of course, thought at the time he spoke, that in this particular form of courtesy, the mother country had the start of us. We have overtaken our trans-Atlantic cousins in other races, and it is to be hoped that we shall, in due time, come up with them in this.

THE law has always been a witty profession, and opportunities for saying good things have often been the temptation and excuse for violating the canons of politeness. A spinster of

uncertain years, being on the stand as a witness, the cross-examining advocate deemed it material to inquire what her age might be. "I am not ashamed of my age," answered the lady, spitefully. The lawyer replied, "Certainly, you ought not to be ashamed of anything you have had so long."

In a county court, in the interior of this state, a gentleman in a soiled white cravat, having given valuable testimony in favor of the party calling, the cross-examination commenced as follows:

Counsel. "What is your occupation?"

Witness. "I am a small candle in the house of the Lord."

Counsel. "Oh, yes, a dipped candle I suppose."

Retort Courteous.—John Oxly, pawnbroker, of Bethnal Green, was indicted for assaulting Jonathan Boldsworth on the highway, putting him in fear, and taking from him one silver watch, value 5*l.* 5*s.* The prisoner pleaded, that having sold the watch to the prosecutor, and being immediately after informed by a person who knew him, that he was not likely to pay for the same, he had only followed him and taken the watch back again. But it appearing on the trial that, presuming he had not been known when he committed the robbery, he had afterwards sued the prosecutor for the debt on his note of hand; he was found guilty, sentence, *death.*—*Old Bailey Sessions* Paper, 1747.

LATE ENACTMENTS.

CHAP. 25,

An Act to amend sections eleven and thirteen of article one, title one, chapter eight, part two of the Revised Statutes, entitled "Of marriage, and of the solemnization and proof thereof."

Passed February 22, 1873, three-fifths being present.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. Section eleven of article one of title one of chapter eight of part two of the Revised Statutes is hereby amended so as to read as follows;

§ 2. If either of the parties, between whom the marriage is to be solemnized, shall not be personally known to him, the minister or magistrate shall ascertain from the respective parties their right to contract marriage, and, for that purpose, he may examine the parties, or either of them, or any other person, under oath, which he is hereby authorized to administer, which examination shall be reduced to writing and subscribed by the parties, and either of the respective parties making a false statement under this oath shall be deemed guilty of wilful and corrupt perjury, and shall be liable therefor.

§ 1. The first subdivision of section thirteen of article one, title one of chapter eight of part two of the Revised Statutes is hereby amended so as to read as follows:

2. The names and places of residence of the parties married, and that they were known to such minister or magistrate, or were satisfactorily proved, by the oath of the parties themselves or a person known to him, that they were the persons described in such certificate, and that they were of sufficient age to to contract marriage.

§ 3. This act shall take effect immediately.

CHAP. 9.

An Act in relation to the calendar of the commission of appeals, authorizing the transfer of causes from the calendar of the court of appeals and the disposition of causes on the calendar of the commission of appeals.

Passed February 7, 1873.

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. All the causes pending in the court of appeals on the first day of January, 1869, not on the printed calendar of the commission of appeals for 1873, and not heretofore disposed of by the commisioners, may be put upon the calendar by their order; and, from time to time, such other causes, as in pursuance of section twenty-eight of the sixth article of the constitution, have been or may be ordered to be heard and determined by said commissioners, may be added to the said calendar without any further notice of hearing; and all such causes, with those now upon the calendar, shall stand for hearing in their order accordingly, and subject to correction by said commissioners.

§ 2. When any such cause shall be called for argument, and no other disposition shall be made thereof at the time of the call, it shall stand dismissed without costs; and an order shall be entered accordingly, which shall be absolute, unless, on the first day of the next term, the cause be submitted by one or more of the parties, on fifteen days' notice to the other parties at the last term for arguments to be held by the commissioners.

§ 3. This act shall take effect immediately.

General Butler's Bill, just passed by Congress fixes the President's salary at $50.000; Vice-President, $10.000; Chief Justice, $10.500; Justices, $10.000. Senate vote stood 36 to 27; House, 102 to 96,

ROMAN JURISTS AND CODES.

(Concluded.)

The digests of the civil law prior to Justinian, were the Jus Civile Papirianum, the Breviary of Anianus, the Gregorian, Hermogenian and Theodosian Codes.

Some account of the Digest of Papinius was given in the last paper.

The Gregorian Code was a collection of imperial constitutions from Hadrian to Constantine the Great.

The Hermogenian Code was a supplementary collection.

These digests were the private enterprises of the lawyers whose names they bear and received the same degree of consideration in the forum that our courts might bestow upon Edmund's Statutes of New York. These books, however, prepared the way for the Theodosian Code, the most important Digest of the Civil Law, except the Corpus Juris Civilis.

In the year 438 the Emperor Theodosius, reigning at Constantinople, the capital of the western portion of the now divided Roman Empire, appointed eight commissioners, at whose head was an eminent jurist, Antioclus, to codify the Civil Law.

These commissioners were invested with power to retrench what was superfluous, to add what was wanting, to change what was ambiguous and to correct what was incongruous. Con. Theo. Frag. Jued., p. 20.

Their work, when done, contained the rescripts of sixteen emperors, arranged in sixteen books, and in chronological order from that year, 312 to 438, beginning with those of Constantine the Great.

The Theodosian Code was immediately adopted with much ceremony by the Emperor of the West, and thus became a standard work throughout the Empire. It was first printed at Basil on the Rhine, in 1528, by Joannes Sichardus. Twenty-two years after an edition was published in Paris by Tillet, and in 1566 an edition was published by Cujacius at Lyons.

We owe the preservation of the Theodosian Code to King Alaric. The German conquerors of the west permitted the Romans to enjoy their own laws, and the so-called *Breviarium Aniani*, completed in the year 506, by order of the German King, contains an abridgement of the Gregorian, Hermogenian and Theodosian Codes, the new constitutions, an epitome of the Institutes of Gaius, extracts from the Sententaie of Paulus, and the books Papinian. It is only in this ancient abridgement that a considerable portion of Theodosian Code has been transmitted to our time. We cannot leave this branch of our subject without a brief notice

of the commentaries of Prof. Gothofrede, who died at Geneva in 1652. He labored assiduously for thirty years upon the Theodosian Code, and his commentaries, published thirteen years after his death, are a monument of almost unprecedental industry. Gothofrede has collected a stupendous mass of learning and his information is derived from every accessible source. To the text of the Code he subjoins the ancient explanation, this is followed by his notes in which he adverts to the various readings, the emendations of the text, and to parallel or conflicting passages in the Theodosian or Justinian laws, and pours around every subject of importance an immense stream of erudition drawn from the deepest recesses of jurisprudence and history. Hugo enthusiastically calls the work of Gothofrede "Opus immortale," and Gibbon, Irving, Cooper, Kent and all other English civilians acknowledge their indebtedness to the indefatigable Swiss.

We have now brought our hasty review down to within a century of the time of Justinian. During this period no further attempt was made to codify the Civil Law.

The condition of law literature at this period was deplorable—law books were interesting to but few and always expensive. Before the invention of printing the labor and materials for writing were within the reach of the rich alone. Even during the period from Cicero to the last of the Antonines many works of value were lost, and during the succeeding three centuries of disorder many more law manuscripts were destroyed and their names alone are recorded. When Justinian began to reign, the laws and opinions which had filled a thousand volumes could not be easily found. His Grecian subjects were ignorant of the language in which the law was recorded. Pride prompted the Emperor to imitate Theodosius in attaching his name to a legal system. Hands competent for the task of legal reformation were ready to serve him, and the Corpus Juris Civilis was begun. We will close this paper with some account of the discovery of the Institutes of Gaius, the most interesting and valuable literary discovery of modern times. Gaius was the Blackstone of the Civil Law. He lived in the time of the last of the Antonines and was one of the five jurists whose opinions were confirmed by an Imperial decree of the Emperor Valentinian III., who directed that they alone should be cited in courts, except such extracts as they had incorporated in their works. The genuine text ofGaius was not known to the modern world until 1816. Extracts from Gaius were found in the Codes and Pandects sufficient to excite but not enough to gratify curiosity.

The Institutes of Justinian were known to be little more than those of Gaius, yet no one hoped that the works of Gaius would be restored to light, although they had lain for centuries in the library of the Chapter at Verona, the precious manuscript, whose true character was unknown to

its priestly custodians, was at last discovered by the keen eyes of the German Niebhur. Niebhur had gone to Italy to consult the original authorities in the collection of materials for his history. One day pursuing his investigations at the cathedral library of Verona, his eye fell upon an ancient dusty manuscript of the Epistles of St. James. But Niebhur shall tell you his own story. He thus writes to Savigny, Sept. 4, 1816. Life and Letters of Niebhur, page 319: Harpers, 1852.

"The Cathedral of Verona possesses a library extremely rich in very old latin parchments. Fortunately for it, about the middle of the eighteenth century, a thoroughly learned prebendary—a rare phenomenon even then—Gian Jacopode Dionigo, by name, examined and arranged the whole of its contents; and some time after, Antonio Mazzoti, a very honest and industrious librarian, made an excellent catalogue of them. The first thing that fell into my hands, on opening the chest containing the manuscripts, was a very thin little volume of extremely ancient single and double leaves of parchments, which, according to the title page, were collected from the dirt and rubbish by the said Dionigo in 1758. Most of them are biblical fragments, from perhaps the sixth to the eleventh century, and a note, by the hand of their diligent collector, exhibits their contents; but almost instantly I espied among them two fragments of quite a different kind, whose nature he did not understand, and of which he has, therefore, omitted all notice. I have only espied this fragment that nothing might be overlooked. But now comes the main piece of news I have to announce, namely, that there is preserved at Verona, as much of *Ulpian* as would fill a small octavo volume, of which, however, I was only able to copy a single leaf by way of a specimen and attestation, which I herewith transmit to you for publication. * * * * * At Verona my lucky star was again in the ascendant, for I found the *Codes* XIII., containing the Epistles of St. Jerome, a pretty thick quarto volume of the ninth century, which is a complete *Palimpsest*, except about a fifth part of the leaves, which are new, some of the part written over is of a theological, but by far the greater portion of a judicial nature. It is written by the same hand as the fragment of Gaius, from which we may conclude that the cathedral chapter or the church at Verona, was once in possession of several works on jurisprudence which the ecclesiastics afterwards used up; and that it had these books before Justinian's time and under King Theodoric. My transcript is as exact a representation of the original as it was possible to make, without tracing it through transparent paper. My dear Savigny, here lies a treasure waiting for your hands to dig it up; a bait that shall lure you over the Alps to us, or will you persuade some one else to come? You will not suffer this discovery, which is exactly what you have been wishing for so ardently, to be lost for want of some one to make use of it.

But whoever comes let him not depend merely upon his own eyes. Let him bring with him the best chemical re-agents to bring out the writing, and also a good magnifying glass." Thus the enthusiastic Niebhur announces his great discovery to his distinguished friend at Berlin.

Again October 17, 1816, Niebhur wrote to Savigny from Rome: "If the letter I wrote you from Venice arrived punctually, dear Savigny, (of which, however, I do not feel at all confident,) and found you at Berlin, I am certain that you must have written to me, for my discoveries at Verona were, I should think, almost enough to induce you to order post-horses on the spot and set out for Italy yourself."

But Niebhur's anxiety was ill-founded for his treasure safely reached Savigny who soon recognized not Ulpian as Niebhur supposed but the literally long lost Institutes of Gaius. None but a German civilian can appreciate the excitement which the publication of this discovery caused among the lawyers and the law students of Germany and France. The following year the Royal Academy of Berlin dispatched Prof. Greschen, a civilian, and Prof. Bekker, a philologist, to *Verona* to prosecute with Niebhur the investigation of the manuscripts. The results were duly published from time to time, and in 1820 the first edition of the Institutes of Gaius, edited by Prof. Greschen, was published at Berlin.

Gaius has been translated in French by Prof. Boulet, who says, that no works ever produced a more remarkable revolution in the study of the Roman law. It has recently been translated in English by Dr. Tomkins, of London, whose works upon Roman Law are not only the most recent, but the best in the English language.

CUSTODIANSHIP OF DECEASED BODIES.

JOHN F. BAKER.

One of the most novel and interesting questions which come before our courts of judicature is that, as to the legal right to the remains of deceased persons. A case was recently tried in the Supreme Court, Kings County, New York, wherein Rebecca Secor obtained judgment perpetually enjoining David P. Secor from removing the remains of her deceased husband, from the place where they had been decently interred. The remains had been removed by the defendant, who set up in his answer that he purchased a plot pursuant to the instructions of his father, and partly with his money, as a family burial place, such request having been made ten years previous to his death.

The widow being the administratrix in law, and in preference to all others, the question arose whether she was so far entitled to the remains as to direct and control their place of interment. She is nearer in point of relationship and affection than any survivor. She leaveth father and mother and cleaveth to her husband, and is the companion and comforter during his life, and should be the natural custodian of his person. And during the life of the widow there would be manifest injustice to allow the remains to be disturbed by the next of kin, in opposition to her wish. The question involved in this case was whether a son of the decedant had the right to remove the remains, against the will of the surviving widow. The case in 3 Edwards Ch. R. 155, was cited by the defendant as authority for the doctrine that, the next of kin have not only the right to determine the place of burial, but also, to remove the remains to such place as they may determine. It was a case where a daughter and the next of kin of the deceased claimed the right to remove the remains to another place, the land where the vault then was having been sold. No objection being interposed, the petition was granted, the church paying the expense of the removal. It was simply a question who should remove the remains, the next of kin, or the church, and not analagous to the Secor case.

By the civil law of ancient Rome, the charge of burial was, first, upon the person to whom it was delegated by the deceased; second, upon the *scripti hæredes* (to whom the property was given,) and if none, then upon the *hæredes legitimi* or *cognati* in order. Pothier Pand, (Paris ed., 1818), vol. 3, p. 378; Corpus Juris Dig., lib. 11 tit. 7, 1, 12, 54.

In the very learned and exhaustive Report of Hon. Samuel B. Ruggles as referee (4 Bradford's Surrogate Rep. 503,) may be found a most valuable digest and review of the law of burial in Europe and in this country. The due protection of the dead, he says, engaged the earnest attention of the great law-givers of the polished nations of antiquity. "The laws of the Greeks carefully guarded the private rights of individuals in their places of interment; and a similar spirit shines forth, in the clear intelligence and high refinement of the Roman jurisprudence. In the Digest of the Civil Law, Fl. 47, Tit. 12, we find the beneficent and salutary provision, which gave a civil remedy, by the '*Sepulchri Violati Actio*,' to every one interested, for any wanton disturbance of a sepulchre." In the six centuries of Saxon rule which succeeded, as is forcibly observed by Chancellor Kent, "the Roman civilization, laws, usages, arts and manners must have left a deep impression, and have become intermixed and incorporated with Saxon laws and usages, and *constituted the body of the ancient English common law.*" 1 Kent Com. 547. The report closes with the belief that "the following legal principles are justly deducible from the fact that no ecclesiastical element

exists in the jurisprudence of this State, or in the frame-work of its government: (1.) That neither a corpse, nor its burial, is legally subject in any way, to ecclesiastical cognizance, or to sacerdotal power of any kind. (2.) That the right to bury a corpse and to preserve its remains is a legal right which the courts of law will recognize and protect. (3.) That such a right, in the absence of any testamentary disposition, belongs exclusively to the next of kin. (4.) That the right to protect the remains includes the right to preserve them by separate burial, to select the place of sepulture, and to change it at pleasure. (5.) That if the place of burial be taken for public use, the next of kin may claim to be indemnified for the expense of removing and suitably reinterring the remains." *Vide* 3 Phillimore, 335. The Supreme Court of Louisiana, decided in *Ternant tutrix* v. *Boudreau*, 6 Robinson 488, that jewels and other ornaments buried with a dead body, belonged to the heir of the deceased, and were subject to his disposition.

Mr. Justice Pratt,in rendering the decision of the Court in the Secor case, says: "The legislatures in this country and in England, through a long series of years, seem to have recognized the executor as the person having the lawful possession of the remains and the one upon whom the duty devolves of properly burying them. 2 and 3 William, 4 Chap. 75; 2 Rev. Stat. 71; Laws New York 1794 and amendments to 1870. The cases of *Ambrose* v. *Kenison* 10 C. B. 776 and *Jenkins* v. *Tucker* 1 H. Bl. 90, decide that a husband is bound to bury the deceased wife, and the wife to bury the deceased husband. *Queen* v. *Fox* 2 Ad. & Ell. 246; 1 Greenl. 226; *Chappel* v. *Cooper* 13 M. & W. 259. In the case 3 Camp. 378, it was held, that a stranger, in whose house a dead body is, may cause it to be buried, and pay the expense out of the effects of the deceased. Courts can compel the proper burial or disposition of a dead body, and in case of conflicting interests or controversy between relatives determine their rights in the premises. Now if it be conceded that the law imposes the duty upon executors, irrespective of a direct provision of a will, then why may not the same reasoning be invoked in behalf of an administrator, or the party upon whom devolves the administration. 2 William on Exec. 829.

"In the present case, the body was buried in a proper place without dissent. By what right, therefore, can the next of kin, claim a removal against the will of the surviving wife? It cannot be upon the reasoning that they have an interest in the body as property, for it is clear that there can be no property in a corpse. 2 East P. C. 652. [Says Mr. Ruggles in his admirable report: In portions of Europe, during the semi-barbarous state of society in the middle ages, the law permitted a creditor to seize the dead body of his debtor; and in ancient Egypt, a son could borrow money, by hypothecating his father's corpse; but no evidence

appears to exist, in modern jurisprudence, of a legal right to convert a dead body to any purpose of pecuniary profit. | If a party who furnishes the coffin and habilaments retains or acquires a property in them after burial, and probably he does sufficiently to insist that no other person shall remove or convert them to another purpose,—then, if the doctrine of the defendant herein obtain, it would present the anomalous spectacle of a body taken in a state of nudity from the grave where the widow had placed it, and from thence transported to other ground. Those bound by the closest ties of love to the deceased while he was alive should render these sacred rites, and they ought not to be left to others.

"A suit for trespass could be maintained by the rightful owner of the land or by a person having the charge and control of it, against any person disturbing a grave and the widow or next of kin, might have a right of action for any injury done to the headstone or monument erected over the grave, or for carrying away the habilaments or coffin; or maintain a bill in equity to prevent such removal or injury. Protection has in some cases been enforced by indictment. *Reg* v. *Sharpe* 3 Jar. n. s. 192; 2 Allen (Mass.) 512. These authorities sustain the doctrine that mere relationship will not justify the taking of a corpse away from the grave where it has been buried, without the consent of all parties interested. No matter what relation a person may be to the deceased or what motives actuate, he has no right to disturb the grave."

There seem to be valid reasons connected with public policy and the peace of families, why, in the absence of testamentary disposition, the possession of a corpse and the right to determine its mode of burial should follow the administration of the estate. The court in closing further says: "A proper respect for the dead, a regard for the tender sensibilities of the living, and the due preservation of the public health, requires that a corpse should not be disinterred, or transported from place to place except under circumstances of extreme exigency.

"Scarcely an adult dies who does not leave numerous relatives in equal degree of consanguinity. Suppose then, each of the next of kin desired a different place and form of ceremony of burial, who among them could determine the question in dispute? Certainly the public could not wait for judicial determination of the rights claimed by the several relatives.

"Therefore, it would seem that, in the absence of any testamentary direction, the husband should attend to the burial of the wife, and the wife of the husband, rather than that the question be left open to unseemly contests between the next of kin. The plaintiff in this case should be entitled to judgment."

A recent case decided in the Supreme Court of Pennsylvania, *Wynkoop* v. *Wynkoop* 42 Penn. S. R. 293, sustains many of the views above

expressed. In Indiana it was held that, a corpse descends to the next of kin, like other property, but this view, we apprehend, would not be sustained on principle or authority in this State.

The case of Secor which we have reviewed briefly excited no little legal comment. The question raised being comparativly novel, the defendant appealed to the general term of the Supreme Court, in the second judical district of New York, where the elaborate opinion of Mr. Justice Pratt was sustained.

To the curious who may wish to read further on this interesting subject, we would refer them to the very able opinion of Mr. Justice Potter, in the case of *William G. Pierce et al.* v. *The Proprietors of Swan Point Cemetery et al.*, delivered before the full court, June 21, 1872, in the Supreme Court of Rhode Island. In that case the justice presents an exhaustive review of the law of burial in different ages and nations, with valuable historical references, and holds, substantially, that while a dead body is not property in the strict sense of the old common law, it is a sort of *quasi* property, and the relatives have rights which the courts will protect; it is in the nature of a custody or trust which a court of equity will regulate.

For American cases, see 10 Pick. 37, 154; 13 id. 402, 19 Pick. 304; Story's Eq. Jur. vol. 1, 5, 671; 2 Peters, 566; 1 Smith's Lead. Cases, page 7.

For cases touching various branches of this subject, see 2 Bar. & Ald. 806 Coke 3 Inst. 203; 1 id. 4, 18 b.; 1 Burns. Eccl. Law, 266, 334.

LIABILITY OF BAILEE.

The more recent adjudications upon the liability of a bailee, fail to give the criteria of negligence, for the reason that the degree of care demanded of them, varies according to the character of the bailment, and the circumstances of each particular case. Common sense would dictate that the care required on the part of the depositary holding millions of gold, or convertible United States bonds, should be greater than that of a depositary of non-negotiable railroad bonds. Thus, the rule seems to be, that where the consequences of negligence will probably be serious injury to others, and where the means of avoiding the injury are completely within the party's power, ordinary care requires the utmost degree of human vigilence and foresight. *Kelly* v. *Barney*, 2 Kern. 425. The standard of ordinary skill being on the advance, the banker, the

broker, and every bailee is bound to provide such improved means of safety concerning the thing bailed, as may be within their power. This question of degree of negligence has been frequently discussed in cases resulting from railroad accidents, as well as from burglaries. In the well-known action of *Dike* v. *the Erie Railroad Company*, resulting from the Port Jervis disaster, five years ago, which case was tried in Brooklyn; the case turned mainly upon the question of defective rails of defendant's road. The plaintiff recovered. So in the case of *Hagerman* v. *Western Railroad Company*, 3 Kern. 9, as to care and skill of the company in selecting axle-trees for their road—the court held that the defendants were liable, if the defect could have been discovered in the course of its manufacture, by any process or test known to the skillful in such business. Whether a want of care is imputable to a person, must necessarily depend upon circumstances which essentially determine the issue. Negligence is well defined to be either the omitting to do something that a reasonable man would do, or the doing something that a reasonable man would not do. *Blyth* v. *the Birmingham Water Work Company*, 36 E. L & E. Rep. 508; *Brown* v. *Lynn*, 31 Penn. 512; *Ernst* v. *H. R. R. R. Co.*, 35 N. Y. 9. Thus, in modern jurisprudence, negligence may well be said to be an absence of care, according to the circumstances. *Vaughn* v. *Taff Vale R. R. Co.*, 5 H & N. 686; *Bilbee* v. *Railway Co.*, 114, E. C. L. R. 592.

That there is no criteria of negligence would seem to be indicated from the several cases lately tried, growing out of bank robberies. For example, a case was tried a few days ago in Philadelphia, *David Scull* v. *the Kensington National Bank*, where a judgment was recovered for a large sum, the point in the case being upon the probable negligence of the bank; so the recent case, *Perkins* v. *the Second National Bank of Cleveland*, involved a similar question.

One of the most peculiar and important cases of the kind, was that heard in the Common Pleas court of New York City, ten days ago, wherein *the First National Bank of Lyons* sued *the Ocean National Bank of the City of New York* to recover $52,000, which, with other securities and moneys deposited in the defendant's bank, was robbed by burglars, who entered the bank between a Saturday night and Monday morning; such entrance to the bank being effected from the basement, which was occupied by a tenant of the bank. In another part of this JOURNAL (page 103) we give, in brief, the facts of the case, and the principal points in the charge of the court upon the degrees of negligence and the questions involved. It will be found exceedingly interesting to bankers and those having valuables on deposit as a warning, and as illustrating the degree of care requisite by such depositories. The case of the *Steamboat New World* v. *King*, 16 How. U. S. Rep. 472, is inter-

esting, as touching the question of the degree of care requisite in various cases of this character. Upon reading the charge of the court it will be seen that one of the principal points in the case was, whether the bank was grossly negligent or slightly negligent. If the bank received a reward for, or derived a benefit from the bailment, they would be liable for ordinary negligence. In the absence of positive proof that they received a benefit, the question might properly be passed upon by the jury, in view of all the circumstances, whether or not the bank did, in fact, derive benefit from the deposit

In general, it has been held, that in a gratuitous bailment it is not enough that the defendant took the same care of the bailor's property as he did of his own, but he is bound also to go further and show that he took proper care, and as a prudent and reasonable man would, of such property. In *Doorman* v. *Jenkins*, where a person left valuables of his own and the plaintiff's in an unsafe place and they were stolen, it was held that the fact of the defendant having lost his own property in that way, was wholly immaterial. 2 Add. & Ell. 256; Vide also, *Tracy* v. *Wood*, 3 Mason, 132.

In the *Chicopee Bank* v. *Philadelphia Bank*, 8 Wall. n. s. 641, Mr. Justice Nelson, delivering the opinion of the court, went so far as to say that the loss of the bills by the bank carried with it the presumption of negligence and want of care, and if it was capable of explanation, so as to rebut this presumption, the facts and circumstances were peculiarly in the possession of its officers, and the defendant was bound to furnish it. And further, he says: "When a peculiar obligation is cast upon a person to take care of goods intrusted to his charge, if they are lost or damaged while in his custody, the presumption is, that the loss or damage was occasioned by his negligence or want of care of himself or his servants."

See, as in contrast to some of the above cases, that of *Foster* v. *the Essex Bank*, 17 Mass. Rep., which was one of the principal cases relied upon by the defendants in the Ocean Bank case. The current run of decisions go to the extent of holding that a bailee is required to use the diligence commensurate with, or in proportion to the injury likely to result to the bailor by any imprudence or want of care on his part. *McGrath* v. *Hudson R.R. Co.*, 32 Barb. 144; *Brown* v. *Lynn*, 31 Penn. 512, 30 How. 219; *More* v. *Westervelt, Sheriff*, 27 N. Y. 234. And that ordinary care is requisite where the bailment is beneficial to the bailor and bailee, 2 Kent. Com. 587. The degree of care required is greater where life is endangered. *Clark* v. *Eighth Av. R. R.*, 32 Barb. 657; *Cayzer* v. *Taylor*, 10 Gray, 274.

The question of the liability of banks is freely discussed by Story in his work on bailments 210, where he substantially holds that the business of directors is to control the affairs of the institution, and the neglect which

would render them responsible, must depend on circumstances; that if they become acquainted with facts calculated to put prudent men on their guard a degree of care commensurate with the evil to be avoided is required, and a want of that care makes them responsible.

The case of the *First National Bank of Lyons* v. *The Ocean National Bank*, will probably be brought on for trial again at an early day, (as the jury disagreed) and its progress will doubtless be watched with interest by depositories generally, as the result of it may be very beneficial or injurious to the public.

A high degree of diligence should be demanded, on the part of those who hold themselves out as depositaries, and such care and diligence should necessarily be commensurate with the character of the thing bailed, and the extent of the injury in the event of loss. The law should give due protection, and particularly to the class of bailments of such intrinsic value, and require on the part of all such depositories the highest degree of care possible, under the exigencies of each case. Among the later decisions, the question seems to be left with the jury to say whether or not, under all the circumstances, the bailee exercised that degree of care which was requisite or necessary, and which an astute and prudent man would have done under such state of facts.

UNITED STATES SUPREME COURT.

IN ERROR TO THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA.

THE ERIE RAILWAY COMPANY, Plaintiff in Error, v. *THE STATE OF PENNSYLVANIA.*

Opinion of the court by STRONG, J., delivered March 10th, 1873.

The question presented in this case is the same which we have considered and answered in the case of *The Philadelphia and Reading Railroad Company* v. *The Commonwealth of Pennsylvania*, No.—, decided at this term. The plaintiff in error is a New York corporation, which by acts of the Pennsylvania Legislature of February 16th, 1841, and March 26th, 1846, was authorized to construct its railroad through a portion of that state, paying for the privilege annually, the sum of ten thousand dollars, and subjected to taxation on so much of its stock as equalled the cost of construction of that part of its road situate in Pennsylvania, in the same manner and at the same rate as other similar property was, or might be subject.

Under the act of Assembly of the state, of August 25th, 1864, a tax

was levied upon freight carried upon that portion of the road situate in Pennsylvania, either taken up within the state and carried out, or received by the company in another state for the sole purpose of being brought within it, and actually so brought. The single question now is, whether that act, so far as it taxes such freight, is constitutional. For the reasons which we have given in the case first above referred to, we hold that it is not, and consequently the judgment of the Supreme Court of the state, affirming the validity of the act, must be reversed.

The judgment is reversed, and the record is remitted for further proceedings, in conformity with this opinion.

R. A. LAMBERTON and JOHN W. SIMONTON, Esqs., of Harrisburgh, JAMES E. GOWEN, Esq., of Philadelphia, and WILLIAM W. MCFARLAND, Esq., of New York, for the companies, plaintiffs in error; JAMES W. M. NEWLIN, LEWIS WALN. SMITH, and F. CARROLL BREWSTER, Esqs., of Philadelphia, and WAYNE MACVEAGH, Esq., of Harrisburgh, for the State of Pennsylvania, defendant in error.

COURT OF COMMON PLEAS—GENERAL TERM.

IMPORTANT PILOT DECISION.

Before Judges Daly, C. J., Robinson, Larremore and Loew.

The steamer St. Louis, running between New York and New Orleans, was spoken off Sandy Hook when coming into this port, by John W. Murray, a pilot licensed under the state law. The vessel refused to take him on board, and he brought suit before Judge Quinn in the First District Court to recover his pilotage fees. Counsel for the defendants, argued that the St. Louis was "a coastwise steam vessel" within the meaning of the act of Congress of 1871, providing that "all vessels propelled in whole or in part by steam, when navigated within the jurisdiction of the United States, shall be subject to the rules and regulations established by the United States for the government of steam vessels, and that every coastwise, sea-going steam vessel subject to such rules and regulations, and to the navigation laws of the United States, not sailing under register, shall, when under way, except upon the high seas, be under the control and direction of pilots licensed by the United States inspectors of steamboats," and therefore was not required to take a pilot under the state law. The United States statute provides that in the case of the vessels indicated, no charge by State or municipal action shall be levied, but it expressly excepts "coastwise steam vessels" from the operation of this saving clause. Judge Quinn gave judgment for the

plaintiff, and defendants appealed to this court, where the judgment was affirmed. Chief Justice Daly, in rendering the decision, says, that where this statute refers to a "coast-wise, sea-going steam vessel not sailing under register" it must mean one that is enrolled and licensed for the coasting trade, and a vessel sailing from one part of the coast of the United States to another, or which is employed in the whale or coast fisheries, and does not refer to a registered vessel, that may trade or sail to any port of the world, as it was expressly declared "not sailing under register." That the state pilot law of 1867 in no way conflicts with the provision of the United States act, the obligation of taking a pilot licensed by the State Board being only imposed upon masters of foreign vessels, vessels coming from a foreign port and vessels sailing under register. A coast-wise vessel is one sailing by the way of or along the coast. In a certain sense the St. Louis was a vessel of this description, but was not necessarily limited to running by way of or to and from ports upon our coast. She was a registered vessel, and, being so, was privileged to go to or stop at foreign ports, and on the voyage in question had stopped at Havana. That she was under control and direction of her master, who was a United States pilot, did not affect the question.

THE BAR ASSOCIATION.

AN IMPORTANT AMENDMENT SUGGESTED.

Again the Bar Association are moving vigorously in the right direction. At a meeting of the association held on Tuesday evening, William M. Evarts presiding, the executive committee reported in their minutes that no old building would answer the purpose of the association, and recommended the Building Committee to consider the availability of certain vacant lots which had been brought to their notice. The Standing Committee on the amendment of the laws reported as follows:

Your committee have considered and discussed a number of communications addressed to them relating to amendments of the law, among others, on the abolition of arrest in civil actions; the amendment of Rule No. 73 of the Supreme Court on the appointment of referees in foreclosure cases; the amendment of the law of evidence in relation to comparison of disputed writing; the amendment of the law requiring unanimous verdicts of acquittal in criminal cases, etc. Your committee respectfully report that in their judgment the law of evidence in relation to comparison of disputed writings as adopted by the courts of this state is unsatisfactory. Such rule is as follows:

Where indifferent instruments are properly in evidence for other pur-

poses, the handwriting of such instruments may be compared by the jury and the genuineness or simulation of the handwriting in question be inferred from such comparison. But other signatures cannot be introduced for that purpose. *Van Wyck* v. *McIntosh*, 4 Kernan, 439, 442.

The committee recommended the following act:

An act amending the law of evidence in relation to disputed writings.

SECTION 1. Comparison of any disputed writing with any writing proved to the satisfaction of the judge to be genuine, shall be permitted to be made by witness, and such writings and the evidence of witnesses respecting the same may be submitted to the court and jury as evidence of the genuineness or otherwise of the writing in dispute. The act to take effect immediately.

The committee reports that the act recommended by them is adopted verbatim from the English statute of 17 and 18 Victoria, known as the Common Law Procedure Act of 1854, chapter 125, section 27.

The report was signed by Charles O'Conor and Frederick S. Betts, secretary, and was adopted. The committee was requested to obtain such legislation as was desirable in the matter.

The chairman announced the following as the committee appointed on Elective Judiciary: Benjamin D. Silliman, Theodore W. Dwight, Henry L. Clinton, Wheeler H. Peckham, John W. Sargent. The chairman was afterward added. The object of this committee is to have judges appointed by the executive instead of elected by the people.

It will readily occur to all who have kept pace with the manner of electing judges, that a reform in this regard is necessary. Let us get back to the old time-honored rule and have the judiciary appointed by the executive, and thereby avoid any further disgrace under the elective system. Let the executive be reponsible for the appointment of good and proper men to sit on the Bench.

Under recent decisions, it is generally held, that where the defendant in constructing his machine or invention, omits, entirely, one of the ingredients of the plaintiff's combination without substituting any other, he does not infringe, and if he substitutes another in the place of the one omitted, which is new and which performs a substantially different function, or if it is old, but was not known at the date of the plaintiff's invention as a proper substitute for the omitted ingredient, then he does not infringe. *Carver* v. *Hyde*, 16 Pet. 514; *Nance* v. *Campbell*, 1 Black, 424; *Roberts* v. *Hamden*, 2 Cliff. 504; 2 id. 511; *Brook* v. *Fisk*, 15 How. 219, 10 id. 43; *Priniy* v. *Ruggles*, 16 Pet. 341; *How* v. *Abbott*, 2 Story, 194.

SUPREME COURT OF THE UNITED STATES.

NOS. 31, 32, AND 33.—DECEMBER TERM, 1872,

THE CLEVELAND, PAINESVILLE AND ASHTABULA RAILROAD COMPANY, Plaintiff in Error, v. *THE COMMONWEALTH OF PENNLYSVANIA.*

In error to the Supreme Court of the Commonwealth of Pennsylvania.

1.—The power of taxation of a state is limited to persons, property, and business within her jurisdiction. All taxation must relate to one of these subjects.

2.—Bonds issued by a railroad company are property in the hands of the holders, and when held by non-residents of the state, in which the company was incorporated, they are property beyond the jurisdiction of that state. A law of Pennsylvania, passed on the 1st of May, 1868, which requires the treasurer of a company, incorporated and doing business in that state, to retain five per cent. of the interest due on bonds of the company, made and payable out of the state to non-residents of the state, citizens of other states, and held by them, is not, therefore, a legitimate exercise of the taxing power of the state. It is a law which interferes between the company and the boudholder, and, under the pretense of levying a tax, impairs the obligation of the contract between the parties.

3.—The exemption from taxation by the State of Pennsylvania of bonds thus issued to, and held by non-residents of that state, citizens of other states, is not affected by the fact that the bonds are secured by a mortgage, executed sunultaneously with them, upon property situated in that state. A mortgage there, though in the form of a conveyance, is a mere security for a debt, and transfers no estate in the mortgaged premises. It simply creates a lien upon them, and only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce the payment of his demand. This right has no locality independent of the party in whom it resides.

4.—The tax laws of a state can have no extra-territorial operation; nor can any law of a state inconsistent with the terms of a contract, made with or payable to parties out of the state, have any effect upon the contract whilst it is in the hands of such parties or other non-residents of the state.

Mr. Justice FIELD delivered the opinion of the Court.

The plaintiff in error, the Cleveland, Painesville and Ashtabula Railroad Company, was incorporated by an act of the legislature of Ohio, passed in 1848, and authorized to construct a railroad from the city of Cleveland, in that state, to the line of the State of Pennsylvania. Under this act and its supplement passed in 1850, the road was constructed. By an act of the legislature of Pennsylvania passed in 1854, the company was authorized to construct a railroad from the city of Erie in that state, to the state line of Ohio, so as to connect with this road from Cleveland, and also to purchase a railroad already constructed, between those points. This grant of authority was subject to various conditions which the company accepted, and under its provisions the road between the points designated, was constructed, or the one already constructed was purchased and connected with the road from Cleveland, so that the two roads together formed one continuous line between the cities of Cleveland and Erie. The whole road between those places was ninety-five and a half miles in length, of which twenty-five miles and a half were situated in the State of Pennsylvania, and the rest, seventy miles, were situated in the State of Ohio. The company, so far as it acted in Pennsylvania under the authority of the act of her legislature, has been held by her courts to be a separate corporation of that state, and as such, subject to her laws for the taxation of incorporated companies. 7 Casey, 371. But there was only one board of directors who managed the affairs of both companies as one company, and had the entire control of the whole road between Cleveland and Erie.

In 1868 the funded debt of the company amounted to two millions and a half of dollars, and was in bonds of the company secured by three mortagages, one for five hundred thousand dollars, made in 1854, one for a million of dollars, made in 1859, and one for a million of dollars, made in 1867. Each of the mortgages was executed upon the entire road from Erie, in Pennsylvania, to Cleveland, in Ohio, including the right of way and all the buildings and other property of every kind connected with the road. The principal and interest of the bonds first issued were payable in the city of Philadelphia; the principal and interest of the other bonds were payable in the city of New York. All the bonds were executed and delivered in Cleveland, Ohio, and nearly all of them were issued to, and have been ever since held and owned by non-residents of Pennsylvania and citizens of other states.

On the first of May, 1868, the legislature of the State of Pennsylvania passed an act entitled "An act to revise, amend, and consolidate the several laws taxing corporations, brokers, and bankers;" the eleventh section of which provides as follows: "The president, treasurer, or cashier of every company, except banks or savings institutions, incorporated under the laws of this commonwealth, doing business in this state, which pays interest to its bondholders or other creditors, shall, before the payment of the same, retain from said bondholders or creditors, a tax of five per centum upon every dollar of interest paid as aforesaid; and shall pay over the same semi-annually, on the first days of July and January in each and every year, to the state treasurer for the use of the commonwealth; and every president, treasurer, or cashier as aforesaid shall annually, on the thirty-first day of each December, or within thirty days thereafter, report to the auditor-general, under oath or affirmation, stating the entire amount of interest paid by said corporation to said creditors during the year ending on that day; and thereupon the auditor-general and state treasurer shall proceed to settle an account

with said corporation as other accounts are now settled by law."

The treasurer of the company, under this act, made a report in May, 1869, showing that during the previous year the company had paid interest on its funded debt of two and a half millions of dollars, at the rate of seven per cent., amounting to one hundred and seventy-five thousand dollars. Upon this report the auditor general and state treasurer "settled an account" against the company, finding that it owed to the state the sum of $2,336.50 for the tax on the interest which the company had paid.

In reaching this conclusion these officers apportioned the interest upon the debt owing by the company according to the length of the road, assigning to the part in the State of Pennsylvania an amount in proportion to the whole indebtedness which that part bears to the whole road. There was no law, however, in existence at the time directing or authorizing this proceeding.

From the settlement thus made the company appealed, under the law of the state, to the court of common pleas of one of her counties, specifying various objections to the settlement, and among others substantially the following:

That the greater portion of the bonds of the company having been issued upon loans made and payable out of the state, to non-residents of Pennsylvania, citizens of other states, and being held by them, the act in question, in authorizing the tax upon the interest stipulated in the bonds, so far as it applied to the bonds thus issued and held, impaired the obligation of the contracts between the bondholders and the company, and is therefore repugnant to the constitution of the United States, and void.

The contest in the court of common pleas took the form of a regular judicial proceeding, a declaration having been filed by the attorney-general on behalf of the state against the company as for a debt and the company having joined issue by a plea of non-assumpsit and payment. The common pleas sustained the validity of the alleged tax against the objections of the company, and verdict and judgment passed in favor of the state. On error to to the supreme court of the state the judgment was affirmed, and the case is brought here for review under the second section of the amendatory judiciary act of 1867.

The question presented for our determination is whether the eleventh section of the act of May, 1868, so far as it applies to the interest on bonds of the railroad company, made and payable out of the state, issued to and held by non-residents of the state, citizens of other states, is a valid and constitutional exercise of the taxing power of the state, or whether it is an interferance, under the name of a tax, with the obligation of the contracts between the non-resident bond-holders and the corporation. If it be the former, this court cannot arrest the judgment of the state court; if it be the latter, the alleged tax is illegal, and its enforcement can be restrained.

The case before us is similar in its essential particulars to that of *Jackson* v. *The Railroad Company*, reported in 7 Wallace. There, as here, the company was incorporated by the legislatures of two states, Pennsylvania and Maryland, under the same name, and its road extended in a continuous line from Baltimore in one state to Sunbury in the other. And the company had issued bonds for a large amount, drawing interest, and executed a mortgage for their security upon its entire road, its franchises and fixtures, including the portion lying in both states. Coupons for the different installments of interest were attached to each bond. There was no apportionment of the bonds to any part of the road lying in either state. The whole road was bound for each bond. The law of Pennsylvania, as it then existed, imposed a tax on money owing by solvent debtors of three mills on the dollar of the principal, payable out of the interest. An alien resident in Ireland was the holder of some of the bonds of the railroad company, and when he presented his coupons for the interest due thereon, the company claimed the right to deduct the tax imposed by the law of Pennsylvania, and also an alleged tax to the United States. The non-resident refused to accept the interest with these deductions, and brought suit for the whole amount in the Circuit Court of the United States for the District of Maryland. That court, the chief justice presiding, instructed the jury that if the plaintiff, when he purchased the bonds, was a British subject, resident in Ireland, and still resided there, he was entitled to recover the amount of the coupons without deduction. The verdict and judgment were in accordance with this instruction, and the case was brought here for review.

This court held that the tax under the law of Pennsylvania could not be sustained, as to permit its deduction from the coupons held by the plaintiff would be giving effect to the acts of her legislature upon property and effects lying beyond her jurisdiction. The reasoning by which the learned justice, who delivered the opinion of the court, reached this conclusion, may be open, perhaps, to some criticism. It is not perceived how the fact that the mortgage given for the security of the the bonds in that case covered that portion of the road which extended into Maryland could affect the liability of the bonds to taxation. If the entire road upon which the mortgage was given had been in another state, and the bonds had been held by a resident of Pennsylvania, they would have been taxable under her laws in that state. It was the fact that the bonds were held by non-resident which justified the language used, that to permit a deduction of the tax from the interest would be giving effect to the laws of Pennsylvania upon property beyond her jurisdiction, and not the fact assigned by the learned justice. The decision is, nevertheless, authority for the doctrine that property lying beyond the jurisdiction of the state is not a

subject upon which her taxing power can be legitimately exercised. Indeed, it would seem that no adjudication should be necessary to establish so obvious a proposition.

The power of taxation, however vast in its character and searching in its extent, is necessarily limited to subjects within the jurisdiction of the state. These subjects are persons, property, and business. Whatever form taxation may assume, whether as duties, imports, excises, or licenses, it must relate to one of these subjects. It is not possible to conceive of any other, though as applied to them, the taxation may be exercised in a great variety of ways. It may touch property in every shape, in its natural condition, in its manufactured form, and in its various transmutations. And the amount of the taxation may be determined by the value of the property, or its use, or its capacity, or its productiveness. It may touch business in the almost infinite forms in which it is conducted, in professions, in commerce, in manufactures, and in transportation. Unless restrained by provisions of the federal Constitution, the power of the state as to the mode, form, and extent of taxation is unlimited, where the subjects to which it applies are within her jurisdiction.

Corporations may be taxed like natural persons upon their property and business. But debts owing by corporations, like debts owing by individuals, are not property of the debtors in any sense; they are obligations of the debtors, and only possess value in the hands of the creditors. With them they are property, and in their hands they may be taxed. To called debts property of the debtors is simply to misuse terms. All the property there can be in the nature of things in debts of corporations, belongs to the creditors, to whom they are payable, and follows their domicile, wherever that may be. Their debts can have no locality separate from the parties to whom they are due. This principle might be stated in many different ways, and supported by citations from numerous adjudications, but no number of authorities, and no forms of expression could add anything to its obvious truth which is recognized upon its simple statement.

The bonds issued by the railroad company in this case are undoubtedly property, but property in the hands of the holders, not property of the obligors. So far as they are held by non-residents of the state, they are property beyond the jurisdiction of the state. The law which requires the treasurer of the company to retain five per cent. of the interest due to the non-resident bondholder is not, therefore, a legitimate exercise of the taxing power. It is a law which interferes between the company and the bondholder, and under the pretence of levying a tax commands the company to withhold a portion of the stipulated interest and pay it over to the state. It is a law which thus impairs the obligation of the contract between the parties. The obligation of a contract depends upon its terms and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions, or dispensing with those expressed, is a law which impairs its obligation, for, as stated on another occasion, such a law relieves the parties from the moral duty of performing the original stipulations of the contract, and it prevents their legal enforcement. The act of Pennsylvania of May 1st, 1868, falls within this description. It directs the treasurer of every incorporated company to retain from the interest stipulated to its bondholders five per cent. upon every dollar and pay it into the treasury of the commonwealth. It thus sanctions and commands a disregard of the express provisions of the contracts between the company and its creditors. It is only one of many cases where, under the name of taxation, an oppressive exaction is made without constitutional warrant, amounting to little less than an arbitrary seizure of private property. It is, in fact, a forced contributed levied upon property held in other states, where it is subjected, or may be subjected, to taxation upon an estimate of its full value.

The case of *Maltby* v. *The Reading & Columbia Railroad Co.*, decided by the Supreme Court of Pennsylvania in 1866, was referred to by the common pleas in support of its ruling, and is relied upon by counsel in support of the tax in question. The decision in that case does go to the full extent claimed, and holds that bonds of corporations held by non-residents are taxable in that state. But it is evident from a perusal of the opinion of the court that the decision proceeded upon the idea that the bond of the non-resident was itself property in the state because secured by a mortgage on property there. "It is undoubtedly true," said the court, "that the legislature of Pennsylvania cannot impose a personal tax upon the citizen of another state, but the constant practice is to tax property within our jurisdiction which belongs to non-residents." And again: "There must be jurisdiction over either the property or the person of the owner, else the power cannot be exercised; but when the property is within our jurisdiction, and enjoys the protection of our state government, it is justly taxable, and it is of no moment that the owner, who is required to pay the tax, resides elsewhere." There is no doubt of the correctness of these views. But the court then proceeds to state that the principle of taxation as the correlative of protection is as applicable to a non-resident as to a resident; that the loan to the non-resident is made valuable by the franchises which the company derived from the commonwealth, and as an investment rests upon state authority, and, therefore, ought to contribute to the support of the state government. It also adds that, though the loan is for some purposes subject to the law of the domicile of the holder, "yet, in a very high sense," it is also property in Pennsylvania, observing, in support of this position, that the holder of a bond of the

company could not enforce it except in that state, and that the mortgage given for its security was upon property and franchises within her jurisdiction. The amount of all which is this: that the state which creates and protects a corporation ought to have the right to tax the loans negotiated by it, though taken and held by non-residents, a proposition which it is unnecessary to controvert. The legality of a tax of that kind would not be questioned if in the charter of the company the imposition of the tax were authorized, and in the bonds of the company, or its certificates of loan, the liability of the loan to taxation were stated. The tax in that case would be in the nature of a license tax for negotiating the loan, for in whatever manner made payable it would ultimately fall on the company as a condition of effecting the loan, and parties contracting with the company would provide for it by proper stipulations. But there is nothing in the observations of the court, nor is there anything in the opinion, which shows that the bond of the non-resident was property in the state, or that the non-resident had any property in the state which was subject to taxation within the principles laid down by the court itself, which we have cited.

The property mortgaged belonged entirely to the company, and so far as it was situated in Pennsylvania was taxable there. If taxation is the correlative of protection, the taxes which it there paid were the correlative for the protection which it there received. And neither the taxation of the property, nor its protection, was augmented or diminished by the fact that the corporation was in debt or free from debt. The property in no sense belonged to the non-resident bondholder or to the mortgagee of the company. The mortgage transferred no title; it created only a lien upon the property. Though in form a conveyance, it was both at law and in equity a mere security for the debt. That such is the nature of a mortgage in Pennsylvania has been frequently ruled by her highest court. In Witmer's Appeal, 9 Wright, 463, the court said: "The mortgagee has no estate in the land, any more than the judgment creditor. Both have liens upon it and no more than liens." And in that state all possible interests in lands, whether vested or contingent, are subject to levy and sale on execution, yet it has been held, on the ground that a mortgagee has no estate in the lands, that the mortgaged premises cannot be taken in execution for his debt. In *Rickert* v. *Madeira*, 1 Rawle, 329, the court said: "A mortgage must be considered either as a *chose in action* or as giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former it would not, as it would fall within the same reason as a judgment bond or simple contract. If we should consider the interest of the mortgagee as a real interest, we must carry the principle out and subject it to a dower and to the lien of a judgment;" * * and that it "is but a *chose in action*, a mere evidence of debt, is apparent from the whole current of decisions." *Wilson* v. *Shoenberger's Executors*, 7 Casey, 295.

Such being the character of a mortgage in Pennsylvania it cannot be said, as was justly observed by counsel, that the non-resident holder and owner of a bond secured by a mortgage in that state owns any real estate there. A mortgage being there a mere chose in action, it only confers upon the holder, or the party for whose benefit the mortgage is given, a right to proceed against the property mortgaged, upon a given contingency, to enforce, by its sale, the payment of his demand. This right has no locality independent of the party in whom it resides It may undoubtedly be taxed by the state when held by a resident therein, but when held by a non-resident it is much beyond the jurisdiction of the state as the person of the owner.

It is undoubtedly true that the actual *situs* of personal property which has a visible and tangible existence, and not the domicile of its owner will, in many cases, determine the state in which it may be taxed. The same thing is true of public securities consisting of state bonds and bonds of municipal bodies, and circulating notes of banking institutions; the former, by general usage, have acquired the character of, and are treated as, property in the place where they are found, though removed from the domicile of the owner; the latter are treated and pass as money wherever they are. But other personal property consisting of bonds, mortgages, and debts generally, has no *situs* independent of the domicile of the owner, and certainly can have none where the instruments, as in the present case, constituting the evidences of debt, are not separated from the possession of the owners.

Cases were cited by counsel on the argument from the decisions of the highest courts of several states, which accord with the views we have expressed. In *Davenport* v. *The Mississippi and Missouri Railroad Company*, 12 Iowa, 529 the question arose before the supreme court of Iowa whether mortgages on property in that state held by non-residents could be taxed under a law which provided that all property, real and personal, within the state, with certain exceptions not material to the present case, should be subject to taxation, and the court said:

"Both in law and equity the mortgagee has only a chattel interest. It is true that the *situs* of the property mortgaged is within the jurisdiction of the state, but, the mortgage itself being personal property, a chose in action, attaches to the person of the owner. It is agreed by the parties that the owners and holders of the mortgages are non-residents of the state. If so, and the property of the mortgage attaches to the person of the owner, it follows that these mortgages are not property within the state, and if not they are not the subject of taxation."

In *People* v. *Eastman*, 25 Cal. 603, the

question arose before the Supreme Court of California, whether a judgment of record in Mariposa county upon the foreclosure of a mortgage upon property situated in that county could be taxed there, the owner of the judgment being a resident of San Francisco, and the law of California requiring all property to be taxed in the county where situated; and it was held that it was not taxable there. "The mortgage," said the court, "has no existence independent of the thing secured by it; a payment of the debt discharges the mortgage. The thing secured is intangible, and has no *situs* distinct and apart from the residence of the holder. It pertains to and follows the person. The same debt may, at the same time, be secured by a mortgage upon land in every country in the state; and, if the mere fact that the mortgage exists in a particular county gives the property in the mortgage a *situs* subjecting it to taxation in that county, a party without further legislation, might be called upon to pay the tax several times, for the lien for taxes attaches at the same time in every county in the state, and the mortgage in one county may be a different one from that in another, although the debt secured is the same."

Some adjudications in the Supreme Court of Pennsylvania were also cited on the argument, which appear to recognize doctrines inconsistent with that announced in *Mallby* v. *Reading and Columbia Railroad Company*, particularly the case of McKeen against the county of Northampton, 13 Wright, 519, and the case of Short's Estate, 11 Harris, 63, but we do not deem it necessary to pursue the matter further. We are clear that the tax cannot be sustained; that the bond, being held by non-resident of the state, are only property in their hands, and that they are thus beyond the jurisdiction of the taxing power of the state. Even where the bonds are held by residents of the state the retention by the company of a portion of the stipulated interest can only be sustained as a mode of collecting a tax upon that species of property in the state. When the property is out of the state there can then be no tax upon it for which the interest can be retained. The tax laws of Pennsylvania can have no extra-territorial operation; nor can any law of that state inconsistent with the terms of a contract, made with or payable to parties out of the state, have any effect upon the contract whilst it is in the hands of such parties or other non-residents. The extra-territorioral invalidity of state laws discharging a debtor from his contracts with citizens of other states, even though made and payable in the state after the passage of such laws, has been judicially determined by this court. *Ogden* v. *Saunders*, 12 Whea. 214; *Baldwin* v. *Hale*, 1 Wallace, 223. A like invalidity must, on similar grounds, attend state legislation which seeks to change the obligation of such contracts in any particular, and on stronger grounds where the contracts are made and payable out of the state.

It follows that the judgment of the Supreme Court of Pennsylvania must be reversed, and the cause be remanded for further proceedings in conformity with this opinion, and it is so ordered.

The Pittsburgh, Fort Wayne and Chicago Railroad Company,
v.
The Commonwealth of Pennsylvania. } 32

The Delaware, Lackawana and Western Railroad Company,
v.
The Commonwealth of Pennsylvania. } 33

These cases involve the same question considered and decided in the case of *Cleveland, Painesville and Ashtabula Railroad Company*, v. *The Commonwealth of Pennsylvania.* The tax levied in these cases upon the bonds of non-residents of the state is three mills on the dollar, to be paid out of the interest. In the case decided, the tax levied was five per cent. upon the interest of the bonds. The difference in the mode of the assessment does not affect the principle decided.

Upon the authority of the case cited, the judgments in these two cases must be reversed, and the causes be remanded for further proceedings; and it is so ordered.

[Our thanks are due to James H. Mandeville, Esq., counsel in patent cases, Washington, for the above opinions.—ED.]

OCEAN BANK ROBBERY CASE.

The case of the *First National Bank of Iowa* v. *the Ocean National Bank of New York*, which was on trial for over a week in the Common Pleas Court before Judge Larremore, and which has excited much interest among bank officers and business men, resulted a few days ago, in a disagreement of the jury. It will be remembered that the time the Ocean Bank was robbed, about four years ago, the plaintiff had nearly fifty thousand dollars worth of bonds in its safe for safe-keeping, all which were taken, together with the bonds of the bank. Plaintiff, brought this action to recover the amount so lost, alleging that it was owing to negligence on the part of the bank that the property was stolen.

The charge of Judge Larramore was clear and explicit as to the liability of banks and banking institutations for losses occuring under different grades of negligence, and must be of great interest to bankers generally. In the course of his charge the learned judge said;

"A bailment is defined to be a delivery of a thing to another in trust for some special object or purpose, and upon a contract, express or implied, to conform to the object or purpose of the trust. The one who delivers the property is called the bailor, and the one who receives it the bailee. You will readily apply these terms to the plaintiff and defendant in this action. There are different classes of bailments, to two of which only it will be necessary to direct your attention as affecting the issues involved in this trial The first is called a deposit, where the goods are delivered to be returned on demand and without recompense. The second is called a mandate, as where goods or property are received to be carried to some place, or for the performance of some act to them without reward. You perceive, therefore, that the distinctive feature in bailments of this character is, that the service to be performed is entirely gratuitous. And such was the case between the parties to this action. The bonds in suit were held by defendants subject to plaintiff's order and demand. They were not pledged or hypotheeated to any person, nor for any purpose. The possession and control of them by the defendant was voluntary, and so far as the evidence shows, without any express agreement or understanding to that effect. It is true that the interest accruing on the bonds was collected, and paid over by the defendant, but no compensation for this was demanded or allowed. The bare fact of the plaintiff's keeping an account in defendant's bank, and having large credit balances therein, was not such a consideration (unless so agreed) as would bind the defendant to a greater degree of diligence in the care of these bonds. The safekeeping of securities of this character is not necessarily a part of the general business of a bank, and no special agreement having been shown in this instance, the liability of the defendant (if any) is that of a bailee, without compensation. The responsibility attached to such a relation is well defined. While the bailee who receives a reward for, or derives a benefit from the bailment, is liabile for slight or ordinary neglect, the bailee without reward is responsible only for gross neglect. That you may the better understand the meaning of this term, I will briefly refer to the different degrees of negligence and the distinction that exists between them. Slight neglect is the want of such diligence as circumspect and cautious persons exercise in the care of their own goods and chattels. Ordinary neglect is the want of ordinary diligence, or the omission of the care which every man of common prudence takes of his own concerns. Gross neglect is the want of even slight diligence or of such care as every man of common sense, however inattentive takes of his own property, and is esteemed in law a violation of good faith. The question you are to pass upon is, was the loss of plaintiff's bonds caused by the gross neglect of the defendant?"

After defining the degrees of liability and as they depend upon the character and circumstances of the bailment—the nature, value and quality of the property—the diligence required being in proportion to the degree of danger of loss, the charge concluded as follows:

"Now, gentlemen, you are called upon to say whether this burglary could have been commited if there had been a watchman in the bank at the time—whether he would not have discovered it in time to give the alarm and prevent its execution. You will give this careful consideration in determining the question of defendant's negligence. The responsibility of this case now rests with you. Give to it that careful and deliberate attention which its importance demands. Let neither prejudice nor sympathy influence your decision. The defendant is entitled to a verdict if you are satisfied that such care was used in the keeping of the bonds as any person of common sense, and under like circumstances, would have exercised, and without any knowledge of any intended burglary, or the insufficiency of the means then employed to meet it. But if you believe that the defendant had such knowledge of the insecurity of the bank against burglars as to require other means than those then in use for its protection, that none such were used, and that the loss occured in consequence thereof, then the plaintiff is entitled to recover.

BIRDSEYE, CLOYD & BAYLIS, for plaintiff; JOHN E PARSONS, T. M. DAVIS & S. D. SMITH, for defendant.

For decisions touching the questions involved in such a case, see the article in this issue on "Liability of Bailee."

ACTION TO RECOVER EXCESSIVE DUTIES.

Joseph Bensauson, Jr., v. *Thomas Murphy.*

This action was brought to recover a certain sum exacted, as alleged, in excess of the legal duty on wine imported in bottles, while defendant was collector of the port of New York. To save expense and delay of a trial, the facts were submitted to the United States Circuit Court. Judge Shipman rendered an elaborate decision a few days ago, in the course of which he said:

The duties on the merchandise in question were levied under the act of July 14, 1870, Stats. at Large, vol. 16, p. 262, sec. 21, which, so far as applicable to this class of goods, is as follows:

"After the 31st day of December, 1870, in lieu of the duties now imposed by law on the articles hereinafter enumerated or provided for, imported from foreign countries, there shall

be levied, collected and paid, the following duties and rates of duties, that is to say: On all wines imported in casks containing not more than 22 per centum of alcohol, and valued at not exceeding 40 cents per gallon, 25 cents per gallon; valued at over 40 cents and not over $1 per gallon, 60 cents per gallon; valued at over $1 per gallon, $1 per gallon, and in addition thereto 25 per centum *ad valorem*. On wines of all kinds imported in bottles, and not otherwise herein provided for, the same rate per gallon as wines imported in casks, but all bottles containing 1 quart or less than 1 quart, and more than 1 pint, shall be held to contain 1 quart, and all bottles containing 1 pint or less shall be held to contain 1 pint, and shall pay in addition 3 cents for each bottle."

The first question raised by the protest is, whether this wine in bottles is subject to an *ad valorem* duty. The statute provides that "wines of all kinds, imported in bottles and not herein otherwise provided for," shall be subject to "the same rate per gallon as wine imported in casks; but all bottles containing one quart or less than one quart, and more than one pint, shall be held to contain one pint, and shall pay in addition three cents for each bottle." I think it very clear that the words "the same rate per gallon" refer exclusively to the specific duty imposed on wines in casks, and do not include the *ad valorem* duty. The latter can in no just sense be regarded as a "rate per gallon." The rate per gallon is specific and fixed by the clause regulating the duty on wine imported in casks at 25 cents, 60 cents and $1 per gallon, the specific rate to be applied to each gallon to be ascertained by fixing the commercial value of the gallon. The act then adds to all wines imported in casks an *ad valorem* duty of 25 per cent. These specific rates imposed on wines imported in casks are then applied to wines imported in bottles, but the ad valorem duty is not referred to in connection with the latter. If Congress had intended to impose on wine imported in bottles, both the specific and ad valorem duties laid on wine imported in casks, they certainly would have so declared in unambiguous terms. That could have been done by simply, in so many words, subjecting wine in bottles to the same rates of duty as wine in casks. I am satisfied that the words "the same rate per gallon" were used only with reference to the specific rate applied to each gallon, and are limited by plain terms to that, and that consequently the wine in question was only liable to the same specific duty on the gallon as it would have been had the importation been in casks instead of bottles. *Lawrence* v. *Caswell* 13 How. 488. The exaction therefore of the 25 per cent. ad valorem was not warranted by the statute, and the plaintiff is entitled to recover it in this suit.

The remaining question is, whether the rate of duty levied by the collector in each gallon is the one prescribed by the statute. He required the plaintiff to pay $1 upon each gallon. The plaintiff insists that 60 cents per gallon was the rate to which this wine was subject. By the statute, the collector was to hold them as containing one quart each, and he thus fixed the quantity at three gallons for each case, 111 gallons in all. On this quantity he levied a duty of $111—$1 per gallon. Obviously he took the value of the commercial or standard gallon as noted by the appraisers, which was $1 and then applied the value of that gallon to the statutory gallon as arbitrarily fixed by this act. There is no pretense that there was any reappraisement or revaluation. The whole process was arithmetical. The noting on the invoice by the appraisers of $1 is of no importance. It was erroneous and in conflict with the other part of their return. It was based upon the value of the commercial or standard gallon, and arrived at by taking that as the measure or quantity by which the value of the wine per gallon was to be ascertained for the purpose of levying the duty. But the duty prescribed by the statute upon each gallon is to be ascertained by arbitrary rule fixed by the law itself. Nothing can be clearer than that the appraiser took the standard or commercial gallon as the rule of determining the quantity.

This decision reduces 50 per cent. the duty it has long been the custom to collect on wine imported in bottles.

NON-PAYMENT OF ALIMONY.

Reversing the Usual Practice in such Cases.

Clark v. *Clark.*

The action was decided in favor of the plaintiff, granting her a divorce and alimony of $1,300 per annum, and $500 counsel fee, ordered to be paid by the defendant. The alimony and counsel fee not being paid, defendant, as has heretofore been the rule, was arrested for contempt of court. Defendant's counsel moved to set aside the attachment and arrest of defendant on the ground that the statute concerning contempts only gave courts the power to punish parties for contempt of court for non-payment of money ordered by such court to be paid, in cases where, by law, execution cannot be awarded for collection of such money, and in no other case; that this order for alimony and counsel fee was incorporated in the final judgment of divorce; that it was a portion of a final judgment and therefore collectable by execution, and the defendant not punishable for contempt in case of non-payment. Judge Robinson

discharged the defendant. This decision, together with one of a similar kind given recently by the genaral term of the Supreme Court at Buffalo, changed the entire practice of the courts in respect to the arrest of defendants for non-payment of permanent alimony.

The practice heretofore has been to punish, as for contempt, a party for non-payment of alimony. Whether said alimony was ordered *pendente ilte* or on final judgment; but this decree which follows the case of *Lansing* v. *Lansing* in 4 Lansing, settles this practice.

The order *pendente lite* can be enforced by punishment as for a contempt; but the final judgment *must be by execution.*

NOTES OF CASES.

FANCHER, J., in his able opinion in the case *Platt Exr.* v. *Platt*, heard at special term, Supreme Court, says:

A party insisting upon the validity of conveyances and transfers, which were executed by a sick and enfeebled man, for no consideration, or for considerations below the real value of the property, should be ready to show satisfactorily why they where executed, and to make it appear that no undue influence was exerted on the one side, and no submission to improper persuasion or promises was yielded to on the other; and where the party benefited by such transfers stands in such relation to the grantor that undue influence may have been exerted, and no proof is offered to rebut its existence, it may be presumed. *Hall* v. *Hall*, Eng. R. 1 P. and D. 481; *Rhodes* v. *Bates*, lb. 1 Chan. App. 257; *Dent* v. *Bennett*, 4 M. and Cr. 273; *Page* v. *Horne*, 11 Beav. 227; *Harvey* v. *Mount*, 8 Beay. 439; *Brook* v. *Berry*, 2 Gill. (Md.) 83; *Lyon* v. *Home*, L. R. 6 Eq. Ca. 655.

Such transactions have frequently been condemned by courts of equity. *Huguenin* v. *Beasley*, 14 Ves. 273; *Clarke* v. *Beasley*, 31 Beav. 80; *Grovenor* v. *Sheratt*, 28 Beav. 659; *Lyon* v. *Home*, Eng. R. C. 6 Eq. Ca. 655; *Page* v. *Home*, 11 Beav. 227; *Harvey* v. *Mount*, 8 Beav. 439; *Sears* v. *Shafer*, 1 Barb. 408; 2 Seld. 272; *Voorhis* v. *Voorhis*. 39 N. Y. 465; *Brice* v. *Brice*, 5 Barb. 538; *Tyler* v. *Gardner*, 35 N. Y. 592; *Whelan* v. *Whelan*, 3 Cow. 538; *Kinne* v. *Johnson*, 60 Barb. 69; *Carpenter* v. *Danforth*, 52 Barb. 581; *Williams* v. *Bailey*, Eng. R. 1 H. L. App. 200; *Boyse* v. *Rondborough*, 6 H. L. C. 2, 49; *Osborn* v. *Williams*, 18 Ves. 37; *Eadie* v. *Slimmons*, 26 N. Y. 9.

IN *Hume* v. *Mayor, &c.*, 47 N. Y. 639, may be found a very interesting case on the question of liability of a municipal corporation for injuries caused to individuals by obstructions on the highway. It is held that if the obstructions are not placed there by its own officials, or by authority of the city government, it will not be liable until after actual notice of their existence, or until by reason of the lapse of time it should have known it; when actual notice will be presumed. See in this connection *City of Brooklyn* v. *B. C. R. Co.*, Id. 475.

As to liability of a city for damages caused by its neglect to keep its streets or highways in proper condition and repair, see the important case of *Collins* v. *The City of Council Bluffs*, 32 Iowa R. 324.

USURY LAWS.

In the last number of this JOURNAL we presented some considerations in favor of the repeal of the usury law of New York State, and against such laws generally. The article has since been copied in part or in whole in a number of periodicals of the country and has received its share of criticism *pro* and *con*. As clearly sustaining many of the views therein advanced, we present below the questions recently propounded by the *Commercial and Financial Chronicle* to the President of the Boston Board of Trade, and his answers thereto. From which testimony it will be seen that the repeal of the usury laws in Massachusetts, has proved advantageous.

"1. Was your law of March 6th, 1867, as popular among borrowers as among lenders?

"*Reply:* Probably it was not popular with borrowers on mortgage, who obtained money at 6 per cent., and with many ignorant persons, who supposed it possible to make money cheap by legislation; but I think the great body of intelligent merchants, and those borrowers especially, who were shut out from six per cent. loans, heartily approved of it.

"2 Has that law worked any hardship or oppression to the borrowing class?

"*Reply:* I am not aware that it has done so. On the contrary, I think it has essentially benefited a large class of borrowers, by enabling them to compete with the favored class who formerly monopolized the six per cent. loans at the banks and elsewhere, as well as by increasing the amount of available capital in the market.

"3. Did the rates of interest show any general disposition to rise immediately after the passage of the law?

"*Reply:* I do not think they did, and for a

long time after the passage of the law, I think its effect was hardly to be noticed. But its ultimate effect has been to substitute seven per cent. for six in mortgages and bank loans.

"4. If so, have the free movements of supply and demand counteracted that temporary rise and developed a subsequent decline?

"*Reply:* With the exception of the above named advance from six to seven per cent., which I think was gradual, there has been, in my opinion, neither advance nor reaction, but a constant tendency in the direction of ease and steadiness.

"5. Are your present rates, on the average, higher or lower than before the anti-restriction legislation of 1867?

"*Reply:* It is my impression that rates now vary less than formerly; that changes are more gradual and less extreme in their character; and that rates are, on the average, rather lower than higher, allowing, however, for exceptional circumstances.

"6. Is there as much tendency to spasmodic changes in the rate of interest as formerly?

"*Reply*: I think spasmodic changes in the rate of interest have been absolutely unknown since the passage of the law.

"7. What has been the general operation of the new law, as affecting the facilities of mercantile business and the rates of discount during the years 1868-1873?

"*Reply:* The effect of the law appears to me to have been in every way satisfactory—so much so that the advocates of an irredeemable paper currency have thought it necessary to ascribe the improvement to that particular cause. I think the full benefit of the abolition of usury laws will not appear until our currency is restored to a sound basis. But, even with our present experience, I believe it would be utterly impossible ever to restore usury laws in Massachusetts. The amount of loanable capital has very greatly increased, and borrowers, in consequence, are supplied with far more ease than formerly, and, on the whole, at lower rates. J. S. Ropes,

President of the Boston Board of Trade."

EVENTS OF THE MONTH.

The Jury System.—At a meeting of the Bar Association, held a few evenings since, the defects of the present jury system came up for consideration, and were freely discussed.

Stephen P. Nash said that the defense of insanity is one which the ordinary jury is incompetent to decide. It ought to be raised by preliminary or special plea and be tried before a special jury. As constitutional questions might be involved, he proposed that an amendment to article I., Section 2, of the State Constitution be sent to the Constitutional Commission now in session in Albany, to the effect that provision may be made by law for trial of sanity or soundness of mind by a jury of five skilled persons; and that in civil cases and cases not punishable by death, the vote of nine jurors shall be sufficient for a verdict. He said that in England very radical changes were proposed in the jury system, Sir John Colerige favoring juries of seven.

Orlando L. Stewart, Judge Peabody, Mr. Olmstead and others, took a lively interest in the discussion.

Insurance.—A Bill on the insurance question was reported to the Assembly several days ago, which, in effect, provided that,

No life insurance company doing business in the State of New York shall have power to lapse or declare forfeited any policy hereafter issued by them by reason of non-payment of premiums or interest, or any portion thereof, until the expiration of 30 days after such payment of premium or interest becomes due, according to the terms of the policy, and that the policy holder shall have such notice in writing.

William Foster was hung on the 21st of March 1873, at the jail yard of the Tombs in the presence of about two hundred curious spectators. The various and weighty appeals made to the governor to effect a commutation of his sentence to imprisonment for life, totally failed to accomplish any favorable result. Some of the most noted letters to the executive, recommending such a commutation, were those of William M. Evarts, Edwards Pierrepont, William Orton, Ellen L. Putnam, the widow of the murdered man, John Foster, the father of the condemned, Barlow, Larocque & MacFarland, Nelson J. Waterbury, Rev. Dr. Tyng, Abm. R. Lawrence, Rev. William D. Walker, John Kelly, ex-sheriff, and a memorial signed by many citizens, besides a letter from the Hon. William H. Leonard, and affidavits of several of the jurors. The ordeal through which Governor Dix passed in this matter was quite as self-imposing as that of Washington in the case of Major Andre. The *World* in a well-considered article on the subject, truly says: "Governor Dix could not have been more cautious, fair-minded and considerate, had he held in his hands the life of his own dearest friend. He has not acted with haste; he has given a patient, candid hearing to all that could be said in behalf of the prisoner." After carefully reviewing the facts and circumstances attending the criminal act of Foster, and the character of the evidence adduced on the trial,

and also considering the appeals made to him, Governor Dix, in a masterly letter to Dr. Tyng, concluded as follows :

"I am asked, in disregard of the evid hce and the judgment of the highest judicial tribunal in the state on the law, to set aside the penalty awarded to the most atrocious of crimes. It seems to me that the inevitable effect of such a proceeding on my part, under the circumstances of this case, would be to impair the force of judicial decisions, and to break down the barriers which the law has set up for the protection of human life. To this act of social disorganization I cannot lend the executive authority confided to me by the people of the State. I deem it due to the good order of society to say that, so far as depends on me, the supremacy of the law will be inflexibly maintained, and that every man who strikes a murderous blow at the life of his fellow, must be made to feel that his own is in certain peril. If we cannot by firmness of purpose attain this end, we may soon be forced to acknowledge the disheartening truth, that there is nothing so cheap or so ill-protected as human life."

This firm act of the Governor must strike terror to the lawless classes, and all citizens will now feel that the community is less likely to be injured by them. Speedy retribution for all crimes, and unswerving execution of the laws, must have a salutary effect in clearing the calendars and insuring protection to society.

GEORGE MACDONNELL and his confederate, Frank A. Warren, *alias* A. Biron Bidwell, the Bank of England forgers, have been arrested. Bidwell was arrested in Havana, MacDonnell was taken prisoner by deputy sheriff Jarvis, on board of the steamer Thuringia, in New York harbor. on the 20th ult. and is confined in the tombs.

The complaint in behalf of *the Governor and Company of the Bank of England*, was prepared by their attorneys, Messrs. Blatchford, Seward, Griswold & DaCosta, was presented to his Honor, Judge Brady, who issued an attachment. The bill of complaint shows that, during several days in the month of February last, the defendant, MacDonnell, presented at the plaintiff's banking-house in London, for discount, various written instruments purporting to be bills of exchange duly accepted ; that the aggregate amount of the bills was £102,000 which is equal to $497,760. in gold ; that the signatures on each of the bills, both of the drawers, endorsers and acceptors were forged, and that the forgery was known to the defendant. and upon the complaint a receivership was granted. A large amount of valuables was found on MacDonnell's person, and many of the bonds have been recovered.

The case is the most extensive one that has been known for years.

CURRENT TOPICS.

CAPITAL PUNISHMENT.—The large increase of capital crimes and the frequent trials, but infrequent convictions, has excited no little discussion of the question, whether or not the rule a life for a life, works a public benefit. The facts are now, as in former ages, that the highest crime known to the law will be committed despite the most rigorous punishment that civilized nations can adopt. For centuries it has been the study of philosophers and publicists to discern what particular kind of punishment will most effectually deter the commission of crime. As a means of preventing persons from doing deeds of blood, is the gibbet a failure? While the frequency of murders would seem to indicate this, can any one suggest another penalty which will better secure the desired end? Would imprisonment for life in a dark dungeon strike more terror to the heart of the lawless? Assuming that life is the dearest boon that can be vouchsafed to man, if that life is to be surely taken, when legally forfeited, ought it not to prevent capital offences more completely than any other mode of punishment? While this would seem so, we are reminded on the other hand that, in the States where this punishment is abolished capital crimes are said to be less frequent than formerly ; but that convictions *more surely follow*. Michigan abolished the death penalty in 1846, Rhode Island in 1852, and officers of the law in those states bear witness that it has had a salutary effect ; Wisconsin in 1853, and Iowa in April 1872, cast aside the hempen rope, while Illinois, Minnesota and Indiana, it is said, are about to do likewise. The executives of these several states seem to support the change. In those states, convictions being more certain, the community, from that fact, it is said, is more thoroughly cleansed of the disorderly element, than in states that continue to execute the law of capital punishment. The efficacy of punishment being to warn and deter the vicious from committing crime, it is simply a question whether the fate of criminals in those anti-capital punishment states serves as a warning. It is speedy and certain convictions which will deter the vicious and the lawlessly inclined, and rid the community of those enemies of mankind.

What shall be the step in this matter by the

Empire State? We feel assured that the criminal code of Michigan or Rhode Island would be wholly inadequate for New York, and are more and more convinced that it is a rigorous and firm policy that is required in this city and state.

LEGAL NEWS.

Judge Blatchford in the collision case *Robert Johnson* v. *Steamtug, U. S Grant*, dismissed the libel with costs.

The charges of bribery against members of the Indiana Supreme Court have been decided to be wholly groundless.

Judge Woodruff has decided in the case of *Charles Sawyer* v. *Samuel Oakman*, that a United States commissioner cannot authenticate a stipulation made out of his own circuit.

The trial of Michael Nixon for the murder of Charles N. Phyfer, in the Oyer and Terminer, before Judge Brady, resulted in his conviction of murder in the first degree, and he was sentenced to be hanged on the 16th day of May, prox.

The Supreme Court at Boston decided in the cases of the Union Mutual Fire Insurance Company of that city, that, "neither the expiration of the policy nor its cancellation released the holder from liabilitiy to assessment for all losses which occurred while he was a member of the company,"

Judge Gilmor, of Baltimore, sustained a demurrer and quashed the indictment in a crimnal case, a few days ago, on the ground the word "fraudently" was used in the indictment for "fraudulently." This motion called forth an elaborate argument.

Indiana's new divorce law provides that no divorce shall be granted unless the applicant can prove, by at least two witnesses, a *bona fide* residence of two years within the state; it forbids the person obtaining the divorce to marry again within two years, and limits the grounds for the divorce to the causes specified in the present statute.

Judge Fancher, in the motion made in the suit of John Anderson and Allen R. Walker, asking for the appointment of a receiver for the Knickerbocker Life Insurance Company, decided that as it appeared that the plaintiffs had, in collusion with Erastus Lyman, the former president of the company, entered into a conspiracy against the company and as there was no doubt of the solvency of the company, he would deny their motion with costs.

At a meeting of the Cleveland Bar Association held a few days ago the following resolution was considered:

Resolved, That the testimony given by Judge C. T. Sherman before the committee in the recent investigation in Congress, and the letters admitted by him to be genuine, evince such a want of integrity and such moral turpitude as to destroy all confidence in his judicial administration and require that he should at once resign and relieve the Federal Court from the embarrassment consequent upon his continued occupying of the judgship.

The following is a copy of the writ of certiorari granted by Judge Brady in the Stokes case.

The People of the State of New York to the Court of Oyer and Terminer, in and for the County of New York: We being willing for certain causes, to be certified of the proceedings under a certain indictment against Edward S. Stokes for the murder of James Fisk, jr., lately depending before you, do command you that the transcript of the proceedings in said action to wit: a certain bill of exceptions signed by Albert Cardozo, a former Justice of the Supreme Court, taken under the issue raised by a special plea to the indictment and filed in the clerk's office of the Oyer and Terminer, on the 30th day of April, 1872, together with an order of the said court of Oyer and Terminer, dated the 30th day of April, 1872, directing that said bill of exceptions become a part of the record herein; also certain affidavits used on a certain motion for a new trial herein, and filed in the office of the clerk aforesaid on the 27th day of January, 1873, together with an order of the court of Oyer and Terminer, denying the said motion on the 14th day of February, 1873, contained in the minutes kept by the clerk of said court, also certain papers used on a motion to correct and amend the judgment record, together with an order entering on said minutes denying the same, with all things touching the same, you certify to our justices of our Supreme Court of Judicature, in and for the First Judicial District of the State of New York, without delay, fully and entirely as the same remained in your custody, together with this writ.

Witness the Hon. John R. Brady, one of the Justices of the Supreme Court, at the court house in the City of New York, on the 1st day of April, 1873.

[L S.] CHAS. E. LOEW, Clerk.

Allowed pursuant to statute.

JOHN R. BRADY, Justice.

The writ was served upon the District-Attorney and upon the court of Oyer and Terminer in the person of its clerk. The proceeding is an unusual one, as no writ of this character has been granted for more than half a century.

MISCELLANEOUS.

THE MARRIAGE ACT.—The law passed by the legislature last month relative to the solemnization of marriage, which act we gave in full in our last issue, is salutary, and is a step in the right direction. It is one of the reforms which we advocated in our February number.

AMONG the bills passed by the XLII. Congress was one prohibiting the use of the word "National" by banking houses, save those which are regularly incorporated under the laws of Congress. The penalty of non-compliance with this law is a fine of $50 for every day the word remains.

A UTAH LAW.—The territory of Utah has passed a law, that all property owned by either spouse before marriage, and that acquired afterwards by gift, bequest, devise or descent, is the separate property of that spouse by whom the same is so owned or acquired; that either spouse may sue or be sued; that no right of dower shall exist in the territory. Utah is growing less utopian every day.

In an admirable address delivered before the New York Medico-Legal Society by Clark Bell, Esq., after presenting an analysis of medical jurisprudence truly observed:

"This society should strive to so elevate the standard of excellence among experts, as to arrive, in important legal trials, at the results which science demands, with absolute precision so far as is possible. Too much attention and prominence cannot be given on your part to the precise minute, and scientific training of medical experts, who shall confessedly be thoroughly and well versed in that careful and practical knowledge, necessary and essential to the intelligent and reliable examination of the issues presented in a given case. There will be fewer cases when "doctors disagree," according to the old adage, if the witnesses are not M. D's. simply, but if they are thorough, profound, and fully competent medical experts."

The happy suggestions of Mr. Bell carried out would supply a want that has long been needed by the profession in criminal trials.

THE *Southern Law Review*, in an able article on the English and French Law, observes:

The lawyer goes straight to the point of his case, and the judge shows his attention not only by his attitude and manner, but by his incessant supervision of everything going on, and by his frequent interruptions. At *nisi prius* they take full notes of the testimony, and of all the points made. Besides the desire of worthily discharging the functions of their office, most of them take a positive pleasure in the routine of business. "When M. Cottu, the French advocate, says Lord Campbell, went to the northern circuit, and witnessed the ease and delight with which Mr. Justice Bayley got through his work, he exclaimed *'Il s'amuse a juger!'* and Judge Buller used to say, somewhat irreverently, that his idea of heaven was to sit at *nisi prius* all day, and play at whist all night." This is somewhat different from Gray's idea of Paradise, which was to lie on a sofa and read such novels as Gil Blas. It is certain that the impression made by the English judges, was that they felt a positive pleasure in the performance of their duties.

INDIANA has enacted a stringent liquor law—a kind of double and twisted Maine law—and we may now expect that peace and quiet will reign in that State. One section of the act reads:

"It shall be unlawful for any person to buy for or furnish to any person who is at the time intoxicated, or in the habit of getting intoxicated, or to buy for or furnish to any minor, to be drank by such minor, any intoxicating liquor. Any person or persons violating this section shall be fined not less than $5 nor more than $50," Section nine provides that "It shall be unlawful for any person to get intoxicated."

IN an essay on the maxim, "*Ignorantia legis neminem excusat*,"—which took the prize at the Incorporated Law Society, London—the writer says:

"The English Laws, like Sibylline prophecies of old, though wise and valuable in themselves, are unintelligible to any but the initiated; instead of being arranged in even a rude order, each leaf is left to lie where the breeze of chance may happen to place it, so that even the learned often differ as to the right mode of interpretation, Yet the law holds each man

to be intimately acquainted with the whole of this judicial class. The evils of such a system are great.

The editor of the *Law Magazine and the Law Review*, commenting on the essay says:

"His opinion that England's laws are the most excellent that the world has ever yet seen, is perhaps rather due to patriotic enthusiasm than deliberate judgment. We rather believe in the immense superiority of the Roman law, considered as a system, to the English law.

A LAWYER'S DUTY.—Erskine, in his defence of Thomas Paine, said:

"If the advocate refuses to defend, from what he may think of the charge or of the defence, he assumes the character of the Judge, nay, he assumes it before the hour of judgment, and in proportion to his rank and reputation, puts the heavy influence of, perhaps, a mistaken opinion into the scale against the accused, in whose favor the benevolent principles of English law makes all presumptions, and which commands the very Judge to be his counsel."

Lord Brougham, in his address to the House of Lords, as counsel for Queen Caroline, said:

"An advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world—that client, and none other. To save that client by all expedient means; to protect that client at all hazards and costs to all others and among others, to himself, is the highest and most unquestioned of his duties."

PROF. WASHBURN, in a little work on the practice of the law, quotes, approvingly, from the address of Senator Carpenter, delivered before the law graduates of Columbia College, as follows:

"I believe that more causes are lost by unskillful examination of witnesses than from all other species of malpractice combined. Always know what your witnesses called to prove; direct his mind to that particular object; get through with him as quickly as possible. In cross-examination of witnesses if I were to lay down one and one invaluable rule it would be not to cross-examine at all. In nine case out of ten, where a witness testifies against you, your cross-examination will make a bad matter worse."

USURY IN WALL STREET.

On the 17th inst., the grand jury entered the court of general sessions and made the following presentment:

THE PRESENTMENT.—The grand inquest under the special charge of his honor Recorder Hackett on the subject of usury and the supposed locking up of money in this city have carefully examined a large number of bankers, brokers and persons engaged in financial matters and have failed to trace the reason for the present stringency in the money market to a so called lock-up of money or to any special cause. Had any further proof been wanting of the utter impossibility of enforcing a compliance with the usury laws in this city during a scarcity of money, it has been found in our proceedings since we were called together. The absurdity of the law and its unpopularity since it has been abolished in the neighboring States is so great that not a man can be found who will aid the authorities in discovering the infractions of it. Nothing can be more demoralizing than to have on the statute book of the State laws which are disregarded by men of undoubted integrity and standing in the community. Any person acquainted with the practical effects of usury laws on the price of money at monetary centres cannot but see that the enormous rates which have been so long paid in this city are due almost entirely to the existence of such laws. In no other part of the world are such rates known, and nothing but the great prosperity of the country has enabled the financial community to stand up so long under them. The State has granted special charters to several corporations, such as warehouse companies, &c., authorizing them to take commissions over and above legal interest on their loans of money, thus legalizing in special cases the very thing the Usury law was intended to prevent. It is perfectly well understood that the enormous rates paid by the stock speculators have had the effect of drawing the capital of the city from its ordinary or legitimate channels, thus shutting off the merchant and trader from the possibility of obtaining money at moderate rates of interest, such as our ordinary business can stand.

For these reasons and many others which might be mentioned touching the best interests of this city and the State, this grand jury hereby recommends to the Legislature of the State the immediate repeal of the usury laws, or such a modification of them, so far as they relate to the City and County of New York, as will permit money to come here from other places and countries, and be employed legally, or equalizing the rate of interest with other great monetary centres.

WILLIAM HABIRSHAW, Foreman.
L. S. COMSTOCK, Secretary.
Grand Jury Rooms, April 17, 1873.

The following were appointed a Committee to proceed to Albany and report to the Governor, and request him to send it to the Legislature: Isaac H. Reed, Morris K. Jesup, and Lucius S. Comstock.

BOOK NOTICES.

THE REVISED STATUTES OF THE STATE OF NEW YORK, AS PREPARED BY THE COMMISSIONERS.

We have received from Montgomery H. Throop, Esq., a member of the commission, appointed under chapter 33 of the laws of 1870, Part III, chapters I-XIV, of the Statutes so revised, which appears to be very complete.

So well performed has been the task on the part of the Commissioners in revising the Statutes of the State that it merits general commendation. Their valuable labors have also attracted the attention of some of the others States. California, as appears by her recently published Code of Procedure, has taken the liberty of incorporating sections 372 and 373, which were wholly original with our Commissioners, into her Code as sections 346 and 347. That fact may be a fair indication of the wisdom and ability displayed by the Commissioners, who certainly deserve the thanks of the people of this State.

TELEGRAPH CASES DECIDED IN THE COURTS OF AMERICA, GREAT BRITIAN AND IRELAND. Edited by CHARLES ALLEN, New York Published by Hurd & Houghton, Cambridge: The Riverside Press, 1873.

In the preface of the work the Editor says, that, completeness having been aimed at it is hoped that no reported case will be found wanting. The volume is superbly gotten up, the press work and the typography showing the wonted neatness and accuracy which characterize the books from the Riverside Press.

Covering as it does the adjudications upon the various questions which have arisen for a period of over twenty years past, this work can but be of general interest to the profession. On page 5 may be found the interesting case of *Edward Shields* v. *Washington Telegraph Co.*, where a telegraph in these words: "Oats fifty-six, bran one-ten, corn seventy-three, hay twenty-five," was incorrectly transmitted, so that when delivered "sixty-six" was substituted for "fifty-six." No explanation of the meaning of the telegram was made to the telegraph company, and it was held that the measure of damages was simply the price paid for transmitting the telegram. *Camp* v. *Western Union Telegraph Co.*, on page eighty-five is a case as to a company limiting their liability to damages by certain rules and regulations, brought home to the knowledge of those with whom they deal, and held that, a company requiring important messages to be repeated in order to guard against mistakes, and charging one half the usual price for such repitition "is a reasonable rule."

The Washington and New Orleans Telegraph Co., v. *Hobson & another*, as well as the case *Prosser* v. *Henderson*, are of general interest. On page 471 may be found the important case *Sweatland* v. *Illinois & Mississippi Telegraph Co.*, resulting from error in the transmission of a message, now reported, 27 Iowa 432, wherein, Dillon, C. J., delivered an exhaustive opinion on the question of a company's liability for mistakes. In *Baldwin* v. *United States Telegraph Co.*, 613 p., it was held that a mistake in transmitting the address, and a consequent misdelivery of it, are *prima facie* evidence of negligence on the part of the company. See, also, the interesting case *Young & Co.* v. *Western Union Telegraph Co.*, page 708 as to conditions and regulations of a company in the transmission of messages.

We cordially commend this valuable work to the profession generally.

TREATISE ON THE LAW OF JUDGMENTS, INCLUDING ALL FINAL DETERMINATIONS OF THE RIGHTS OF PARTIES IN ACTIONS, OR PROCEEDINGS AT LAW OR IN EQUITY. BY A. C. FREEMAN, Counselor at Law. San Francisco: A. L. BANCROFT & Co., 1873.

This work reaches us too late for an extended notice, but the subject is one of general practical interest.

We believe with the author that a correct understanding of the subject is essential to a proper and consistent administration of law.

This is the only work on the subject of judgments, and it will doubtless produce a more thorough knowledge of the law and assist in the prevention of needless litigation, and with that view we may conclude the treatise is submitted to the profession. The practitioner will do well to secure this work for his library.

We have received the following exchanges:

The Southern Law Review, Nashville.
The American Law Register, Philadelphia.
The Legal Gazette, Philadelphia.
Bench and Bar, Chicago.
Solicitors' Journal and Reporter, London.