The Legal News.

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EMPLOYER AND WORKMAN.

The rule that a workman has no action against his employer for injuries received in the performance of his duty, has been sustained by the English Courts in a long series of decisions. Some of the principal cases referring to the point will be found on turning back to page 159 (No. 14). Of late, however, some have wished to relax the rule a little in the case of railway companies, and to make them liable for the injuries sustained by their employees. The London correspondent of the *Gazette* notices the proposed change as follows:—

"Another topic that is being fully ventilated is the propriety of making railway companies liable for the injuries received by their servants. Now the latter are entitled to no compensation for such injuries, a case, which is considered conclusive, having been decided some years ago, in which the learned judges ruled that in the absence of an express contract to the contrary there was an implied contract between employer and servant that the former should not be liable for damages received by the latter in the performance of his duty. The grounds upon which this decision was based have since been admitted to be wrong, but the decision stands nevertheless, the liability of an employer to a stranger for injury caused by his servant being an exception to the general rule, and not a part of the common law. The railway servants demand to be put on the same footing as the public, and they have the able advocacy of Mr. Lowe on their side, but it is extremely doubtful whether they will gain their object, especially as the bill for improving their legal position was talked over just before the recess, and the question has assumed so difficult an appearance that no one seems inclined to revive it."

There seems to be no insuperable objection to the proposed alteration of the law. It it were carried out, the companies would become in point of fact the insurers of their employees against accidents, and, if appreciable at all, the effect probably, other things being equal, would be simply to reduce the wages paid to railway servants by so much as would cover the increased risk to the employer. Against the change, it might be urged that there is no occasion for legislating in the interest of a class, seeing that accident insurance companies stand ready, for a small consideration, to afford the insurance desired by employees.

FORENSIC ELOQUENCE.

The style of speaking in the English House of Commons, as everybody is aware, has changed very greatly within less than a century. The impassioned oratory of Pitt's time is heard no more, and the Commons does its business for the most part in a very matter-of-fact way, with but little toleration and less respect for set speeches. Equally striking, according to the *Edinburgh Review*, is the change which may be observed in the style of speaking in the English Courts. Noticing Sumner's statement, that he had "heard a style of argument before the Supreme Court at Washington superior to anything he had heard in London," the *Review* says:—"We are unable to make the comparison. But there has long been at the English bar an aversion to oratorical display, except on very rare occasions which seem to admit of it; and, on the whole, the business of our courts is conducted in a very plain, matter-of-fact way which may have seemed tame to an American ear, especially to Sumner, who had in him the instinct and powers of an orator. Indeed, we fear that if he could now renew his visits to Westminster Hall he would not find that an interval of forty years has raised or improved the intellectual, legal, or oratorical powers of those who preside or argue there. On the contrary, with some few exceptions, he would find, we regret to avow it, a great and palpable decline. On the bench he would look in vain for the strength, the concentration, the learning, the masterful authority of those earlier days. At the bar he would seek in vain for eloquence, or even advocacy, of the highest order, and he would learn with extreme surprise that one of the most eminent members of the English bar in 1878—a man without a superior, and almost without a rival—was the *ci-devant* Secretary of State of the Southern Confederacy. More

serious still is the fact that the status of an English judge has notably declined. The great augmentation in the number of judges, the divisions of the courts into upper and lower ranks, the abolition of peculiar courts, and the modern habits of the judicial body, have concurred to extinguish that rare and almost sacerdotal dignity which from an early period of our history had clung to the King's judges. They are now regarded as magistrates —respected but not revered."

REPORTS AND NOTES OF CASES.

COURT OF REVIEW.

Montreal, April 30, 1878.

TORRANCE, DORION, PAPINEAU, JJ.

THIBAUDEAU *et al.* v. JASMIN & GENDRON.

[From S. C. Richelieu.

Affidavit for Writ of Compulsory Liquidation—Security held for Debt.

Held, that it is not necessary that the affidavit under Section 9 of the Insolvent Act of 1875 should state that the debt is not secured.

The defendant Gendron complained of a judgment rendered against him by the Superior Court, Richelieu District, for $827. The proceedings began by the issue of a writ of compulsory liquidation. The defendant, among other objections, urged that the affidavit under which the writ issued, was null, as it omitted to state what guarantee was held by the plaintiffs for their debt.

TORRANCE, J. There are several judgments of the Superior Court in which this objection was made: *inter alia*, *Barbeau* v. *Larochelle et al.*, 3 Q. L. R. 31; but the judgment in that case was reversed in appeal, and is reported at p. 189 of same volume (1 LEGAL NEWS, 178.)

Judgment confirmed.

E. Lareau for plaintiffs.

Barthe & Co., for defendant Gendron.

TORRANCE, DORION, RAINVILLE, JJ.

MARIN v. BISSONNETTE, & BISSONNETTE, opposant.

[From S. C. Iberville.

Donation, Mode of Questioning Validity of.

Held, that a deed of donation may be set aside on contestation of the opposition filed by the donee invoking such deed.

The plaintiff, in order to obtain payment of a money condemnation against the defendant, took in execution a piece of land which was in contest in the case. The opposant, daughter of defendant and living with him, claimed the land as her property under a deed of donation from her father, 15th August, 1876. The plaintiff contested the opposition, and demanded the nullity of the donation on the ground of fraud against the creditors of the donor. The contestation was maintained by the Court at Iberville.

TORRANCE, J. There are two points of importance in the case. The opposant contends that the contestation comes too late, owing to the opposant having obtained a prescriptive title under C. C. 1040, which requires the creditor to bring his suit within one year from the time of his obtaining a knowledge of the fraud. The Court has decided that the facts proved do not bring the case within the rule, as it is only proved that the plaintiff had heard of the transfer. We think that the judgment in this respect is unassailable. The opposant further contended that the validity of the donation could only be tested by a revocatory action. The Court on this point was also against the opposant. It was so decided long ago in the case of *Cumming et al. & Smith et al.*, 5 L. C. J., 1, where the contestation prayed that the deed should be set aside, and the conclusions were such as to enable the Court to do justice between the parties as fully as in an action purely in form revocatory or *actio Pauliana*. We see no injustice in confirming the judgment, being satisfied that the pretended deed of donation is fraudulent and should be set aside.

Judgment confirmed.

Jetté & Co., for opposant.

Doutre & Co., for plaintiff, contesting.

SUPERIOR COURT.

Montreal, April 30, 1878.

MACKAY, J.

WILSON v. CITY OF MONTREAL.

Illegal Assessment—Action for Restitution—Interest.

Held, that a person who pays money for assessment under an assessment roll made by Commissioners after the time appointed for them to report, and when they were *functi officio*, is entitled to restitution.

2. It is not necessary under such circumstances that the Court should declare the assessment roll null, or that the roll should be before the Court.

3. Interest on money so illegally paid runs only from the date of the demand of restitution.

The declaration asked for the setting aside of an assessment roll, and that defendants be condemned to pay plaintiff $1,823.99, with interest and costs. It alleged that on the 27th July, 1868, commissioners in expropriation were appointed for the widening of Place d'Armes Hill; that they were to report on September 15, and the delay was extended to October 10. That on November 20, long after their powers had ceased, the commissioners made an assessment roll, distributing the cost of the improvement, and assessing plaintiff $1,236 31. He paid it to avoid an execution, and now sought to recover it.

The plea denied plaintiff's allegations, and set out that he was benefitted by the improvement, and never complained of the roll, which was duly confirmed.

PER CURIAM.—The payment to defendants is proved; it was a payment under protest. As to whether the money was a debt due by law to defendants, it was so, of course, if the assessment roll referred to could be seen to have been made by the Commissioners within their powers, and within the time fixed for their operating. The Commissioners' appointment conferred office on them only for a time, that is, up to Sept. 15. Was that time extended by authority? Plaintiff says so, but he says no more than that it was extended to Oct. 10. Nothing appears from which we can say that beyond this date the Commissioners had power or office; yet the assessment that plaintiff paid was upon a roll made by those Commissioners only in November. This was too late.

Much has been written in the last thousand years on error of law and error of fact, and on error or mistake as ground for rescinding agreements, or reclaiming money paid. Writers on the subject have in all times differed. Even texts of the Roman law on the subject seem contradictory. See Savigny; Thibaut; Smith's Leading Cases; Kent's Comm. Under the English and American systems of law the case of defendants would prevail; but I do not see how the English or American systems can control this case. We have law of our own, and it cannot be put out of mind, or made to cede to other law. I refer to our Civil Code 1047, which I read by the light of the commentators, for instance, of Marcadé, vol. 5, pp. 254 et seq. The assessment money paid by Wilson was not due to any body; the defendants must restore it. I see it has been held so in Scotland, in a case like this one.

As to my declaring the assessment roll null and void, largely, as prayed, I cannot do that, in the absence of the roll, nor is it absolutely required that I should do this to enable me to order the restitution of the money in question. I see enough upon the issues as formulated and the proofs in so far as the parties have made proofs, and (I may add) abstained from making proofs, to compel me to say that it appears that Wilson's money was paid as an assessment imposed upon him upon the operation of the assessors made outside of the time within which it was competent to them to operate. Plaintiff does show *prima facie* that the Commissioners were *functi officio* when they made the assessment roll. If they were not after the 15th Sept. they were after 10th Oct.

A question of some importance remains, that of interest. The plaintiff is entitled to interest, but from what date? He remained seven years and a half inactive, and then first asks defendants to repay him his money, with interest from time of payment. Our Code bars demand for all arrears of interest over five years. But the law also enacts for a case like this, that interest only runs from demand, for the defendants were in good faith. (5 Marcadé, 258.) They supposed that the money was due to them. The Commissioners erred in form, so the money was not due, not a lawful debt. A quasi contract resulted from all that passed, obliging defendants to repay, but only on demand. No demand was made until this suit was brought, so interest can only be allowed from service of process. The like was ruled in *Brunelle* v. *Buckley*, which went through three Courts.

E. Barnard for plaintiff.

R. Roy, Q.C., for defendants.

JOHNSON, J.

DAWES v. FULTON *es qual.*

Assignee, Action against—Insolvent Act, Section 125.

Held, that the ordinary hypothecary action cannot

be exercised against an assignee who is in possession of immoveable property of an estate in his quality as such.

JOHNSON, J. The defendant is assignee of the insolvent estate of William Henderson, who purchased from the plaintiff, in October, 1872, five lots of land for the sum of $2,855, paying down $713, and undertaking to pay the balance in four annual instalments with interest, and hypothecating the land for security. The balance now due is $1,955. In July, 1875, Henderson made an assignment to Mr. James Tyre, and the defendant was subsequently elected by the creditors. In November following Henderson got a deed of composition and discharge from his creditors, and, in addition to the sum that they agreed to take, he assumed all hypothecary claims on his real estate; and the assignee was to reconvey everything except the immoveable property, which was to remain vested in him as collateral security for the performance of all the other conditions of the deed. He has remained in possession ever since, and the object of the present action is to get a *delaissement*, or make him pay to the plaintiff the balance of the price of the land. There is a demurrer to this declaration; and it was ordered to stand until the merits. The grounds of it are, first, that the action as taken is prohibited by the 125th section of the Insolvent Act; and secondly, that, under the allegations of the plaintiff, even if the right of bringing an ordinary action existed, it is made apparent that the defendant's possession, in his quality of assignee, has a character given to it by the deed of composition which would prevent the exercise of the hypothecary action, and deprives him of the means of making a *deguerpissement* as an ordinary proprietor, as he holds as he does only in virtue of his office, which subjects him to the operation of the Insolvent Act. It appears to me quite undeniable that the defendant holds only as assignee, and has certain duties imposed upon him in respect of this property as such, and only as such. He is sued as assignee, and to a certain extent is still accountable to the creditors. The 125th section subjects him to the summary jurisdiction of the Court, as one of its officers; and it enacts also in express terms that "all remedies sought or demanded for "enforcing any claim for a debt, privilege, "mortgage, hypothec, lien or right of property "upon any effects or property in the hands, "possession or custody of an assignee may be "obtained by an order on summary petition; "and not by any suit or other proceeding what-"ever." The remedy therefore here is not an hypothecary action in the ordinary form as taken in the present case; but it is to ask for an order that the assignee be authorized to sell the property; and under the demurrer the action is dismissed with costs. It was urged that an order had been made in the Insolvent Court at variance with this view of the law; but I have looked at that order which was made by myself, and I only find it ruled there that property seized upon Henderson was seized *super non domino*, which does not in the least conflict with the denial of an ordinary right of action against an assignee who is subject by law to the summary jurisdiction of the Court.

Benjamin for plaintiff.

A. & W. Robertson for defendant.

DIGEST OF ENGLISH DECISIONS.

[Continued from p. 240.]

2. A mining company sank a pit, and intercepted underground water, which had previously flowed in an unascertained course, and threw it upon the land of a neighbour. The water had previously, when left to flow underground of itself, come out upon the neighbor's land. *Held*, that the mining company was liable for the damage.—*West Cumberland Iron and Steel Company* v. *Kenyon*, 6 Ch. D. 773.

Misprint.—See *Innkeeper*.

Navigable River.—The right of navigation in a river above tidewater, acquired by the public by user, is, as regards the owner of land through which the river flows, simply a right of way; and the owner of the land may erect a bridge over the river, provided it does not substantially interfere with the right of way for navigation. The property in the river-bed is in the owner of the land.—*Orr Ewing* v. *Colquhoun*, 2 App. Cas. 839.

Negligence.—See *Mine*, 1; *Telegraph*.

Partnership.—In September, 1871, C. gave bonds, in accordance with the rules of *Lloyd's*, to enable his son W. to become a member thereof, as he the same month did, carrying on the business in his own name exclusively. In January, 1872, an agreement was made pur-

porting to be between father and son, but executed only by the son, reciting that the father had given the bonds as above, and had also loaned the son £200; and, in consideration therefor, the son covenanted with the father that one H., and no other, should underwrite in W.'s name, and should be paid £200 a year and one-fifth the net profits; that C. should be at liberty to cancel the bond at any time, on notice to C. and H.; that C. should not spend more than £200 a year till he paid his debts; that one-half the net profits, deducting H.'s share, and £25 a year, should belong to C.; that W. should not endorse or speculate until he paid his debts; that W. should repay C. the £200 and interest on demand; that W. should keep a separate account, as underwriter, which should be liable to inspection by C.; and that the profits of business should not be touched before they amounted to £500, and then, with C.'s consent, an agreed sum might be withdrawn on account of W., and a like sum for account of C. None of the creditors knew that the father had anything to do with the business. The son also carried on two other distinct businesses in his own name. In bankruptcy proceedings against the son, *held*, that the father was not a partner in the underwriting business.—*Ex parte Tennant. In re Howard*, 6 Ch. D. 303.

Patent.—In 1865, a patent for skates was granted in England. Two years before, a foreign book, giving a general description of the invention, was sent to the library of the Patent Office. A few weeks before the granting of the patent, another foreign book, containing a drawing of the invention, was sent to the library. The book was not catalogued, but was in a room open to the public, where a librarian testified that he once noticed it before the date of the patent. *Held*, not to be prior publication.—*Plimpton* v. *Spiller*, 6 Ch. D. 412.

Presumption.—A respectable farmer and church elder courted a young lady for some years, and they were finally, in 1850, married, while she, to his knowledge, was in an advanced stage of pregnancy. Seven weeks afterwards, she was delivered of a daughter. The matter was kept secret, and the child removed to another part of the country, where the husband supported her till she became able to support herself. In 1875, the girl claimed to be his daughter; and he brought this action to have it declared that she was not. Both husband and wife swore to that effect; and the wife told two different stories to account for her pregnancy. *Held*, that the presumption of paternity against the husband was, under the circumstances, almost irresistible, and that the burden was on him to show affirmatively the contrary, and this he had failed to do.—*Gardner* v. *Gardner*, 2 App. Cas. 723.

Privity.—See *Telegraph.*

Profits.—See *Partnership.*

Public Worship Act, 1874.—1. The Arches Court of Canterbury found the Rev. C. J. Ridsdale to have offended against the ecclesiastical law, in that (1) he wore, during the service of holy communion, vestments known as an alb and chasuble; (2) he said the prayer of consecration in the communion service while standing, so that he could not be seen by the people to break the bread and take the cup in his hand; (3) he used in the communion service wafer bread, instead of bread such as is usually eaten; (4) he placed and retained a crucifix on the screen between the chancel and the nave or body of the church. On appeal to the Judicial Committee of the Privy Council, *held*, that the first and fourth charges were established, and the judgment of the Arches Court should be affirmed; and that the second and third findings were not sustained by the form in which the charges were made, and should be disallowed. A very full historical discussion of the ecclesiastical law and practice applicable to the case.—*Ridsdale* v. *Clifton*, 2 P. D. 276.

2. A reredos made of Caen stone, of which the central compartment showed the Saviour on the cross and the figures of St. John and the three Marys, all carved in relief, was set up in a new church. The bishop refused to consecrate the church until it was taken down. This was done, and the church consecrated. On petition for leave to replace the same, *held*, that the petition should be granted.—*Hughes* v. *Edwards*, 2 P. D. 361.

Publication.—See *Patent.*

Railway.—A railway company contracted to carry cattle from Ireland to Huntingdonshire, in England. The railway company employed a steamer not belonging to the company, nor worked by it, to convey the cattle from Dublin

to Liverpool. On the voyage, the cattle were lost through the negligence of the master and crew of the steamer. The form of contract employed by the railway company declared that the company would not be liable for loss or damage arising from such negligence, or from any accident whatever incident to navigation. *Held*, that, under the scheme of legislation made up of the Traffic on Railways and Canals Act, 1854 (17 & 18 Vict. c. 31), the Railways Clauses Act, 1863 (26 & 27 Vict. c. 92), the Railways Regulation Act, 1868 (31 & 32 Vict. c. 119), and the Railways Regulation Act, 1871 (34 & 35 Vict. c. 78), these conditions embodied in the contract were unreasonable and void; that the company was liable exactly as it would have been had it been the owner of the vessel; and that it could not set up as a defence in a suit like this for damages its own illegal action in working a steamboat. —*Doolan* v. *The Midland Railway Co.*, 2 App. Cas. 792.

Sheriff.—*Held*, that a sheriff had made in substance a levy, and was entitled to his poundage and fees, where he went to the debtor's house with a warrant and demanded payment, and told the debtor he should go on to sell if the amount was not paid, and the debtor paid.—*Bissicks* v. *The Bath Colliery Company, Limited. Ex parte Bissicks*, 2 Ex. D. 459.

Shipping and Admiralty.—In an action of co-ownership in a vessel against J. H., formerly sole owner, G. W. alleged and proved that a bill of sale of a moiety of the vessel from J. H. to T. W. was duly registered, and that G. W. had purchased and paid for that moiety, receiving therefor a bill of sale from T. W., which was also duly registered. J. H. stated in defence that he never gave a bill of sale of or sold said moiety, and, if registration thereof had been made, it was fraudulent. *Held*, that the plaintiff, being a *bona fide* holder for value, was not affected in his rights by the alleged fraud; and his demurrer to that part of the defence alleging fraud was sustained. — *The Horlock*, 2 P. D. 243.

Slander.—See *Libel and Slander.*

Solicitor.—See *Attorney and Client.*

Specific Performance.—1. An agreement for a lease for thirty years was duly executed Sept. 5, 1876; but it did not state when the lease was to begin. It appeared that the proposed lessor knew the purpose for which the premises were leased and to be used; but he refused to complete the lease, and the lessee was kept out for a good many weeks. On a suit for specific performance and for damages, *held*, that the agreement was a sufficient memorandum under the Statute of Frauds, and under it the lease must be held to commence immediately, and that there must be specific performance and damages for the plaintiff's loss of profits in the business which he leased the premises to carry on, during the time he was kept out.—*Jaques* v. *Millar*, 6 Ch. D. 153.

2. Dec. 23, 1861, M. took a lease from A. of certain premises for ten years, with the option in M. at any time during the term to purchase the premises for £3,500, upon payment of which to A. the lease should determine, and M. should be entitled to an assignment thereof. Jan. 23, 1863, A. mortgaged the premises to G. In July, 1867, after some negotiations looking to a purchase by M., the latter, by his solicitor, gave notice to A. and G. that he intended to purchase. A draft of a conveyance of the premises to M. was prepared, but was not completed, owing to a failure between A. and G. to agree as to whom the purchase-money should be paid. This was the subject of a correspondence between July, 1867, and March, 1868. In July, 1868, G. gave M. notice to pay the rent to him; and M. made him some payments at odd times, the receipts whereof, both before and after the date for the termination of the lease, were generally expressed to be for rent. In Nov., 1872, A. went into bankruptcy; and, May 1, 1873, the trustee in bankruptcy informed M. that he proposed to sell the premises, and gave M. the first chance. M. said nothing about having already agreed to purchase until after a second interview, when he set up the claim, and in July, 1873, filed his bill for specific performance. Therein he set up the additional fact, that he had, with the knowledge of both A. and G., expended about £300 in improvements on the premises since 1867. *Held*, that the optional clause in the lease, followed by the notice given in 1867, formed a good contract; but that M., through his delay in acting from March, 1868, to May, 1873, had lost his right to specific performance, and the fact that he was in possession did not alter the case, as he was in during that time, not under the

contract as purchaser, but as tenant under the lease.—*Mills* v. *Haywood*, 6 Ch. D. 196.

Stoppage in Transitu.—W., a trader in Falmouth, purchased goods of B., a merchant in London. On Oct. 27, 1876, B. sent an invoice to W. The goods were put on board the same day. The steamer sailed October 29, and arrived at Falmouth October 31, when the goods were put into the warehouse of C., wharfinger and agent of the steamer company. In the evening of October 30, or the morning of October 31, the bill of lading arrived. October 30, W. absconded, and, November 4, he was adjudged bankrupt. The same day, B. telegraphed to C. not to deliver the goods. It appeared that C. was in the habit of receiving goods and holding them at the risk of the consignee, and that he had the exclusive right as against the steamer company of delivering the goods. One condition of delivery was, that the freight should be paid. C. testified that he considered himself in all cases the agent of the consignee from the time of the arrival of the goods on the wharf. *Held*, that the goods were still in transit when B.'s message arrived. C. was not agent of the consignee.—*Ex parte Barrow. In re Worsdell*, 6 Ch. D. 783.

Telegraph.—*Held*, affirming the decision of the Common Pleas Division, that an action cannot be maintained against a telegraph company by the receivers of a telegram, for negligence in the delivery thereof, in consequence of which negligence the receivers suffer damage.—*Dickson* v. *Reuter's Telegraph Co.*, 3 C. P. D. 1; s. c. 2 C. P. D. 62; 1 Legal News, 37.

Vendor and Purchaser.—A tenant for life without power to lease undertook to grant a sixty years' lease at 6*d.* rent, with a covenant for quiet enjoyment, the lessee to erect a house, as he in fact did. The lessee died, and his son paid rent to H., who had come into possession of the fee. Subsequently, H. conveyed the property to the plaintiff, subject to the sixty years' lease, which he supposed valid. The plaintiff sued for immediate possession. *Held*, that he was entitled.—*Smith* v. *Widlake*, 3 C. P. D. 10.

Watercourse.—See *Mine*, 2.

Will.—1. Testator left £6,000 in trust for his two daughters J. and A., for their respective lives, in equal moieties, and "from and immediately after the several deceases of each of them, leaving lawful issue or other lineal descendants or them surviving," upon trust to pay, assign, and transfer the principal fund "of her or them so dying unto her or their child or children, or other lineal descendants, respectively, . . such child or children, or other lineal descendants, to take *per stirpes* and not *per capita*, . . to be paid . . to them respectively when and as they respectively shall attain the age of twenty-one years." The income to be applied meantime, if necessary, for their support; "nevertheless, the . . shares of the said child or children," in the principal, "shall be absolute vested interests in him, her, or them immediately on the decease of his, her, or their respective parent or parents." In case a daughter should die without leaving "issue or lineal descendants her surviving," there was a gift over to the other daughter and her issue and lineal descendants, in similar form; and, in case both daughters should so die, a gift over to third persons. *Held*, that the children of a daughter who died before their mother's death did not take.—*Selby* v. *Whittaker*, 6 Ch. D. 239.

2. Testator began as follows: "As to my estate, which God has been pleased in his good providence to bestow upon me, I do make and ordain this my last will and testament as follows (that is to say)." He then devised a farm; then, in an informal way, another farm; he then made seven money bequests and a gift of shares in a company, gave his executors £100 each, and made M., R., and O. his "residuary legatees." He possessed other freehold lands besides those mentioned in the will. *Held*, that such lands passed to M., R., and O., as "residuary legatees."—*Hughes* v. *Pritchard*, 6 Ch. D. 24.

3. Testator gave his brother J. S. all his real and personal estate, with full power to give, sell, and dispose of it in any way he should see fit, and appointed him sole executor. The will then proceeded thus: "But provided he shall not dispose of my said real and personal estate, or any part thereof, as aforesaid, then, and not otherwise, I do hereby give, devise, and bequeath my said real and personal estate, or such part or parts thereof as he shall not so dispose of, in the manner following." The testator then proceeded to dispose of his property by a series of trusts, entails, and

contingent remainders; and, after some specific legacies, gave to H. and D., two of the beneficiaries, the household furniture, &c., to hold in trust as heirlooms for whoever should succeed under the provisions of the will to the property in the house; gave the residue of his property to the said H. and D., upon trust to sell and convert "with all convenient speed after the death of the survivors" of himself or his said brother J. S. and the said H. and D. were, in this part of the will, appointed executors. The expression, "the survivor of myself and my said brother" J. S., occurred in several places in the will. J. S. died in the testator's lifetime. *Held*, that the gift to J. S. was a gift for life, with power of appointment and a gift over on J. S.'s failure to appoint, or on his death in testator's lifetime; and this latter event having happened, the gift over took effect on the death of the testator.—*In re Stringer's Estate. Shaw* v. *Jones-Ford*, 6 Ch. D. 2.

4. A testator recited that his son had become indebted to himself in various sums, and bequeathed to the son the sums mentioned, and released him from payment thereof. Between the date of the will and testator's death, the son became still further indebted to the father. *Held*, that these sums were not covered by the will, under the Wills Act (1 Vict. c. 26).—*Everett* v. *Everett*, 6 Ch. D. 122.

5. A testator gave, devised, and bequeathed "all the real and personal estate which I am or shall or may be entitled to under the will of my late uncle J. M." to the defendants. He bequeathed to the plaintiff the residue of his personal estate. Between the date of the will and the testator's death he received £800 from his uncle's estate, and invested £600 thereof in railway stock. He purchased before his death £3,500 more of this stock; and at his death the whole £4,100 stock was standing in his name. *Held*, that the defendant was entitled to the £600 stock.—*Morgan* v. *Thomas*, 6 Ch. D. 176.

6. A testator provided that his residuary estate should be divided into sevenths, gave one-seventh to each of his two sons absolutely, and the remaining five-sevenths to trustees to pay the income to his five daughters, Elizabeth, Sarah, Eliza, Mary, and Hannah, during their respective lives, in equal shares. Upon the decease of Elizabeth, the trustees should pay one-fifth of the fund to the children of Elizabeth; upon the decease of Sarah, one-fifth to the children of Sarah; upon the decease of Eliza, one-fifth to the children of Mary; and upon the decease of Hannah, one-fifth to the children of Hannah. The testator made mention in a subsequent part of the will "of the issue of any of" his daughters, without discriminating. *Held*, that the will must be construed by interpolating a provision for the children of Eliza on her death similar to that made for the others, and a clause stating that the provision for the children of Mary should take effect on the death of Mary, instead of on the death of Eliza.—*In re Redfern. Redfern* v. *Bryning*, 6 Ch. D. 133.

THE EARLY FRENCH BAR.

In the earlier period of the French bar the proceedings in the ecclesiastical courts were conducted wholly in the Latin language; in the secular courts the vulgar tongue alone was used; but the technical terms of the law, the pedantry and affectation of lawyers and judges rendered their speech nearly, if not quite, incomprehensible to the public at large; so that the French that was heard in the courts was as different from that of the common people as was that of the prioress of Chaucer:

> "And French she spake full fayre and fetisly,
> After the scole of Stratford atte Bowe,
> For French of Paris was to hire unknowe."

Thus when, in 1393, the kings of England and France were treating for a truce, the English commissioners could not understand the language of the French lawyers who represented their adversary; and Froissart says that the English excused themselves in the discussion by saying, "that the French which they had known from infancy was not of the same nature and condition as that which the clerks of law used in their treaties and proposals." As the English of the higher classes of that day, such as would be selected for agreeing on a truce with the enemy, generally understood French quite as well as their own language, it would seem that the dialect of the bar of which they complained must have been peculiarly barbarous and uncouth. Such, however, was the fashion of the age; science and learning of

all kinds veiled themselves in obscurity, and sought to enhance the popular respect by an air of profound mystery.

At a time when the spiritual courts engrossed a large part of the legal business of the country, and when causes in the civil courts were often tried by wager of battle, the demand for lawyers was limited; the functions and station of lawyers were somewhat uncertain, and the bar could hardly claim the dignity of being a separate institution. In the ecclesiastical courts, the preparation, management and trial of causes was entrusted to persons who had taken clerical or priestly orders; a class of men who, however, not being content with this exclusive privilege, appeared also as advocates in the secular courts, notwithstanding there was a rule, more often broken than kept, which forbade them to appear except in their own courts, unless in cases where the interests of the church were concerned; a wide and vague exception, since it might be asserted that the church was concerned in all questions touching good morals, which are in some way involved in nearly every judicial proceeding. The superior learning of the clergy, joined to the veneration in which they were held by the people, gave them great advantages in enabling them to intrude themselves into the secular courts, where they affected to appear less in the guise of partizans than as defenders of morality and religion. Some of these made the practice of law a regular pursuit; they possessed ability and sometimes achieved distinction; at least one of them became a bishop and another a pope. They had a double chance of promotion, from the crown and from Rome. Since we perceive that the secular lawyers adopted the style of the spiritual brethren, and accepted their canons of taste, there is reason to suppose that the influence of the latter outweighed that of the former; but there is but little or no evidence extant of any hostility growing out of the rivalry of these two orders, which might otherwise have been brought forward as a reason for the fact that in all the subsequent and long protracted struggles between the crown and the Roman See, the bar uniformly ranged itself on the side of the crown. At first, no doubt, the clergy found a pretty easy victory over lawyers deficient in learning, practicing before ignorant courts; but as the laws and recognized customs of the country increased in number, and grew more diversified in detail, it became more and more difficult to keep up with the rules of decision under two different codes of laws; the result of which was that the clergy were gradually forced to recede to their own tribunals.

The French bar, as understood in modern times, traces its lineage to the ordinances of St. Louis, dated in 1270, which prescribed in some measure the duties of advocates. Three things were required of them, loyalty, courtesy, disinterestedness. It seems that it required such a quantity of words to display these three qualities that it soon became necessary to add a fourth; for, in a very few years later, brevity was also strictly enjoined; and this last quality appeared to be the most difficult of all to be attained. Before the close of the thirteenth century a magistrate gave the following charge to the bar: "Good method is needful to advocates, and to all sorts of people who have to plead for themselves, or for others; and when they set forth their pleas they should compress the facts in as few words as they can, the contention being, however, all comprised in the words; for the memory of man retains more easily a few words than many, and they are more agreeable to the judges who receive them." Time and again the courts renewed the protest against that prolixity which in early times seemed to be almost inseparable from the law, and which in a variety of forms still adheres to it. There is something even pathetic in the appeals of judges, who must have suffered much, against the prevailing redundancy of the pleadings, written and oral. Advocates were implored "to leave off all digressions in order that they might go straight to the material points, to avoid useless replies and repetitions, not to employ subterfuges and circumlocutions," which then, for the first time, began to be called chicanery.

Then, as if all patience were well nigh lost, the charge proceeded to recommend to the bar that "in speaking they should not open their mouths inordinately wide; neither should they gesticulate at random with their heads and feet; nor disfigure their faces with contortions; nor display a great pomp in small cases; in short that their voices and discourse should be in harmony with the subject on hand."

In those days the court of Parliament and

the advocates practicing in it, who were divided into consulting advocates and speaking advocates, followed the king in all his movements; and hence was brought about a graduation of fees based in some degree, curiously enough, on the style in which the advocate travelled. A writer of that age says, "Their salary is regulated by days, according to the importance of the affair, according to their learning and their estate; for it is not reasonable that an advocate who goes on horseback should receive as large wages as one who travels with two horses, or with three or more." It would appear, therefore, that a one-horse lawyer was at the lowest grade of the profession.

The fees do not seem to have been very large, and we are told that often the lawyers pleaded without pay for relatives, "or for the poor, in the name of our Lord." They were forbidden by the rules of the order to refuse their services in defence of a party who was indigent or oppressed, under penalty of expulsion from the bar. If a lawyer practised without pay, no oath of office was administered, but he could not charge any fees until he had taken an oath of office "to maintain himself in the office of advocate well and loyally, and not knowingly to sustain any but a good and loyal cause."

It must not be supposed that when a cause was to be tried by wager of battle the lawyers had nothing to do with the case; for the allegations on either side were drawn up by lawyers, so as to form a regular issue; and these allegations were read on the ground before the parties engaged in the combat. But here the place of the lawyer was quite subordinate; and as all the persons present would prebably be anxious for the fight to begin, he was specially admonished, in matters of this kind, to be brief, and to see that his language was direct. It was also needful that he should speak with such prudence and discretion as to say nothing of his own motion tending to injure or insult the adverse party; for if he should do so, he ran a great risk of becoming a principal in a like contest, in which he would require the presence of some other lawyer to perform a similar service for himself; and at least one instance is recorded where an advocate, who was performing a professional duty of this sort, was called into the field, on wager of battle, for some unlucky word which he had inserted in his pleadings; though it is said that he got off with a good scare. The odds between a lawyer, who had probably never put on a coat of mail in his life, and a knight, who had been accustomed to all military exercises from his infancy up, were obvious enough. According to the theory, indeed, this inequality was a matter of no significance, since Heaven was supposed to fight on the side of the right, and to overthrow the wicked; so that all the champion of innocence had to do was to go through the motions of a combat, in the serene confidence that his humble efforts would be rendered effectual by supernatural aid. It would seem, therefore, that the lawyer in question was a little skeptical on this point, or else that he was too modest to expect the divine interference in his behalf.

The same barons who settled their disputes by the short arbitrament of the sword, sat in judgment between parties who preferred a more peaceable solution of their controversies. Whenever they happened to be in Paris, they sat as judges if it so pleased them, in the Court of Parliament. Fancying, as ignorant men often do, that they had a great knack of deciding cases, they rarely missed a favorable opportunity of assuming a place on the bench. Their opinions are not cited, because they gave none. Their preference was to decide in favor of plaintiff or defendant, with but little discrimination as to details; but as sometimes nothing could be done without recourse to writings and figures, there were connected with the court certain learned men of the law, who acted as private advisers to the judges in matters of unusual difficulty. In the course of time these jurisconsults, as they were called, were occasionally requested to sit on the bench with the judges for the convenience of consultation and the better despatch of business; and it came to pass at last that they acquired the right to sit there, as it were by prescription, and to hold the court alone when its barons were absent, as they were for the first time during the long wars of the reign of Charles the VI. Their absence enabled the administration of justice to assume a more regular form, and the law a more settled accuracy. In the course of time the barons found themselves unable to keep up with these changes, which made the rude country barons ridiculous where they had formerly been distinguished for ease and readiness of decision; and as they were not

supposed to learn new things, they gradually withdrew from a court which they were no longer qualified to adorn. Thus, as the lawyers had managed to exclude the clergy from the bar, they at last supplanted the barons on the bench; a result which the latter accepted only with feelings of deep jealousy and resentment, yielding reluctantly to an influence which they could not exactly understand.

After the Court of Parliament of Paris was made sedentary in that city by an edict of Philip the Fair, the bar began to take on more regular functions; and it rapidly developed into its modern form, and acquired its modern attributes. From that time the more able, learned and eloquent members of the bar, entering upon a more unimpeded career, rose fast to wealth, influence and distinction; but for a long time their personal safety was extremely precarious. One of the earliest lawyers of great note who perished by violence was Jean des Mares, a humane and upright man, an accomplished jurist, an eloquent advocate. During his long life he was devoted to the crown, and was of the greatest service in managing public affairs. When he was seventy-one years of age, a mob having broken out in the city, he addressed the infuriated populace in favor of moderation and peace. It is not known how, in doing this, he gave offence to the king, but Charles VI. commanded him to be seized and tried for treason. He was not permitted to speak in his own defence, and was hurried to the scaffold with a hundred other citizens of Paris, and there closed an honorable life with the calmness of a philosopher and the fortitude of a martyr. In other instances offended nobles made away with advocates whose tongues they could not otherwise silence, by assassination, sometimes private, sometimes judicial.

We have seen that in a very early period the bar had a jargon or dialect of its own; in losing this, other strange and formidable methods of speech came in vogue. Whether the example was at first set by the clergy who practiced in the courts, whether it was through their more general influence, or for whatever other reason it may have been, the oral pleadings of an advocate resembled a sermon more than anything else, and invariably began with some text of Scripture which he deemed suitable to his case, or pertinent to the remarks which he had to make. The formal partition of a discourse into regularly and extensively numerated divisions, which has been so often ridiculed, and which has become so odious to our modern ears, was regarded as an indispensable requisite of a forensic oration; and the greater the number of divisions, the greater apparently was deemed the discourse. One of the most urgent of the orders laid upon the bar was that they should make such divisions: "*Materiam causarum tuarum divide per membra, ut melius commendes memoriæ.*" Of all the recommendations to the bar, a satirical writer has said, this rule was only dominated by the first rule of all: "*Præferas solventes non solventibus;*" ("you shall prefer those who pay to those who pay not.") After citing and repeating his text of Scripture, so that the ruling idea of his discourse, the theme of all his variations, should not be lost sight of, the advocate proceeded to announce the divisions of his subject, and how these divisions were to be subdivided. What followed all this was a complete farrago of quotations from all authors, heathen and divine, thrown in apparently almost at random; the plaintiff was a Daniel, a Hyperion, or a Joseph, the defendant a Cleon, a satyr, or a son of Belial; artificial parallels between incidents in the trial and some fable of mythology were long drawn out; the text of Scripture was repeated at the beginning of every paragraph; half of the speech would be in Latin and Greek, and hardly any part of it to the purpose.

Such was the taste of the age. Looking over these dreary intellectual secretions, which seem to us to be only persuasives to suicide, we may wonder how the judges could endure to listen to such impertinent medleys; and yet in only one recorded instance did a judge manifest any impatience at the received style, and we cannot be quite certain that he was impatient then. There was a case before the court arising out of a contract to manufacture or sell a certain number of jugs. The advocate began by citing a text of Scripture to the effect that the potter has power over the clay, and may make one vessel to honor and another to dishonor. Then after stating the divisions of his subject, he began with the manufacture of earthenware vessels among the Utruscans, and dwelt at great length upon the caramic art among the

Romans. Coming at last to a temporary pause, the president said: "Now, sir, that you have got the Romans in the jug, you can proceed with the case."

[To be continued.]

CURRENT EVENTS.

ENGLAND.

TRADE SECRETS.—In the case of *Hagg* v. *Darley*, decided in the Chancery Division of the English High Court of Justice on the 25th of March last, it was held that a covenant in restraint of trade, although it is unrestricted in respect of space, is reasonable and therefore good in law, if it relates to a trade secret. In this case the purchaser of the business of certain manufacturers and sellers of well-known disinfectants, by his statement of claim alleged, that the mode by which those disinfectants were manufactured was a secret, that the vendors of the business (of whom the defendant was one) had at the time of the sale entered into a several covenant not to carry on the business of manufacturers or sellers of such disinfectants, or other articles of a similar kind within fourteen years from that date, and that the defendant had infringed this covenant.

QUEBEC.

BATONNIERS.—Mr. W. H. Kerr, Q.C., Mr. R. Alleyn, Q.C., and Mr. Robert N. Hall, Q.C., have been elected Batonniers for the Districts of Montreal, Quebec and St. Francis respectively.

UNITED STATES.

THE BANKRUPT LAW.—The Senate on the 10th inst. passed the bill to repeal the bankrupt law, amended so as to make the act go into effect on the 1st of September next. This amendment was a concession to the friends of the existing law who have gained considerable strength in the Senate. We trust the House will concur in the amendment, as a refusal to do so might imperil the success of the movement for repeal. While an immediate, unconditional repeal of the existing statute is what is demanded by the great majority of the people, there is an influential and active body who oppose such a course. The only danger to the movement for repeal is in a disagreement of the two houses, which the friends of the law will do their utmost to bring about.—*Albany Law Journal.*

AN INJUNCTION AGAINST MESMERIC INFLUENCE.—The Boston *Advertiser* says: "A bill in equity has been filed in the office of the clerk of the court at Salem, by Miss Lucretia Brown, of Ipswich, against Daniel H. Spofford, formerly of Salem, but now of New York, in which she sets forth that she is now suffering from a serious spinal disease, caused by the mesmeric influence which Spofford exerts over her, and she petitions the Supreme Judicial Court for an injunction against Spofford, to restrain him from further exerting his influence upon her. The case is a somewhat curious one, and has excited considerable interest in the community. Spofford professed to cure diseases by the laying-on of hands and mesmeric influence. It appears that he was a pupil of Mrs. M. B. Eddy, of Lynn, who claims to have acquired the art of healing all diseases by a special revelation. She agreed to impart her knowledge to Spofford for $100 cash and ten per cent on his future accruing profits. The $100 was paid, but the royalty has not been, and Mrs. Eddy claims that Spofford has set up in the practice of her especial system, and has interfered with her in several of her cases, to the great injury of her patients, Miss Brown's case being one of those in which Spofford has exerted a counter influence. It does not appear that Spofford was ever called professionally to Miss Brown, but that he exerted his influence from a distance, and does now from New York. The issue of the application will be watched with considerable interest."

GENERAL NOTES.

THE CHINESE IN THE U. S.—In the United States Circuit Court for the District of California, on the 29th ult., Judge Sawyer decided, in the case of a Chinaman who applied for naturalization, that a Chinaman is not a white person within the meaning of the term as used in the naturalization laws, and not entitled, to become a citizen. The case will undoubtedly be appealed to the United States Supreme Court.