The Legal News.

Vol. I. JULY 13, 1878. No. 28.

### *TESTIMONY OF EXPERTS.*

On page 57, *ante*, reference is made to the decision of the Supreme Court of Alabama, in the case of *Ex parte Dement*, holding that physicians may be called as witnesses and compelled to give professional opinions, without receiving any remuneration therefor. There seems to be something extremely unjust in forcing a professional man to apply the knowledge gained at the cost of much toil and self-sacrifice, without allowing him any compensation, and it will be seen by reference to page 57, that the authorities are not uniform on the subject. The more equitable rule seems to be laid down in *Webb* v. *Page*, 1 Carr. & Kirw., 23, distinguishing between the case of a man who sees a fact and is called to prove it in a court of justice; and that of a man who is selected by a party to give his opinion about a matter with which he is peculiarly conversant from the nature of his employment in life. Such is the opinion enunciated by the Supreme Court of Indiana in a more recent case than *Ex parte Dement*—that of *Buchman* v. *The State*. On the trial of one Hamilton for rape, Dr. Buchman, a physician, being called, was asked "whether, in female menstruation, there is not sometimes a partial retention of the menses after the main flow has ceased." Refusing to answer this, or any other question depending on his professional knowledge, without being first paid as for a professional opinion, he was committed for contempt. From this judgment he appealed to the Supreme Court, where the decision was reversed and the commitment set aside. The court referred specially to the case of *Ex parte Dement*, among others, but did not consider the decision a sound one. "It is unnecessary to determine in this case," remarked one of the judges, "whether all classes of experts can require payment before giving their opinions as such. It is sufficient to say, that physicians and surgeons, whose opinions are valuable to them as a source of their income and livelihood, cannot be compelled to perform service by giving such opinions in a court of justice without payment." This was not the first case of the kind in Indiana. The Court held *Blythe* v. *The State*, 4 Ind. 525, to be exactly in point on principle. In that case, Blythe, an attorney of the court, had been appointed to defend a pauper on a criminal charge. Declining to render the service without compensation, he was committed for contempt. The Supreme Court, however, held that he was not bound to perform the service gratuitously, on the ground that to hold otherwise would be to subject a particular class to a tax, in violation of the constitution, which provides for a uniform rate of assessment upon all citizens.

The reluctance to provide for the payment of professional witnesses, may arise from the difficulty of assessing the value of such services. The time of professional men varies immensely in value, and it is impossible for the law to fix a compensation that shall be equitable in all cases, but this is hardly a satisfactory reason for failing to make any attempt at rendering justice to professional witnesses under such circumstances.

---

### *APPROPRIATION OF PAYMENTS.*

The decision of the Privy Council in the case of *Kershaw & Kirkpatrick et al.*, an appeal from the Court of Queen's Bench of the Province of Quebec, though turning in some measure upon matters of fact, touches a point of great interest in the rapid transaction of commercial business. The defendant, Kershaw, was a broker of Montreal, who had been employed by one Stevenson to buy two cargoes of wheat on his behalf. The wheat was bought from different parties, and Stevenson received separate invoices for the cargoes. Kershaw afterwards sent his clerk to Stevenson's office, to request payment, or to get as much money as he could on account of the indebtedness. Stevenson could only spare $8000, and on handing the clerk a check for that amount, the clerk (as he said, by accident), acknowledged receipt on the invoice for the cargo secondly purchased from the defendants, Kirkpatrick & Co. When Kershaw became aware of this, he endeavored to get the appropriation altered, but Stevenson declined to make any change. Stevenson having become insolvent, Kirkpatrick & Co. sued Kershaw for the $8000 and were successful. This judgment has been confirmed in England. Their Lordships adopt

the *motif* of the judgment in the Canadian Courts, that the imputation was made by the parties at the time the receipt was given, the intention of the debtor was thereby declared, and it could not be impugned by the other party, more particularly as he had contented himself with pleading the general issue, without specifically alleging change of appropriation. It may be mentioned that Kirkpatrick, before suing Kershaw, endeavored to collect his claim from Stevenson, and actually got $4000, which, with the $8000, made more than the amount of his claim, but the Courts did not attach any special importance to this fact.

## REPORTS AND NOTES OF CASES.

### COURT OF REVIEW.

Montreal, June 28, 1878.

JOHNSON, MACKAY, RAINVILLE, JJ.

[From S. C., Montreal.

LORANGER *v.* CLEMENT.

*Lease—Insolvency of Lessee.*

1. An action to rescind a lease may be brought against a lessee who has become insolvent during the term of the lease.

2. A writing signed by the lessor, not accepted by the lessee, promising that a new lease should be entered into after a certain date, did not constitute a new contract of lease which could be pleaded in defence to an action to rescind the original lease.

JOHNSON, J. The judgment before us for review set aside a lease made by the plaintiff *es qualité* to the defendant of the 5th Oct., 1876, for six years from 1st May, 1877. The defendant became insolvent in October, 1877. The rent was $700 a year, payable quarterly, and in March, 1878, when three quarters, rent were overdue, besides assessments, the plaintiff sued him to annul the lease, and get the back rent, and also the quarter then current, and payable 1st May. The defendant pleaded by a demurrer, and also by exception, that the action ought to have been brought against the assignee of his insolvent estate. This pretention in both forms was overruled, and we think rightly.

He then pleaded that the lease was an emphyteotic lease, which we also think was untenable.

Further he set up that on the 29th October, after the insolvency, the plaintiff had signed a writing promising a discharge from rent past or future, and gave him the gratuitous enjoyment of part of the ground floor up to May 1878, when a new lease should be entered into. This writing is produced and is admitted; and it says the defendant is to rescind the lease whenever required. This was a proposition that was never accepted by the defendant—who never signed the writing at all — but thought to have all the benefit of it, and assume nothing. But even if it had been accepted, can it be said that the contemplation of a new lease between the parties constituted a new contract of lease? for how long? at what rent? We see no reason for disturbing the judgment, and it is confirmed.

*L. O. Loranger* for plaintiff.

*A. Mathieu* for defendant.

JOHNSON, TORRANCE, DUNKIN, JJ.

DEGUIRE v. MARCHAND.

[From S. C., Montreal.

*Lessor and Lessee—Changes made by Tenant.*

Where one of several tenants painted the entire front of the leased building a conspicuous red color, and the defendant, who leased the upper flats, and to whom this color was offensive, covered over the red with a neutral tint, *held*, that the lessor had no ground of rescision against the latter on account of the change.

JOHNSON, J. We all concur in confirming this judgment. It was a case of suburban notoriety. The plaintiff sued the defendant, who had leased the two upper stories of his house, to have the lease rescinded. The grounds alleged for the action were deterioration of the premises, and alteration without express permission in writing of the landlord—as stipulated in the lease. These alterations that were complained of consisted in a hole pierced in the roof, and in having painted the front of the house a grey colour. The plaintiff had another tenant named Pelletier on the ground floor of this house, and he says he got permission from the defendant for this man Pelletier to paint the upper stories red—which was done. There is evidently a mistake in the declaration in this respect—saying that Pelletier had the apartments above the plaintiffs instead of below; but that is nothing, the case having been treated by the parties according to the facts as they are. Pelletier had the lower storey as a shop and painted the outside red, extending this rather *prononcé* color over the upper stories too. The defendant's boarders seem to have

objected to this; and the defendant herself also, and required the other tenant to moderate the extreme brightness of his favorite color, but in vain, and at last proceeded to put on a preparatory coat of a sober hue, and in doing so broke a gas pipe.

The view taken by the court below was that the plaintiff had no substantial cause of action: that he used the trifling pretexts referred to for the purpose of favoring one tenant at the expense of the other: that there is no proof of permission to the ground floor tenant to indulge his extravagant passion for scarlet at the expense of the lady up-stairs: and in fact that substantial justice required that this case should be treated as one in which the plaintiff had no reasonable cause of complaint—and we all sustain that view.

*J. E. Robidoux* for plaintiff.

*Longpré & Co.* for defendant.

---

MACKAY, TORRANCE, DORION, JJ.

DANSEREAU v. ARCHAMBAULT et al.

[From S. C., Montreal.

*Service—Husband and Wife séparés de biens.*

In a joint and several action against man and wife, separate as to property, service of one copy of the writ and declaration is insufficient.

The defendants, man and wife, separate as to property but living together, were sued jointly and severally, and only one copy of the process was served upon them, under Art. 67 of the C. C. P.

The defendants filed an exception to the form, setting up defective service upon several grounds, but issue was ultimately joined on the pretension of the defendants, that a copy should have been left for each.

TASCHEREAU, J., in the Practice Court, maintained this pretension, and this judgment was subsequently confirmed in Review, MACKAY, J., presiding.

*C. H. Stephens* for plaintiff.

*Archambault & David* for defendants.

---

## SUPERIOR COURT.

Montreal, June 28, 1878.

JOHNSON, J.

PLESSIS dit BELAIR v. LAJOIE.

*Insolvency—Action to compel Assignee to take up Instance.*

*Held*, that an assignee cannot be compelled to take up the instance in a suit pending against the insolvent.

JOHNSON, J. The plaintiff brought an action in this court against one Pratt and his wife, who appeared and pleaded, and afterwards became insolvent—the present defendant being named assignee to their estate; and the action is to compel him to take up the *instance*. The point is not, as the defendant put it, whether an action can be continued against an insolvent: of course it can, and it becomes a mere risk as to costs—that is all that the cases cited go to show. But can an assignee be compelled to take up the instance? That is the point. I can see nothing in the statute or in the reason of the thing to enable me to say that he can be compelled. It was said that the point had been settled in the other court, but I have not been able to get at that. The 39th section of the Act certainly gives power to the assignee to take *all proceedings for the benefit* of the estate both in suing, and defending suits; but that is not obligatory. Action must be dismissed.

*Bonin* for plaintiff.

*Archambault & Co.* for defendant.

---

BROWN et al. v. ARCHIBALD et al.

*Promissory Note—Personal liability of Agents signing Notes.*

Where several persons, trustees of an insolvent estate under a deed of composition, which gave them no power to draw or accept bills, signed promissory notes with the words "Trustees to Estate C. D. Edwards" after their signatures, *held*, that they were personally liable.

JOHNSON, J. The action of the plaintiffs here is against the makers of five promissory notes, signed by the defendants in favor of Charles D. Edwards, and endorsed by him to the present holders. The pleas were that Edwards had become insolvent and had made an assignment to Perkins, and afterwards made a deed of composition with his creditors under which the defendants were made trustees of the estate while he himself carried on the business; but being unable to meet the terms of his composition, the official assignee retook the estate; and that the defendants were called upon by Edwards to sign these notes to enable him to get coal that he had bought from the plaintiff, and signed them as trustees, and so limited their liability. The plaintiff answers that the notes were signed with the express understanding of

a personal liability of the defendants, and without which the coal would not have been delivered. There are two points: 1. As to the personal liability of the defendants, under the general rule—they having put the words "Trustees Estate C. D. Edwards" after their signatures; and, 2. Was there any express understanding. Both points depend on the proof, as, no doubt, there may be circumstances that would exempt them from personal liability, and there might also be an express understanding. The question is not new, and according to the current of authority, turns upon distinctions that are sometimes extremely faint. The general principle is that there is personal liability, unless distinctly excluded. In a case of *Rocher* v. *Leprohon*, in September 1876—in Review, it was held by the majority of the court, that there was personal liability, even where the debtor gave a tolerably distinct notice that he intended there should be none. It was the case of a registrar suing a returning officer for the price of work in furnishing election lists, and the returning officer had written to him to get the list, and said: "I require in my capacity of returning officer, &c." I thought there, there was a plain notice of the capacity in which he acted, and in which the other consented to treat with him; and I differed from the Court. A more recent case is that of *Brown* v. *Kerr*, where the defendant signed "R. Kerr, as president of the Montreal Omnibus Company." In that case Mr. Justice Rainville held there was no personal undertaking. That judgment was, however, reversed in Review—and is now before the Queen's Bench. That was an undertaking by which Kerr had agreed to settle an account, in order to prevent the property of the company (of which he was president) from being seized, and the plaintiff had abstained from legal proceedings, and the property had been sold through the instrumentality of the defendant, and on that ground the case was decided against him in review. The cases are very numerous in this country and in England on this subject: the latter are all to be found abbreviated at p. 102, Shelford's digest of case law of joint stock companies, under the head of liability of agents signing negotiable instruments.

*Courtald* v. *Sanders*, 15 W. R. 906, is cited as giving the test, which is, that "*the agent is "bound personally, unless on the face of the instru-*"*ment* which evidences the contract, the signature appears to be on behalf of the company." It is there said that the cases on this subject are somewhat conflicting, and no doubt they are, and will continue to be, under the great variety of circumstances constantly arising in the course of business, and under the different aspect of facts presented to different minds; for, after all, this is mainly a question of fact; and no doubt Mr. Shelford is quite right in saying, that in many instances, persons have been held liable contrary to their intentions; and probably to obviate this, a provision was inserted in the Companies' Act in England with respect to notes and bills of exchange—in language which, however, has been held to do nothing more than express what the law was before. In the present case, what was meant as between all the parties to the notes may be considered with reference to the deed under which the defendants were acting. It was a deed to which Edwards was party of the first part; his creditors parties of the second part—the defendants made trustees of the third part, and Perkins, assignee, binding himself to give up the estate to them, of the fourth part. Edwards gave notes running over thirty-six months to his creditors, who were to discharge him if the notes were paid; and the defendants were to superintend merely, and the debtor, until the last note was paid, was to carry on the business under the supervision and control" of these gentlemen who were to re-assign to him what they had received from Perkins as soon as the notes should be paid. The cases of *Redpath* v. *Wigg*, 1 L. R. Ex. 335, and *Easterbrook et al.* v. *Barker et al.*, 6 L. R. C. P., do not directly apply. In the first, the signature was "for so and so" (the debtor), and in the second there was no undertaking at all by the trustees, and the question was only whether the debtor could pledge their credit. The plaintiff is proved to have asked Edwards to get the notes signed by his trustees. He probably knew, therefore, of this arrangement, and that Edwards had divested himself of his estate, and that the defendants had it for the benefit of the creditors. I do not see how he could be supposed to ask them to bind Edwards' estate, already belonging to the creditors, and held by the defendants in trust for them. They had no power given to them by the deed to draw or accept bills. The mere mention of the

fact that they were trustees could not of course by itself make their contract in that capacity. As creditors of Edwards they had a personal interest in the success of his business, and I think they must be held to have contracted personally. The plea is therefore dismissed, and plaintiff has judgment.

*Abbott & Co.*, for plaintiff.
*Kerr & Co.*, for defendants.

---

*Rhodes* v. *Starnes et al.*—In our last issue it should have been mentioned in our report, that Messrs. *Kerr & Carter* appeared for the defendant, Jas. O'Brien.

---

## *DISPUTED QUESTIONS OF CRIMINAL LAW.*

(*Concluded from page* 324.)

*IV. Defendants as Witnesses for themselves.*—Mr. Evelyn Ashley, a son of Lord Shaftesbury, has succeeded in carrying to a second reading in the House of Commons a bill to enable defendants in criminal cases to testify for themselves. The bill is substantially the same with those now in force in most of the states in this country, and contains the proviso, so familiar to ourselves, that "the neglect or refusal of any prisoner or defendant at any trial to give evidence under the provisions of this act shall not create any presumption against him, nor shall reference be made to, or any comment made upon, such neglect or refusal during such trial."

The bill was advocated, as we learn from the London *Law Times* of April 18, 1878, by Sir Henry James, an eminent counsel, who said, speaking of defendants on trial: "But, if they were not guilty, could there be any greater injustice than saying to them, 'You are innocent; you can clear yourself if you are allowed to speak, but the law says it would not be just for you to have an opportunity of clearing yourself, and, therefore, you cannot be heard.'" And, again: "He could not conceive any more natural desire on the part of an innocent man than that he should stand face to face with his accusers—not with his tongue tied, for there could be no greater injustice to him than to compel him to be silent. Why should he not be allowed to speak when he stood in peril of life, liberty, and property? There could be no benefit to the innocent man in forbidding him to speak."

The bill, however, is vigorously opposed in the *Law Times* by a contributor who argues that the right to make a statement to the jury already belongs to a defendant on trial, and that to put him on his oath does not add to the credibility of his statement, or in any way enhance the weight of what he says. R. v. Malings, 8 C. & P. 242, is cited as establishing the defendant's right to make such a statement. This objection to the bill, however, is of little weight. Even if a right by the defendant to make a statement to the jury be recognized in principle, it is a right which defendants rarely avail themselves of, for two obvious reasons: In the first place, a statement made by a party who does not subject himself to cross-examination has little logical weight. In the second place, such statement, not being under oath, is not evidence, and is so treated on trial. Counsel for the prosecution tell the jury that the statement is not evidence, and the judge sustains the position, and the jury brush aside the statement as not entitled to affect their deliberations. Hence it is that the right, if it exists, has fallen into disuse.

More serious are the remaining objections made by the writer in the *Law Times*. The clause in the statute requiring that no presumption should be raised against the defendant for declining to present himself as a witness is, it is argued, absurd. "Were it not," so it is said, "that the subject is a most serious one, we should be inclined to smile at the perfect absurdity of such a provision. If a man has an opportunity of denying, upon his oath, the truth of a charge made against him, and does not avail himself of it, how in the name of common sense can a jury be restrained from presuming against him? They would naturally say: 'This man does not venture to swear that he is innocent; he must, therefore, be guilty,' An act of Parliament can effectually deal with legal presumptions, but it is out of its power to regulate moral presumptions."

We have had the same difficulties in the United States, and in several states it has been proclaimed that presumptions arising from the defendant's failure to testify are instinctive mental processes which it is beyond the power of legislatures or courts to control. See The

State *v.* Ober, 52 N. H. 459; The State *v.* Lawrence, 57 Me. 574; The State *v.* Bartlett, 55 Me. 200; Calkins *v.* The State, 18 Ohio St. 366.

Yet, on the other hand, it is possible for a court to stop any reference to such a presumption on the part of counsel, and to leave the case to the jury, with instructions that they are to be governed solely by the evidence produced in the case, putting the question in such a way that the jury will feel themselves thus limited. And of this we have several emphatic illustrations. See The State *v.* Cameron, 40 Vt. 555; McKensie *v.* The State, 26 Ark. 334; Crandell *v.* The People, 2 Lans. 309; Knowles *v.* The People, 15 Mich. 408.

The same objection that is made to the statute now before us might be made to statutes enabling defendants in criminal cases to take depositions of absent witnesses, or to have a change of venue in case of public prejudice against them at the place where the indictment is found. It would be no valid objection to the passage of these statutes that they would subject the defendant, in case he should not avail himself of their privileges, to the presumption that, if he had taken the depositions of witnesses who were absent, these depositions would have told against him; or that, if he had obtained a change of venue, the public horror at his guilt would pursue him wherever he was tried.

The remaining objection is put as follows: "Assuming, however, that he elects to give evidence upon oath, the prosecuting counsel will have a perfect right to cross-examine him to the fullest, and the accused will be bound to answer—however, by doing so, he may criminate himself; and in this way we shall have, in all its most objectionable forms, the odious and un-English system of interrogating prisoners. In the hands of a skilful prosecuting counsel, the most innocent man might fare exceedingly bad, and, by incomplete answers to craftily-put questions, may compromise himself to a most serious degree. Under such circumstances it is not likely that even the perfectly innocent will venture to give evidence upon oath, the more especially when he knows that by giving such evidence he will confer upon the prosecuting counsel a right of reply."

That a defendant, on becoming a witness, cannot shield himself on the ground of self-crimination, on his cross-examination, has been abundantly settled in the United States. See the State *v.* Ober, 52 N. H. 459; The Commonwealth *v.* Lannan, 13 Allen, 563; The Commonwealth *v.* Morgan, 114 Mass. 255; Connors *v.* The People, 50 N. Y. 240; The State *v.* Harrington, 12 Nev. 125, and other cases cited in Whart. on Ev., sec. 484.

So far, however, from the rulings in this respect driving defendants from the witness-box, the cases are now very rare in which defendants do not avail themselves of the privilege the statute gives, notorious as are the drawbacks thus imposed upon the privilege. Nor, after all, are these drawbacks such as seriously interfere with the eliciting of truth. A defendant, for instance, who sets up a false *alibi* in his own testimony is likely to be caught; but so is a defendant who undertakes to prove a false *alibi* by the testimony of others. There is this, however, in his favor when he is himself on the stand: he is not likely, if his cause be good, to be injured to the extent he is likely to be, if his case rests on the testimony of friends who, with an imperfect knowledge of the facts, are led by their zeal to testify more than they know. If he be innocent, and answers fully to questions put to him, cross-examination, the more thorough it is, will the more thoroughly exhibit his consistency. If he is fabricating a defence, it is right that the explosion of his fabrication should tell against him. It may be said that an innocent man will, in his desperation, fabricate a defence when put on the witness-stand. But innocent men are equally likely to connive at the fabrication of defences by witnesses or counsel; yet this is no reason why defendants should be precluded from having counsel or calling witnesses. Aside from these views, there are points in a defence (*e. g.*, the defendant's impression, in a homicide case, of the danger of an attack), as to which the defendant is the only person from whom the facts are to be obtained. It is a narrow rule which would prevent such a witness from being examined if he offer himself for examination.

So far as concerns the United States, we cannot study the reports of trials which have taken place since the rehabilitating statutes, without seeing that these statutes in the main conduce to promote public justice by enabling each case to be determined more fully on its merits.

The chances of the conviction of the innocent have been greatly diminished, while those of the conviction of the guilty have certainly not been decreased.—FRANCIS WHARTON, *in Southern Law Review*, (June, 1878).

## *TRIAL BY JURY.*

This is a subject on which much nonsense is spoken and written. Trial by jury has the advantage of immemorial usage upon its side. The freest, most civilized, and advanced nations —England and America—have jealously guarded it as an effectual defence and protection of their civil rights. Their example has been followed, in the criminal department of law at least, by other enlightened nations as fast as they have broken the chains of tyranny, prejudice, or ignorance. But, of late, there has sprung up in this country a wide-spread disposition—and that, too, in the minds of many of the best informed—to question, and even deny, the utility and sense of continuing the jury system in civil cases, although they freely admit that it is the best system yet devised for the trial of criminal cases.

They say there is no magic in a name. A system which may be efficient, and which may have acquired renown, when applied in one mode, may, when regarded in another light, and applied in other circumstances to a different state of things, be productive of inconvenience, uncertainty, injustice, and ruin. That the system has been found beneficial in criminal trials is not conclusive as to its fitness for all trials whatsoever. They represent that our criminal jurisprudence is simple; that it is learned without protracted study; that it forms but a little part of professional education; and what the gentlemen of the law treat with such easy indifference, it would not be difficult for an unlettered jury, under the direction of a judge, to comprehend and apply. The fact to be ascertained is generally divested of those complicated matters which create all the difficulty in the determination of the matters of civil right. A crime has been committed, and the proof adduced to bring home the guilt of the accused is in few cases beyond the understanding of a jury. The nature of the trial excites their interest and enlivens their attention; the mode of procedure is calculated to enlighten even the dullest, and the high responsibility which humanity feels at issuing an award of life or death removes a criminal trial beyond the reach of considerations which must decide the competency of juries for the settlement of matters civil. A nation tenacious of its liberties could not, moreover, in political cases, endure that these should be annihilated without the free consent of the citizens by whom they were secured. Judges, elevated above their position in society, might have no sympathy with the motives that actuated the accused, but which found a welcome reception in the hearts of his fellow-citizens. In all countries judges are generally the organs of the government, though less so in the United States than elsewhere; and the jealousy with which their proceedings are regarded has found too just a foundation in the frequency with which their powers have been abused. To give them the power of deciding on the guilt of criminals would prove detrimental to the well-being of society, by shaking public confidence in the officers by whom its peace is to be preserved. On subjects of great public interest, where popular excitement has taken the reins from reason, and popular passion has created indifference to consequences, it would stimulate insurrection, or create suspicion, anarchy, and discontent, were such excesses checked but by the people themselves. In short, to impose this duty on the judges would be to dig the grave of the purest virtue, which would inevitably sink beneath the malignity of popular detraction.

It is claimed that in criminal justice the simplicity of the procedure, the general simplicity of the fact to be tried, and the general principles of justice tempered with humanity which ought to guide the decision, render the rude judgment by twelve unlettered men fit enough for serving the object of criminal justice. That an erroneous verdict here is not fraught with such gross oppression as in a civil matter; society is the opposing litigant to the accused; its broad and ample shoulders can well bear that one unprincipled adventurer should be let loose for a little longer to weigh upon them—to add an additional wrong to those which a stupid jury has let pass unpunished—consoling itself with the reflection that it is better it should be so than have an after-resurrection of repentance,

on proof of the innocent being condemned. That a rough and sound verdict of this kind does not, indeed, in any case defeat the object of the trial. Though the punishment which the law imposes as a consequence of a verdict of guilty cannot follow, yet the accused cannot retire from his long interview with the judicial authorities unaffected by the narrow escape which he has had; and the solemnity of the trial operates often as much in the way of example as the horror of the execution.

But the same persons who agree in the views just expressed, and urge the expediency, and even necessity, of a jury in criminal trials, at once deny that they have any meaning or application in regard to civil cases. Here, they say, the jury in favouring A do injustice to B, and, while an approximation to a correct judgment on the evidence is all that is required of a criminal jury—their leaning, it is supposed, being to mercy—it is essential in civil cases, to avoid rendering the whole proceeding a very mockery, and the verdict of the jury a libel upon justice, to weigh in the nicest scales the whole circumstances of the case, to its minutest particular; to subject the law to crude notions of justice, or the rules of evidence to the fanciful presumptions from character or preconceived opinions.

It cannot be denied that plausible arguments may be urged against the fitness of a jury to determine the intricate questions that often arise in civil actions. Nor will it be thought a sufficient answer to say that the system has in this and the mother country antiquity to recommend it. We live in times when this plea is treated with small respect. A better reason for the continuance of an institution must be given than that it has been handed down to us by our forefathers, although this alone ought to raise a presumption in its favor, and throw upon an opponent the burden of proving his objection.

"When the English adopted trial by jury, they were a semi-barbarous people; they have since become one of the most enlightened nations of the earth, and their attachment to this institution seems to have increased with their increasing cultivation. They have emigrated and colonized every part of the habitable globe; some have formed colonies, others independent states; the mother country has maintained its monarchial constitution; many of its offspring have founded powerful republics; but everywhere they have boasted of the privilege of the trial by jury. They have established it, or hastened to re-establish it, in all their settlements. A judicial institution which thus obtains the suffrages of a great people for so long a series of ages, which is zealously reproduced at every stage of civilization, in all the climates of the earth, and under every form of human government, cannot be contrary to the spirit of justice."

In his great work, "Democracy in America," M. De Tocqueville thus speaks of trial by jury in civil causes:

"The institution of the jury, if confined to criminal causes, is always in danger; but, when once it is introduced in civil proceedings, it defies the aggressions of time and man. If it had been as easy to remove the jury from the manners as from the laws of England, it would have perished under the Tudors; and the civil jury did in reality, at that period, save the liberties of England. In whatever manner the jury be applied, it cannot fail to exercise a powerful influence upon the national character; but this influence is prodigiously increased when it is introduced into civil causes. The jury, and more especially the civil jury, serves to communicate the spirit of the judges to the minds of all the citizens; and this spirit, with the habits which attend it, is the soundest preparation for free institutions. It imbues all classes with a respect for the thing judged, and with the notion of right. If these two elements be removed, the love of independence becomes a mere destructive passion. It teaches men to practice equity; every man learns to judge his neighbor as he would himself be judged. And this is especially true of the jury in civil causes; for, whilst the number of persons who have reason to apprehend a criminal prosecution is small, every one is liable to have a law suit. The jury teaches every man not to recoil before the responsibility of his own action, and impresses him with that manly confidence without which no political virtue can exist. It invests every citizen with a kind of magistracy; it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in its government. By obliging men to turn their attention to other affairs than their own, it rubs off that private selfishness which is the rust of society."

He moreover claims that it is a great instru-

ment for the education of the people: that it contributes powerfully to form the judgment and increase the natural intelligence of the people. It may be regarded as a gratuitous public school, ever open, in which every juror learns his rights, enters into daily communication with the most learned and enlightened members of the upper classes, and becomes particularly acquainted with the laws, which are brought within the reach of his capacity by the efforts of the bar, the advice of the judge, and even by the passions of the parties; that the practical intelligence and political good sense of the Americans are mainly attributable to the long use which they have made of the jury in civil causes.

These are weighty reasons in favor of the jury system. And they are borne out by the advancement and experience of other nations. The Danish Jurist, Repp, well expresses his views when he says: "All modern nations, (European and American at least), in so far as they dare express their political opinions, though disagreeing in many other points in politics, seem to agree in this: that they consider trial by jury as a *palladium*, which, lost or won, will draw the liberty of the subject along with it. In the many constitutions which have been projected or established in the nineteenth century, most other things were dissimilar and local; this alone was a vital point, a *punctum saliens*, from which it was expected that the whole fabric of a liberal constitution would be spontaneously dated." And, in all revolutionary movements in the nations of the continent, this mode of trial has been put in the van of their demands.

Trial by jury makes the law plain to the comprehension of, and popular with, the people, whom it most concerns. It was said of Socrates that he first drew philosophy from the clouds, and made it walk upon the earth. And of the civil jury it may also be said that it is an institution which draws the law from the clouds of technicality and abstraction, in which it is prone to hide, and makes it walk upon the earth, and familiarize itself with the unlearned and poor, and teach them, as well as the more favored, the nature and extent of their legal rights and remedies.

The object of all judicial investigation is the discovery of truth. Suppose the jury were abolished; what shall we substitute in its place? Shall we place upon the judge the burden of deciding both the law and the fact? Forsyth, in his "History of Trial by Jury," says: "To say nothing of the exhaustion of mind which would be felt by a judge called upon in the rapid succession of causes tried at *nisi prius* to weigh contradictory evidence and balance opposing probabilities, although it may sound paradoxical, it is true that the habitual and constant exercise of such an office tends to unfit a man for its due discharge. Every one has a mode of drawing inferences in some degree peculiar to himself. He has certain theories with respect to the motives that influence conduct. Some are of a suspicious nature, and prone to deduce unfavorable conclusions from slight circumstances. But each is glad to resort to some general rule by which, in cases of doubt and difficulty, he may be guided. And this is apt to tyrannize over the mind when frequent opportunity is given for applying it. But in the ever-varying transactions of human life, amid the realities stranger than fiction that occur, where the springs of action are often so different from what they seem, it is very unsafe to generalize, and assume that men will act according to a theory of conduct which exists in the mind of the judge. These views are just, and will be confirmed by every lawyer of capacity and experience.

But to all this it is often answered, the fault of the jury system consists in this: that it is a system of humbug and, frequently, of perjury. The jury are set apart in a box and told that they are judges. The lawyers address them as judges. The judge addresses them as judges. To be sure, he tells them flatly they must not meddle with the law, and that they must take it from his mouth; but he tells them, also, they are the judges of the fact, although he may probably annul their verdict because they have misjudged the fact. This mode of treating them as judges flatters their vanity, and flatters the vanity of the populace, who are told they are judged by their country—meaning thereby that they are judged by each other; whereas, in reality, their transactions are judged of according to law as expounded by professional lawyers. Some jurymen think themselves judges, occasionally try to judge for themselves, but, oppressed by the law of unanimity, and their own want of experience in business, they are compelled to yield after an ineffectual struggle, and to give way to a majority of their brethren, who usually

obey the direction of the judge. The minority in such cases, it is alleged, are sure to incur the guilt of perjury, and sometimes the whole jury do so. They are sworn to try the cause; but, instead of doing so, which would require a special exercise of judgment in each man, and thereby lead to strife, they retire for safety and ease, to apathy, and wait to hear and obey the opinion of the judge.

All this is wrong, these objectors claim. And they enquire, with a a fine show of indignation, Why should the forms of a barbarous age be maintained to the effect of producing deception? Why should not justice be administered under forms consistent with truth and honesty and sound principle, and in such a way that all may understand what is doing—that a man may know under what sort of government he actually lives, what place he holds, and what place other men hold, and what duties they perform to the community? Why should jurymen be puffed up with the notion that they are judges, when so many inventions have been devised to limit and annul their decisions, and have even been rightly and necessarily devised, as all admit who know anything of such proceedings?

It appears to us that all this heat and all these objections come from misconstruction and misunderstanding, wilful or ignorant of the proper province of a jury. They are to decide the controverted facts of a cause, under the law as given them by the judge. If they go contrary to the law, their verdict will be set aside. But, as to the facts, they are the supreme arbiters. If their verdict is against *all* the evidence, the judge will not allow it to stand. But, if it is a question of the weight of evidence, however much there may be on one side, and however little on the other, and whatever the judge's private opinion may be, the conclusion of the jury upon such evidence, in civil causes, must stand.

The trial by jury, then, is in reality a trial by one's peers. England and America were the first countries on earth that, at least in modern times, attained to a perfectly fair administration of justice, while they had a fixed system of law. This is mainly to be ascribed to trial by jury. One great value of a trial by jury consists in the control over judges which it gives to the public. Parties meet each other publicly; each brings forward his evidence publicly. The import of the case on both sides is stated before the public. The judge conducts the proceedings, and virtually decides the case, in the face of the public. The use of the jury is that the judge cannot decide the cause by merely declaring, in a form of words, that the plaintiff has gained, or the defendant has gained, his cause. A dozen ordinary men have been set apart, by lot, in a box; there they sit; they have heard and seen all that passed, and the judge, by his conduct and decisions during the trial, must satisfy them that he is right. If he fail, they have it in their power, for a time at least, to put a negative upon his judgment.

Most signal benefits result from this. The people are constrained to elect (we believe that the election of judges is a bad system) men experienced in business and learned in the law. An ignorant man in such a situation would never be able to control the lawyers, and would be exposed and run down by public ridicule.

The judge is constrained to act justly. He must act righteously, or encounter infamy and daily discomfiture from the opposition of juries to his opinions. Hence the general impartiality and high reputation of our judges. The Turkish mollahs or cadis are said to yield readily to corruption. Let it be supposed that, when a cause is called, a committee of the surrounding mob were at the same instant called out by lot, and the cadi or judge, after hearing the cause, compelled to convince this committee that the decree pronounced by him is just; it is evident that he would immediately, or from necessity, become a just judge.

Our system is one of law, and not one of caprice. It is correct in that it provides that disputes shall be decided, not by ignorant men, but by the aid of judges learned in the law. Were ordinary persons taken by dozens, by lot, from the mass of mankind, to decide causes without the direction of judges, the country would be without law. Every different jury would have a different opinion concerning the rules of business. In other words, no man would know how to act, because justice would be administered according to no fixed or recorded principles. All the speculations of those men who propose to establish local or popular tribunals, to decide without appeal, are the result of mere ignorance. Civilization cannot make progress unless the principles be fixed and certain according to which transactions are

to be regulated, and principles can only be recorded and adhered to by men who make the study of them the chief business of their lives.

Trial by jury always has been popular with the people, and in spite of all that has been said against it of late years, and in spite of its gross abuse in many instances, it has not only held its ground, but the people have placed it beyond the law-making authority to tamper with it, by embedding it in the constitution of each state. And Judge Cooley, in an article published in the December number of the *American Law Register*, entitled "Some New Aspects of the Right of Trial by Jury," calls attention to the fact that, in several of the states, the legislature has gone beyond the constitution in giving importance to the jury by diminishing the functions of the judge; taking from him entirely the right of assisting and guiding the action of the jury in sifting and weighing evidence, which was an important part of his duty at the common law. The judge is required in these states to confine his charge strictly to a written presentation of the law, and is inhibited from commenting on the facts. This is the case in Missouri. Judge Cooley says: "It does not seem to have occurred to any one to raise the question whether, in preserving the historical right of jury trial, the constitution has not guaranteed the functions of the judge, as well as those of the jury; and whether it was admissible to change the system radically in one particular more than another. * * * It is surely a matter of some importance to know whether a judge may be made a cipher in this time-honored tribunal, and whether the agreement of twelve men in a certain conclusion on the facts, however accomplished, is all the constitution aims at." This whole article is well worthy the careful consideration of every lawyer.

While we deprecate encroachment upon, or diminution of, the functions of the judge, rightly understood, as they existed at the common law, we are firm believers in the system of trial by jury in both criminal and civil cases. That it might be modified in some particulars so as to increase its efficiency without in the least impairing the system, we also believe. But it is not the purpose of this paper to discuss this matter. We believe the system the best yet devised by man for the administration of justice. Taking all things into consideration, it is, as a rule, the best for suitors, the best for the people, the best for judges, and for the profession of the law. Much weight is to be given to the deliberate judgment of a great, brave, thoughtful, intelligent, and progressive people in favor of this system, which they have long tried, which has become more popular the more intelligent and great they have become, which they have found efficient in the administration of justice, and which they declare to be the *palladium* of their liberties. It is only eminent and exalted nations that can thus believe in trial by jury. Where the mental capacity of a nation is mean, or the standard of public morality low, and the obligation of an oath is lightly felt, no worse system could be devised.

For protecting the innocent, the jury system is most effectual. It is very rare that an innocent man is convicted. To say such a catastrophe never happens would be to deny recorded facts. But, before it can happen, the accused has many opportunities to prove himself not guilty. The examining and committing magistrate, the grand jury and petit jury, and the presiding judge must all, in different degrees, have concurred in the result. And this is not all, for the court of appeals, to which the convicted may appeal, stands ready to correct any error that may have been committed in the steps leading to the conviction.

But it cannot with equal truth be asserted, as pointed out by Mr. Forsyth, that juries never acquit in ordinary cases where they ought to condemn. "This is, no doubt, the vulnerable point of the system: that feelings of compassion for the prisoner, or of repugnance to the punishment which the law awards, are sometimes allowed to overpower their sense of duty. They usurp, in such cases, the prerogative of mercy, forgetting that they have sworn to give a true verdict according to the evidence. But it is an error at which humanity need not blush; it springs from one of the purest instincts of our nature, and is a symptom of kindliness of heart which, as a national characteristic, is an honour."

That our judges in this country and England are held in higher estimation and honor than in other countries is due, in great part, to the jury system. In deciding upon facts, opinions will necessarily vary, and judges, like other

men, are liable to be mistaken in estimating the effect of evidence. Every one thinks himself competent to express an opinion on a mere question of fact, and would not hesitate to comment freely and with acrimony upon the decision of a judge which, on such a question, happened to be at variance with his own. The judge would incur much odium, and lose much respect, if, in the opinion of the public, he had decided wrong on a matter of fact about which they believed themselves as well able to determine as himself. This kind of attack is now saved him by the intervention of the jury. He merely expounds the law and declares its sentence, and in the performance of this duty, if he does not always escape criticism, he very seldom incurs censure. And it may be said that the tendency of judicial habits is to foster an astuteness which is often unfavorable to the decision of a question upon its merits. No mind feels the force of technicalities so strongly as that of a lawyer. It is the mystery of his craft, which he has taken much pains to learn, and which he is seldom averse to exercise. The jury acts as a constant check upon, and corrective of, that narrow subtlety to which professional lawyers are so prone, and subjects the rules of rigid techicality to be construed by a vigorous common sense.

And DeTocqueville is right when he says, in substance, that the jury, which seems to restrict the rights of the judiciary, does, in reality, consolidate its power; and in no country are the judges so powerful as where the people share their privileges. It is especially by means of the jury, in civil causes, that the American magistrates imbue the lower classes of society with the spirit of their profession. Thus the jury, which is the most energetic means of making the people rule, is also the most efficacious means of teaching it how to rule well.

The members of the legal profession ought to be the last to denounce the jury system, or to wish to see it in any way impaired. They, more than any other class of men, have been the leaders and rulers of the people of this country. They have been enabled to do this by their influence upon the minds of men; and the most abundant source of their authority has been. and is, the civil jury. Through this medium they are in constant intercourse with the people; and, to their honor be it said, they have, in that intercourse, so impressed the people with their ability, culture, honor, integrity, and fitness to rule, that they have willingly chosen them as their law-makers and rulers.

Of the abuses of the jury system we have not space to speak. Every good citizen is interested in exposing and crushing them. The *Globe-Democrat* of this city for once deserves well of this whole community for the thorough and fearless manner in which it has made known to the people the abuses of trial by jury in this city. If the other great daily journals of the country would, in a like manner, point out these abuses, and demand their immediate correction, it would be but a short time before they would be entirely reformed. If error, abuse and wrong have crept into the system, the true remedy is, not to abolish it, but to vigorously go about abolishing the error, abuse, and wrong.—*Southern Law Review*, (St. Louis).

## *GENERAL NOTES.*

Some Recent Cases.—In vol. 6 of *Daly's Reports*, being reports by the Chief Justice of the Court, of cases argued and determined in the Court of Common Pleas for the city and county of New York, several points of interest occur, among which may be noticed the following:—*Smith* v. *Reed*, p. 33; A boarding-house keeper was held liable for the loss of a boarder's property by theft, committed by a stranger permitted by a servant, in the employ of the boarding-house keeper, to go into the boarder's room. *Hoffman* v. *Gallaher*, p. 42: Plaintiff agreed to paint a portrait of defendant, which should be a likeness satisfactory to his friends. In an action for the price of the portrait, *held* that it was not competent to exhibit the portrait to the jury to enable them to determine if it was a satisfactory likeness. *McGuire* v. *N. Y. C. & H. R. R. R. Co.*, p. 70: In an action for personal injuries for negligence, a stipulation by defendant's attorney as a condition for postponement, that the action should not abate if plaintiff died, *held* valid and enforceable. *Matter of Fincke*, p. 111: The court may summarily order an attorney to pay to his client money collected in a suit, and if the attorney claims a lien for professional services, he is not entitled to a jury to determine his claim.