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THE MACKONOCHIE CASE.

We had occasion, in an early issue of the present volume, to advert to a remarkable judgment of the Superior Court, at Quebec, which expressly overruled and set at defiance a judgment of an appellate tribunal, the Court of Queen's Bench. A somewhat similar incident has caused some sensation in England. It has occurred in one of the famous ecclesiastical suits which seem to upset the minds of learned judges as well as of common mortals. The Rev. Mr. Mackonochie, some time ago, was suspended from his clerical functions for three years, for contempt of the Court of Arches in refusing to obey a decree directed against his ritualistic practices. The Court of Arches, in this proceeding, was acting in accordance with the law as it had been laid down in judgments of the Judicial Committee of the Privy Council, and Lord Penzance little dreamed that the authority of his decree could be questioned. But resort was had to the Queen's Bench Division of the High Court of Justice, and this tribunal, to the surprise of the public and the bar, has ordered a writ of prohibition to issue against the enforcement of the decree of suspension.

The *Times* thereon remarks: "A much more important issue than the enforcement of Lord Penzance's decree is indirectly involved. A majority of the Court of Queen's Bench have repudiated principles of law established by judgments of the Judicial Committee of the Privy Council, and have substantially ignored the legal authority of that high appellate tribunal. The revocation of the sentence passed upon Mr. Mackonochie implies that Lord Penzance was mistaken as to the powers of his office, and that the Judicial Committee of the Privy Council shared in the responsibility for his mistake. This decision reverses the judgments of the Privy Council in a manner so bold that the Lord Chief Justice felt bound to justify it by contending that it was the judicial duty of the Queen's Bench in the exercise of its power of prohibition to review the acts, and if it seemed right, to reverse them, of every tribunal not a branch of the High Court."

The name of the Lord Chief Justice (Sir Alexander Cockburn) carries great weight, and Mr. Justice Mellor concurred with him in his startling assumption of authority. But it should be mentioned that Mr. Justice Lush dissented, and he put his dissent upon the easily understood ground that the Queen's Bench Division cannot override the authority of the Privy Council. "Are we to understand," his lordship remarked, "that a single Division of the High Court of Justice can or will set aside the law as settled by a tribunal of independent jurisdiction, hitherto enjoying universal respect for the importance and value of its decisions? To this extent the Lord Chief Justice at least is prepared to go. To stop short of it would be, he affirms, a dereliction of judicial duty."

AMELIORATION OF CRIMINAL LAW.

The nineteenth century has been prolific in discoveries and inventions; it has exhibited an amazing bound in improvements of many orders. And not least among the things to be put to its credit is the amelioration of the Criminal Code. However often repeated, some of the illustrations of this great change do not cease to be startling. Is it not marvellous to find that Lord Ellenborough, so late as the year 1810, a period within the memory of many still not very old, resisted the abrogation of the death penalty for stealing in shops to the value of five shillings? And the reasoning on which he based his protest is hardly less extraordinary. "My lords," he said, "if we suffer this bill to pass, we shall not know where to stand—we shall not know whether we are on our heads or on our feet. If you repeal the Act which inflicts the penalty of death for stealing to the value of five shillings in a shop, you will be called upon next year to repeal a law which prescribes the penalty of death for stealing five shillings in a dwelling house, there being no person therein; a law, your lordships must know, on the severity of which, and the application of it, stands the security of every poor cottager who goes out to his daily labor. He, my lords, can leave no one behind to watch his little dwelling, and preserve it from the

attacks of lawless plunderers. Confident in the protection of the laws of the land, he cheerfully pursues his daily labors, trusting that on his return he shall find all his property safe and unmolested. Repeal this law, and see the contrast: no man can trust himself for an hour out of doors without the most alarming apprehensions that on his return every vestige of his property will be swept away by the hardened robber. My lords, I think this, above all others, is a law on which so much of the security of mankind depends in its execution, that I should deem myself neglectful of my duty to the public if I failed to let the law take its course."

It is consoling that we have learned by experience that the "security of mankind" has not been greatly affected by the repeal of that barbarous law. At the present day some expedient for effectually restraining fraudulent bankrupts or dishonest directors of corporate bodies, from their nefarious practices, would be considered by most people of more importance to the security of mankind than a re-enactment of the law in question.

Townshend, in his biography of Lord Ellenborough, remarks: "So wilfully blind are the wisest men to the defects of a long established and favorite system, that Serjeant Hawkins declared that 'those only who took a superficial view of the crown law could charge it with severity,' at a time when old women could still be executed for witchcraft; and Lord Ellenborough declaimed at a period too recent, when prisoners might be pressed to death for standing mute and refusing to plead; when women might be flogged, to the outrage of female delicacy, and burnt to death in due form of law; when the horrors were not yet abrogated that formed part of the sentence of high treason; when criminals were slain in the pillory by the capricious fury of the mob; when flagrant but merciful violations of their oaths were in constant use among jurymen; when the twelve judges might be called into the open air to try a wager of battle, which time and civilization had strangely failed to abolish, and the sentence of death was pronounced with all its dread formalities by the reluctant judge, who had no intention of carrying the edict into execution."

ANGERS v. *THE QUEEN INSURANCE CO.*

The decision of the Court of Queen's Bench in the case of *Angers* v. *The Queen Insurance Co.* (ante p. 3) has been affirmed by the Judicial Committee of the Privy Council in a judgment delivered 5th July, 1878, present:—Sir James Colvile, Sir Barnes Peacock, Sir Montague E. Smith, Sir Robert P. Collier, the Master of the Rolls.

PER CURIAM.—In this case their Lordships do not intend to call upon the counsel for the respondents.

This is an appeal from a judgment of the Court of Queen's Bench in Canada, affirming a judgment of the Superior Court of the District of Montreal. The judgment appealed against was unanimous on one of the two points to which the appeal relates, and was decided by four Judges against one on the other. The real decision was that the clauses of a statute of the Province of Quebec, 39th of the Queen, Chap. 7, which imposed a tax upon certain policies of assurance, and certain receipts or renewals, were not authorized by the Union Act of Canada, Nova Scotia, and New Brunswick; which entrusted the Province, or the Legislature of that Province, with certain powers. And the sole question their Lordships intend to consider is, whether or not the powers conferred by the 92nd section of the Act in question are sufficient to authorise the statute which is under consideration?

It is not absolutely necessary to decide in this case how far, if at all, the express enactments of the 92nd section of the Act are controlled by the provisions of the 91st section, because it may well be that, so far as regards the two provisions which their Lordships have to consider, namely, the subsections 2 and 9 of the 92nd section, those powers may co-exist with the powers conferred on the Legislature of the Dominion by the 91st section. Assuming that to be so, the question is; whether what has been done is authorised by those powers?

The first power to be considered, though not the first in order in the Act of Parliament, is the 9th sub-section. The Legislature of the Province may exclusively make laws in relation to "shop, saloon, tavern, auctioneer, and other "licenses, in order to the raising of a revenue

"for provincial, local, or municipal purposes." "The statute in question purports to be, on the face of it, in exercise of that power. It enacts that every assurer, except people carrying on marine insurance, shall be bound to take out a license, before the 1st day of May in each year, from the revenue officer of the district, and to remain continually under license. It then, by the second section, enacts what the price of the license is to be. And reading it shortly, it amounts to this; that the price of the license shall consist of an adhesive stamp affixed to the policy, or receipt or renewal, as the case may be. The amount of the adhesive stamp is to be, in the case of fire, 3 per cent, and 1 per cent for other assurances on the premiums paid. Then the fourth section enacts that anybody who, on behalf of an assurer, shall deliver any policy or renewal or receipt without the stamp shall be liable for each contravention to a penalty of fifty dollars. The fifth section says that every assurer bound to take out a license shall be liable in each case to a penalty not exceeding fifty dollars if it has been delivered without an adhesive stamp. The sixth section says that every person who affixes the stamp shall be bound to cancel it so as to obliterate it, and prevent its being used again. And the seventh makes all policies, premium receipts or renewals, not stamped as required by the Act, invalid. It says they "shall not be "invoked, and shall have no effect in law or in "equity before the Courts of this Province." Then there are certain sections of the Quebec License Act which are incorporated, and the Act is not to apply to assurances not within the Province. The only provision of the Quebec License Act which it is necessary to refer to is the 124th: "For every license issued "by a revenue officer there shall be paid to "such revenue officer, over and above the duty "payable therefor, a fee of one dollar by the "person to whom it is issued."

Now, the first point which strikes their Lordships, and will strike every one, as regards this Licensing Act, is that it is a complete novelty. No such Licensing Act has ever been seen before. It purports to be a Licensing Act, but the licensee is not compelled to pay anything for the license, and, what is more singular, is not compelled to take out the license, because there is no penalty at all upon the licensee for not taking it up; and, further than that, if the policies are issued with the stamp, they appear to be valid, although no license has been taken out at all. The result, therefore, is, that a license is granted which there are no means of compelling the licensee to take, and which he pays nothing for if he does take; which is certainly a singular thing to be stated of a license. They say on the face of the statute, "The price of each license shall consist," and so on. But it is not a price to be paid by the licensee. It is a price to be paid by anybody who wants a policy, because, without that, no policy can be obtained. It may be that the company buys the adhesive stamps, and affixes them; or it may be that the assured buys the adhesive stamps, and affixes them, or pays an officer of the company the money necessary to purchase them and affix them; but whoever does it complies with the Act.

Another observation which may be made upon the Act is this: that if you leave out the clauses about the license, the effect of the Act remains the same. It is really nothing more nor less than a Stamp Act if you leave out those clauses. If you leave out every direction for taking out a license, and everything said about the price of a license, and merely leave the rest of the Act in, the Government of the Province of Quebec obtains exactly the same amount by virtue of the statute as it does with the license clauses remaining in the statute. The penalty is on the issuing of the policy, receipt or renewal; it is not a penalty for not taking out the license. The result, therefore, is this, that it is not in substance a license Act at all. It is nothing more or less than a simple Stamp Act on policies, with provisions referring to a license, because, it must be presumed, the framers of the statute thought it was necessary, in order to cover the kind of tax in question with legal sanction, that it should be made in the shape of the price paid for a license.

If that is so, it is of no use considering how far, independently of these considerations, the 9th sub-section of the 92nd section would authorize a sum of money to be taken from an assurance company in respect of a license. With regard to the precedents cited, it was alleged, on behalf of the appellants, that though at first sight it might appear that this was not a license, and that this was not the

price paid for a license, yet it could be shown by the existing legislation in England and America that licenses were constantly granted on similar terms; and that therefore in construing the Dominion Act we ought to construe it with reference to the other subsisting legislation. Their Lordships think that a very fair argument. But the question is, is it true in fact? When the instances which were produced were examined, it was found that they were of a totally different character. They might be described as licenses granted to traders on payment of a sum of money; but the price to be paid by the trader was estimated either according to the amount of business done by the trader in the year previous to the granting of the license, or with reference to the value of the house in which the trader carried on business, or with reference to the nature of the goods, as regards quantity especially, sold by the trader in the previous year. They were all cases in which the price actually paid by the trader for the license at the time of granting it was ascertained by these considerations. It was a license paid for by the trader, and the actual price of the license was ascertained by the amount of trade he did. This is not a payment depending in that sense on the amount of trade previously done by the trader. It is a payment on the very transaction occurring in the year for which the license is taken out, and is not really a price paid for a license, but, as has been said before, a mere stamp on the policy, renewal or receipt.

As this is the result to which their Lordships come, it becomes necessary to consider the effect of the 2nd sub-section of the 92nd section. That authorizes "direct taxation within the Province in order to the raising of a revenue for provincial purposes." The single point to be decided upon is whether a Stamp Act—an Act imposing a stamp on policies, renewals and receipts, with provisions for avoiding the policy, renewal or receipt, in a court of law, if the stamp is not affixed—is or is not direct taxation? Now, here again we find words used which have either a technical meaning, or a general, or, as it is sometimes called, a popular meaning. One or other meaning the words must have; and in trying to find out their meaning we must have recourse to the usual sources of information, whether regarded as technical words, words of art, or words used in popular language. And that has been the course pursued by the Court below. First of all, what is the meaning of the words as words of art? We may consider their meaning either as words used in the sense of political economy, or as words used in jurisprudence in the courts of law. Taken in either way there is a multitude of authorities to show that such a stamp imposed by the Legislature is not direct taxation. The political economists are all agreed. There is not a single instance produced on the other side. The number of instances cited by Mr. Justice Taschereau, in his elaborate judgment, it is not necessary here to more than refer to. But surely if one could have been found in favor of the appellants, it was the duty of the appellants to call their Lordships' attention to it. No such case has been found. Their Lordships, therefore, think that they are warranted in assuming that no such case exists. As regards judicial interpretation, there are some English decisions, and several American decisions, on the subject, many of which are referred to in the judgment of Mr. Justice Taschereau. There, again, they are all one way. They all treat stamps either as indirect taxation, or as not being direct taxation. Again, no authority on the other side has been cited on the part of the appellant.

Lastly, as regards the popular use of the words, two cyclopædias at least have been produced, showing that the popular use of the word is entirely the same in this respect as the technical use of the word. And here, again, there is an utter deficiency on the part of the appellants in producing a single instance to the contrary. That being so, it is not necessary, it appears to their Lordships, for them to consider the scientific definition of direct or indirect taxation. All that it is necessary for them to say is, that finding these words in an Act of Parliament, and finding that all the then known definitions, whether technical or general, would exclude this kind of taxation from the category of direct taxation, they must consider it was not the intention of the legislature of England to include it in the term direct taxation, and therefore that the imposition of the stamp duty is not warranted by the terms of the 2nd sub-section of section 92 of

the Dominion Act. That being so, it appears to their Lordships that the appeal fails, and they will, therefore, humbly advise Her Majesty to affirm the decision of the Court below, and dismiss the appeal.

A GREAT CHANCELLOR.

[Continued from page 404.]

While profoundly versed in all the technical learning necessary to the proper discharge of his duties, Eldon excelled especially in the law of real property. In this department he was, perhaps, more profoundly and accurately versed than any man of his time at the English bar or upon the English bench. He displayed, also, a wonderful grasp and mastery of the principles governing equitable remedies, especially the remedies of specific performance and that by way of injunctions and receivers. Indeed, the law of injunctions was largely shaped by his decisions, the instances of the relief before his time being comparatively few in number, and the principles applicable to this extraordinary remedy being far from settled. So, too, the law of copyright derived considerable impetus from his decisions, some of which have been followed as leading cases from that time to this. He also relaxed the strict rule that all parties in interest must be made parties to the litigation, and established the reasonable and salutary doctrine that a bill might be filed by several persons in behalf of themselves and all others in interest.

Viewing him side by side with the more illustrious of his predecessors, it is not difficult to distinguish isolated features in which Eldon was their inferior. Thurlow, perhaps, had more native ability of a rugged and aggressive type; Hardwicke certainly displayed more judicial originality; Somers surpassed him in accomplished learning and profound scholarship; Bacon excelled him in what may be termed the philosophy of jurisprudence; and Bacon and Hardwicke both displayed more of that creative ability which established general principles upon which future chancellors might safely build. It is only when we consider the judicial character of Eldon as an entirety that we reach a proper estimate of his true rank among the judges of the past. We see a profound and exhaustive knowledge of all the doctrines of the Court of Chancery, as well as its practice and procedure from the earliest times; a complete mastery of all its decisions; a rare facility in the application of his immense stores of judicial learning to the case in hand; an almost intuitive faculty of determining upon first examination of a case its real bearings; a patience and thoroughness in examining every detail of fact and every authority bearing upon the case—all these, combined with a never-failing courtesy and urbanity in the discharge of his judicial duties, present a peculiar combination of judicial qualities, all of which are requisite to the character of the ideal judge, and in all of which Eldon was never surpassed.

His judicial fame may well be rested upon the sure basis of the universal estimate of the profession; for, after all, a judge's reputation is made or marred by the bar—and with the bar Eldon was supreme. Friends and foes alike conceded his wonderful attainments as a judge, and, through all the heated political controversies in which he was so often involved, his rank as the foremost English judge of his time was never questioned by the profession, to whose crucial test his judicial record of a quarter of a century was submitted and not found wanting. Campbell, enumerating his faults with no unsparing hand, and with his accustomed sneer at his personal foibles, yet does full justice to his ability as a judge. He says: "With all these defects, which I enumerate to show that I do not view him with blind admiration, and to give some value to my praise of him, I do not hesitate a moment to place him, as a judge, above all the judges of my time." And alluding to his deficiency in knowledge of the civil law, Campbell says: "Had he possessed this, he would have been the most accomplished judge who ever sat on any British tribunal."

And yet he missed, in part, the opportunities of his judicial career. He was great only as a judge, not as a statesman. His tendencies were all conservative, not creative. No English chancellor ever had greater opportunities of connecting his fame with law reforms; but they were opportunities which were all unheeded. Coming into power in a time when the growing demands of commerce and business all pointed to the necessity of reform in the procedure of

the courts, had he possessed the boldness and energy to take the lead in promoting measures of law reform, the long duration of his chancellorship and his great ascendency in the House of Lords would have enabled him to add to his judicial reputation that of a law reformer second to no English judge of the past or present time.

It is true that during the period of his chancellorship reform bills were as yet innovations in English jurisprudence, as in English politics. But Bentham's leaven of law reform—that potential force which has never since ceased in its operation upon the ancient system—was already making itself felt. But against all improvements in the practice and procedure of the courts, as against most measure of law reform, Eldon set his face steadily like a rock. With the exception of the bill which he was reluctantly compelled to introduce for the creation of a vice-chancellor, and a bill which he proposed and carried through Parliament in 1819, to abolish the absurd relic of barbarism, trial by battle in real actions, his voice and his vote were always recorded against improvements in the law. Again and again he resisted measures looking to improvement in the Criminal Code, even opposing a bill for the abolition of capital punishment for the crime of forging negotiable securities. Measures looking toward a change in the organization and procedure of his own court uniformly met with his opposition, and that opposition generally insured their defeat.

The years 1832 and 1833 were exceedingly prolific in measures of law reform, all of which met with a sturdy opposition from the venerable ex-chancellor. Among these may be enumerated a bill prepared by the real property commissioners, headed by Lord Campbell, to abolish the tedious and expensive system of fine and recovery by a fictitious suit in the Common Pleas, as a means of aliening real property, and to substitute therefor a simple deed; a bill to abolish a large number of sinecure offices in chancery—which, to his extreme disgust, became a law; a bill to enable plaintiffs and defendants in actions at law to examine each other upon interrogatories; a bill, founded upon the report of the common-law commissioners, authorizing the judges to make rules regulating the pleadings and practice in their courts, which resulted in the celebrated rules of Hilary term, 4 William IV.; and a bill introduced by Brougham for the creation of the system of County Courts.

We smile as we read the list of measures which he thus opposed, but here again, as upon the question of his doubts and hesitation, we may hear him in his own defence. Writing to Lord Redesdale, he epitomizes his views upon law reform in these words: "A little that is reasonable may be effectually attempted; when, if you propose all that is reasonable, nothing would be done." And he concludes this letter with these words: "Indulge the appetite for alteration in the law, which we hear so much of nowadays, and in a reign or two more we shall not have a lawyer—a well-grounded lawyer—left."

In politics Eldon was a Tory of the Tories. During the fifty-five years of his parliamentary career in the Commons and the Lords he was uniformly arrayed against all measures of innovation or reform. He clung to the old landmarks in politics as tenaciously as in law, and the political doctrines which he had espoused in early manhood were the doctrines by which he was guided to the end of his career. "He had imbibed," says Brougham, "from his youth, and in the orthodox bowers which Isis waters, the dogmas of the Tory creed in all their purity and vigor. By these dogmas he abided through his whole life with a steadfastness, and even to a sacrifice of power, which sets at defiance all attempts to question their perfect sincerity. Such as he was when he left Oxford, such he continued above sixty years after, to the close of his long and prosperous life: the enemy of all reform, the champion of the throne and the altar, and confounding every abuse that surrounded the one or grew up within the precincts of the other with the institutions themselves; alike the determined enemy of all who would either invade the institution or extirpate the abuse."

This phase of his political character was well illustrated by an incident which occurred in his old age, and which is mentioned by Twiss in his biography. In 1834, in company with the Duke of Wellington, he attended the commemoration exercises at the University of Oxford, when his grandson received his degree. The distinguished couple were of

course received with much *éclat*, and their appearance in public was everywhere greeted with rapturous applause. But of all the honors heaped upon him on this occasion, the venerable chancellor was best pleased with an incident which he afterwards related in these words: "I will tell you what charmed me very much when I left the theatre, and was trying to go to my carriage; one man in the crowd shouted out, 'There's old Eldon; cheer him, for he never ratted!' I was very much delighted, for I never did rat. I will not say I have been right through life—I may have been wrong—but I will say that I have been consistent."

But his conservatism in politics was the conservatism of conviction, and not of fear. No minister was ever bolder in public emergencies. And in a great political crisis, with a cabinet falling in pieces around him, the country in jeopardy, and the monarchy apparently tottering to its foundation, Eldon arose to the full measure of the occasion, and marshalled his forces with the coolness and daring of a veteran general. With a consummate skill in mastering men, and a still rarer facility in mastering kings, and with a courage that in political crises was simply sublime, he was the man of all others to lead a forlorn hope in an attempt to save his party or his ministry from utter annihilation. And yet he never rose to the dignity of statesmanship. He could build cabinets, but when built he could propose no great measures of policy or reform for their perpetuation. With the boldness to defend existing abuses in the law, in the Church, and in the State, he lacked the courage and inclination to originate great measures of State to perpetuate a ministry which he had created or conserved.

In no feature of his political career is his intense Toryism more apparent than in his life-long struggle against Catholic emancipation and the removal of political disabilities from members of the Romish Church. Beginning as early as 1789, for forty years the question of Catholic emancipation was a controlling question in English politics; and for forty years Eldon was the leader of the conservative forces of Church and State in opposition to the measure. At first the odds were largely in his favor, and every bill looking toward a removal of the disabilities was defeated by immense majorities. But during the later years of the struggle he fought the fight with constantly-waning majorities, until 1829, when the measure became a law. As indicating the intensity of his prejudice in this direction, when debating the king's message, in 1829, which contained a suggestion for the removal of the disabilities, Eldon used these words: "If he had a voice that would sound to the remotest corner of the empire, he would re-echo the principle which he most firmly believed: that, if ever a Roman Catholic was permitted to form part of the legislature of this country, or to hold any of the great executive offices of the government, from that moment the sun of Great Britain would be set!"

But his hostility to the Catholics was political rather than religious. And while his leadership in opposition to Catholic emancipation gained for him a degree of reverence from the followers of the Established Church which has been accorded to few laymen, he was far from being a religious man. Byron relates that on one occasion, when the House of Lords was nearly tied on one of the debates upon the Catholic question, he was sent for in great haste to a ball, which he reluctantly left to emancipate 5,000,000 of people. He came in late, and stood just behind the woolsack. Eldon turning around saw Byron, and said to a peer who was sitting beside him on the woolsack: "Damn them! They'll have it now! By God! the vote that is just come in will give it to them."

Few men who have been trained for the bar, and whose ambition has been professional, and not political, have attained so great an ascendancy in politics, or have been so positive a power in the State for so long a period of time. For thirty years Eldon was the autocrat of the House of Lords. He ruled them in all matters of law, in all questions of Church, and in most matters of State and of politics. From his first entry into the Cabinet he became a positive element in English politics, and during the long and exciting period embracing the State trials, the Napoleonic wars, the Orders in Council, our War of 1812, the final overthrow of Napoleon, the contest for Catholic emancipation, and even down to the passage of the Reform Bill, his ascendancy in the House of Lords, and his

leadership of the conservative forces in Church and State, were unquestioned.

Indeed his entry upon public life was at a period singularly auspicious for one of his conservative tendencies, since it was at the high-tide of reaction in England from the democratic doctrines which were elsewhere gaining ground with rapid stride. He came upon the stage in the beginning of that wonderful period which was aptly termed by Rousseau, "The coming Age of Revolutions." Our colonies had declared their independence, and had achieved it by the sword; the first mutterings were already heard of the coming storm in France, and when that storm had worn itself out and spent its fury there, it seemed more than probable, in the growing discontent, seditious meetings, and treasonable utterances everywhere apparent, that the scene of action was likely to be transferred to England. In this critical juncture Scott came to the front as the defender of the ancient landmarks. His position as attorney general placed him in the foreground in the political and State trials which followed, and in his profession and in the Cabinet, in Parliament, and everywhere, he appeared as the champion of the Constitution and the enemy of all innovation and reform. In the heat and excitement of those troublous times he addressed himself boldly to the task of crushing out the new republican philosophy. And by force of his genius, daring, and ability he thus became the recognized leader of the conservative forces of England.

His private life was unsullied. In an age whose politics were none too clean, whose morals were none too pure, and serving a king whose profligate career brought lasting disgrace upon the English monarchy, Eldon left behind him a reputation which was never assailed by his most bitter political enemies. The most charming feature of his private life was his tender devotion to his wife. The Bessy who had won his young affections, and who had deserted home for his sake, with only poverty staring them in the face, remained through life the supreme mistress of his affections. When she was no longer young or beautiful, and when her infirmities of age and peculiarities of temper had almost wholly deprived Eldon of hospitable intercourse with his friends, he still displayed the most tender and devoted affection toward her, and never wearied of recounting her praises, or of telling the story of the heroism with which she had borne their early years of poverty. Her death, which occurred in 1831, left him quite broken down, and he seems never to have fully recovered from the shock.

His devotion to his brother William, Lord Stowell, is also worthy of note; and the warmth of their affection is manifest in all their voluminous correspondence, which covers the entire period of their public life. Lord Stowell was the elder brother, and the last years of his life were clouded by a failure of his mental faculties. But the weakening of his powers only served to render more touching the fraternal regard between the two brothers, and the elder, notwithstanding the dark cloud which was closing about him, seemed conscious to the last of the unwavering tenderness with which "Jack" watched over him.

His life after resigning the great seals in 1827 was as uneventful as that of most ex-chancellors. He seems to have looked with some confidence to a recall to the woolsack, and in his correspondence for some years afterwards there are traces of disappointment that the looked-for summons to the royal closet to again receive the seals did not come. Cabinets were made and unmadè, ministers came and went, a new sovereign ascended the throne, and still the sturdy old Tory was left in his retirement, until at length he abandoned all hope of being recalled to power. He still attended the House of Lords, however, and took an active part in opposition to the Reform Bill, as well as the various measures of law reform which the disciples of Bentham were bringing forward. His last speech in the House of Lords was delivered July 25, 1834, in opposition to a bill for the construction of a railroad, which he characterized as a dangerous innovation.

He had outlived his time. His early associates in politics and at the bar were all gone. Reformers in government and the law were everywhere confronting him. Catholic emancipation had become a fact; the Reform Bill was a thing of the past; the times were out of joint. With universal change around and about him, he alone continued unchanged. Loyal to the convictions of his youth, he re-

mained the last of his school of politicians and of lawyers. Thus he awaited patiently, and even hopefully, the comming of that event which should give him release. He died January 13, 1838, at the age of eighty-six.—J. L. HIGH, *in Southern Law Review, Aug. Sept.* 1878.

RECENT UNITED STATES DECISIONS.

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Devise and Legacy.—Stock in a company was bequeathed for life, with remainder to several persons, some of whom were also residuary legatees, and others were not. Pending the life-estate, the company increased its capital, giving a new share to the holder of each old one, on making a certain payment. The executor took new shares, equal to the number already held by him, and paid for them out of the estate. *Held*, as between the special and the residuary legatees, that the former was entitled to so much of the value of the new shares as grew out of the accumulated profits of the company.—*Bushee* v. *Freeborn*, 11 R. I. 149.

Divorce.—1. A statute of Utah Territory authorizes the granting of divorces to persons who are not, but wish to become, residents of the Territory. *Held*, that a divorce granted under this statute was of no validity outside the Territory.—*Hood* v. *The State*, 56 Ind. 263.

2. By statute, suits for divorce are to be heard in open court. *Held*, that such a suit could not be referred, even by consent of parties.—*Hobart* v. *Hobart*, 45 Iowa, 501.

3. A citizen of Massachusetts went into Maine, acquiring no domicil there, for the purpose of obtaining, and did fraudulently obtain, a divorce for a cause occurring in, but not a cause of divorce by the law of, his own State; his wife had gone to New York, and there continued. *Held*, (1) that the court in Maine had no jurisdiction; (2) that its decree, though reciting facts sufficient to give jurisdiction, was not entitled to full faith and credit in Massachusetts; (3) that the husband's domicil remaining in Massachusetts, the wife might sue for a divorce there, though not residing there herself.—*Sewall* v. *Sewall*, 122 Mass. 156.

Dower.—A man conveyed land with a mill on it; afterwards the mill was burnt; he died, and the mill was rebuilt; and his wife claimed dower in the land. *Held*, that she should have it according to the value of the land when the dower should be assigned, less the amount by which its value was increased by rebuilding the mill.—*Westcott* v. *Campbell*, 11 R. I. 378.

Easement.—1. Land was sold, with a house on it having windows overlooking adjacent land of the grantor. *Held*, that the grantor could not obstruct the windows if they were necessary to give light and air to the house; otherwise, if sufficient light and air could be derived from other windows opened, or which might conveniently be opened, elsewhere in the house.—*Turner* v. *Thompson*, 58 Ga. 268.

2. Defendant dug a pit on, and removed soil from, the land of another, for his own benefit, and with the owner's license; and, by the operation of natural causes, plaintiff's adjoining land fell into the pit. *Held*, that defendant was liable, without proof of negligence, for the injury to plaintiff's land in its natural state, but not for injury to structures on it.—*Gilmore* v. *Driscoll*, 122 Mass. 129.

Evidence.—1. On the question of the genuineness of a signature, the opinion of a witness, based on inspection of photographic copies of the signature in dispute was *held* inadmissible.—*Eborn* v. *Zimpleman*, 47 Tex. 503.

2. On a criminal trial, the prosecution offered in evidence the written statement of an absent witness, not sworn to, but which a former attorney of the prisoner had consented to have read at the trial. *Held*, inadmissible against the prisoner's objection, on the ground that he was constitutionally entitled to be confronted with the witness, and that his attorney could not waive this privilege.—*Bell* v. *The State*, 2 Tex. Ct. App. 215.

Guaranty.—1. A guaranty was made of payment by another for goods to be sold, not founded on any present consideration passing to the guarantor, and to continue, by its terms, until written notice should be given of its termination. *Held*, that it was revoked by the death of the guarantor.—*Jordan* v. *Dobbins*, 122 Mass. 168.

2. Defendant made a bond to plaintiff, "to be binding one year only from date," conditioned that a third person should pay within five days after maturity any paper discounted by plaintiff for him. *Held*, that paper discounted within the year, though not maturing till after its

expiration, was within the condition.—*Davis* v. *Copeland*, 67 N. Y. 127.

Husband and Wife.—By an ante-nuptial settlement, property was vested in trust to the separate use of the wife during her life, free from the control of her intended or any future husband, and after her death to such persons as she should appoint, and, in default of appointment, to her husband and children, should they survive her. The wife died without making any appointment, having previously obtained a divorce for adultery of the husband. *Held*, that he took nothing under the settlement, though he survived her.—*Barclay* v. *Waring*, 58 Ga. 86.

Illegal Contract.—Action by payee against maker of a promissory note. *Held*, that evidence was admissible to show that the note was made solely to protect defendant's property from his creditors, and under an agreement that it should be cancelled at his request; and that these facts, if proved, were a defence.—*McCausland* v. *Ralston*, 12 Nev. 195.

Indictment.—An indictment for forgery of a check on the City Bank of Dallas purported to set out the tenor of the check, whereby it appeared to be drawn on the City Bank, without designation of place. *Held*, that the indictment was bad for repugnancy.—*Roberts* v. *The State*, 2 Tex. Ct. App. 4.

Insurance (Fire).—1. The lessees of land erected thereon a building, which, by the terms of the lease, was to belong to the lessor at the expiration of the lease, insured the building, describing it as "their building, occupied by them, situated on leased land," by a policy conditioned to be void, unless the interest of the assured as owner, assignee, factor, lessee, or otherwise, should be truly stated. *Held*, that the policy was valid.—*Fowle* v. *Springfield Ins. Co.*, 122 Mass. 191.

2. A policy was conditioned to be void if there should be other insurance, not mentioned in it, on the property; and contained a permission for $6,000 other insurance. In an action on the policy, *held*, that the insured might show that he notified the insurers of, and they consented to, other insurance to the extent of $8,000, and that $6,000 was written in the policy by mistake.—*Greene* v. *Equitable F. & M. Ins. Co.*, 11 R. I., 434.

3. Partnership property was insured by policy conditioned to be void in case of any transfer by sale or otherwise. One partner retired from the firm, and sold his interest therein to the others; after which a loss happened. *Held*, that the policy remained in force.—*Texas Ins. Co.* v. *Cohen*, 47 Tex. 406.

4. Goods stored in a town occupied by the United States troops during the war were insured against fire by a policy exempting the insurers from liability for damage by fire arising by any invasion, insurrection, riot, or civil commotion, or by the act of any military or usurped power. The town, being attacked by a superior force of the enemy, was abandoned by the troops, who, by the order of their commanding officer, set fire to a building containing military stores, to prevent their falling into the enemy's hands. The fire spread to the building containing the goods insured, and destroyed them. *Held*, that the insurers were not liable.—[*Ætna*] *Ins. Co.* v. *Boon*, 95 U. S. 117; reversing s. c. 12 Blaichf. 24; 40 Conn. 575.

5. The owner in fee of land caused the buildings on it to be insured by policy conditioned to be void, "if the interest of the assured be other than the entire unconditional and sole ownership of the property, or if the buildings insured stand on leased ground," unless it should be so expressed in the policy. The land was in fact let for a term of years, and this was not expressed in the policy. *Held*, no breach of the condition.—*Insurance Co.* v. *Haven*, 95 U. S. 242.

6. The owners of certain whiskey procured insurance on "whiskey, their own or held by them on commission, including government tax thereon for which they may be liable." They were so liable as sureties on the bond of the distiller in whose warehouse the whiskey was. *Held*, that this interest was insurable, and covered by the policy; and judgment having been recovered against the assured in a suit on the bond, which the insurers had been requested, and had declined, to defend, *held*, that the insurers were liable for the amount of that judgment.—[*Germania*] *Ins. Co.* v. *Thompson*, 95 U. S. 547.

Insurance (Life).—1. By a policy of insurance the statements in the application were made warranties. These statements were written by the medical examiner of the insurers, to whom the assured told the truth about his health, but

by whose advice some of the questions were untruly answered. *Held*, that the physician was not the insurer's agent to fill out the application, and that they were not bound by his acts.—*Flynn* v. *Equitable L. Assurance Society*, 67 N. Y. 500.

2. An assignment of a policy of life insurance to one who had no interest in the life of the assured, *held*, valid.—*Clark* v. *Allen*, 11 R. I. 439.

Insurance (*Marine*).—A vessel was insured at and from Honolulu, *via* Baker's Island, to a port of discharge in the United States, "the risk to be suspended while the vessel is at Baker's Island loading." *Held*, that extrinsic evidence was admissible to show that Baker's Island was a dangerous anchorage, with no harbor, visited only for the purpose of loading guano; and that, in view of these facts, the effect of the policy was to suspend the risk while the vessel was at the island, whether actually engaged in the process of loading or not.—*Reed* v. *Merchants' Ins. Co.*, 95 U. S. 23.

Interest.—An agent had in his custody for many years, among other property of his principal, a bond made by himself to the principal. He computed the interest, and compounded it every year, and charged the amount against himself on his books; and, at the termination of his agency, stated an account with his principal, including the amount so due on the bond with compound interest. He had made payments from time to time on the bond, which would have more than satisfied it if simple interest only had been reckoned on it. In an action on the account stated, *held*, that no promise to pay compound interest was implied by the statement, or, if any was implied, that it was without consideration.—*Young* v. *Hill*, 67 N. Y. 162.

Judge.—A prisoner convicted and sentenced by a judge who had been regularly appointed, and who had continued to act as such publicly, no other person having been appointed in his stead, sought to be discharged by *habeas corpus*, on the ground that the judge was disqualified under the Constitution, by reason of having taken a seat in the legislature. *Held*, that he was at any rate a judge *de facto*, and that his title could not be inquired into on this process.—*Sheehan's Case*, 122 Mass. 445; *Ex parte Call*, 2 Tex. Ct. App. 497, S. P.

Judgment.—After a general verdict of guilty on an indictment containing several counts for distinct offences, the prisoner was sentenced on some of the counts to imprisonment, and was imprisoned, and the case was not continued. *Held*, that he could not be brought up at another term, and sentenced on another count, though the first sentence was erroneous.—*Commonwealth* v. *Foster*, 122 Mass. 317.

Jury.—The judge presiding at a criminal trial set aside a juror as unfit, of his own motion, without challenge by either party. *Held*, proper.—*State* v. *Lartigue*, 29 La. Ann. 642.

Larceny.—1. The prisoner sold an impounded horse, claiming to own it, but in fact knowing that he had no right to it; and the purchaser took it away from the pound. *Held*, that the prisoner was guilty of larceny.—*State* v. *Hunt*, 45 Iowa, 673.

2. The prisoners, by fraudulent devices, and with felonious intent to convert the prosecutor's money to their own use, induced him to deliver it temporarily, for a specific purpose, to one of them, and then, without his consent, converted it to their own use. *Held*, that they were guilty of larceny.—*Loomis* v. *People*, 67 N. Y. 322.

Lease.—See *Insurance* (*Fire*), 1, 5, *Tax*, 2.

Legacy.—See *Devise and Legacy*.

Limitations, Statute of.—An indorsement of part payment on a note was written, but not signed, by the maker; it being orally agreed between him and the holder that such indorsement should be deemed a payment; but no money or other valuable consideration was actually paid. *Held*, that such indorsement would not take the note out of the Statute of Limitations.—*Blanchard* v. *Blanchard*, 122 Mass. 558.

Lost Property.—Plaintiff bought an old safe, and left it with defendant to sell, permitting him to use it in the mean time. On examining it, defendant found a roll of bank-bills hidden between the outer casing and the lining. *Held*, that, as against plaintiff, he had a right to keep the bills.—*Durfee* v. *Jones*, 11 R. I. 588.

Master and Servant.—1. A servant of a railway company, employed to work on its track, was run over and injured by a locomotive, through the negligence of the engineer. *Held*, that the company was liable; but that evidence that the servant had a family, whom he could not support by his labor since his injury, was inadmis-

sible on the question of damages.—*Pittsburg, Ft. Wayne, & Chicago Ry. Co.* v. *Powers*, 74 Ill. 341.

2. A servant, hired for a year to work in the lumber trade, embarked in the same trade on his own account. *Held*, that his master might discharge him within the year, though he gave his whole time and attention to the master's business.—*Dieringer* v. *Meyer*, 42 Wis. 311.

Mortgage.—A power of sale in a mortgage was executed after the death of the mortgagor, and a surplus remained, after paying the debt, in the hands of the mortgagee. *Held*, that the administrator of the mortgagor could maintain no action to recover it.—*Chaffee* v. *Franklin*, 11 R. I. 578.

Municipal Corporation.—1. A city owned a wharf, and was entitled to take tolls for its use. A vessel lying at the wharf was injured by striking a stake under water, which could not be seen at low tide. *Held*, that the city was liable, and none the less so because another corporation was required by statute to remove obstructions from the stream, or because the United States occasionally dredged the stream, or because the city received no tolls from the owners of the vessel.—*Petersburg* v. *Applegarth*, 28 Gratt. 321.

2. A child attending a public school in a school-house provided by a city, under the duty imposed on it by general laws, cannot maintain an action against the city for an injury suffered by reason of the unsafe condition of a staircase in the school-house, over which he is passing.—*Hill* v. *Boston*, 122 Mass. 344. [See this case for a very full discussion of the liability of cities and towns to a private action for neglect of public duty.] And see *Aldrich* v. *Tripp*, 11 R. I. 141, *contra*.

3. A city, by changing the grade of a highway, as it had power by statute to do, caused surface water to flow into the plaintiff's cellar. *Held*, that the city was liable to the plaintiff.—*Inman* v. *Tripp*, 11 R. I. 520.

4. The Constitution of Missouri forbids municipal corporations to become stockholders in, or to loan their credit to, any company, unless two-thirds of the qualified voters of such municipal corporation, at a regular or special election to be held therein, shall assent thereto. *Held*, that the assent of two-thirds of the voters actually voting at the election was sufficient.—*Cass County* v. *Johnston*, 95 U. S. 360.

Negligence.—The steerage of a ship at quarantine was fumigated, after excluding passengers, by order of the health officers, with a poisonous substance, put in open vessels; afterwards, the steward sent the passengers back, but neglected to remove one of the vessels, as he had been directed by the health officer to do, though he removed the others; and the child of a passenger drank from the vessel, fell sick, and died. *Held*, that the master of the ship was liable.—*Kennedy* v. *Ryall*, 67 N. Y. 379.

New Trial.—A. and B. were indicted and tried jointly. A. was acquitted; and B. was convicted, and moved for a new trial, on the ground that A. could give evidence for him. But as it did not appear that a severance was asked for before trial, or an acquittal of A. during the progress of the trial, to enable him to testify, nor that B. was ignorant till after trial, of the fact that A. could give evidence, a new trial was refused.—*State* v. *Woodworth*, 28 La. Ann. 89.

Notary.—A notary public certified an acknowledgment on documents which he knew to be forged. *Held*, that the sureties on his official bond were liable for damages caused by his act.—*Rochereau* v. *Jones*, 29 La. Ann. 82.

Nuisance.—Action for suffering water to collect on defendant's land, whence it overflowed on and injured plaintiff's land. *Held*, that defendant was liable, though he had done all in his power to carry the water off safely.—*Jutte* v. *Hughes*, 67 N. Y. 267.

Officer.—Defendant, a sheriff, having attached goods as the goods of A., at plaintiff's suit, afterwards released them, on B.'s claiming them as his, though plaintiff offered to indemnify him for holding them. *Held*, that defendant was not liable at all events; but that the burden was on him to show that the goods did not belong to A.—*Wadsworth* v. *Walliker*, 45 Iowa, 395.

Power.—A will appointed three executors, with power to sell land; and land of the testator was sold and conveyed, with the consent of all, but by the deed of one alone. *Held*, that the power was defectively executed, but that equity would aid it.—*Giddings* v. *Butler*, 47 Tex. 535. See *Mills* v. *Mills*, 28 Gratt. 442.

Trade-mark.—The name "Bethesda," applied to a mineral spring, and used as a mark on barrels in which water from the spring is sold, *held*, entitled to protection as a trade-mark.—*Dunbar* v. *Glenn*, 42 Wis. 118.