The Legal News.

Vol. I. SEPTEMBER 14, 1878. No. 37.

MR. JUSTICE JETTÉ.

The vacancy on the Bench of the Superior Court, caused by the death of the late Mr. Justice V. P. W. Dorion, has been filled by the appointment of Mr. L. A. Jetté, of Montreal. Mr. Jetté is a gentleman of high standing in the profession. He was admitted to the bar in February, 1857, and by abilities of a high order, and close attention to professional work, speedily attained a considerable practice. Among the important cases in which he was concerned may be mentioned the celebrated Guibord case, in which he was counsel for the Fabrique in defending the suit. In 1872 he first entered public life, being elected by a large majority, for the division of Montreal East, over his distinguished opponent the late Sir George E. Cartier. In the general election of 1874, Mr. Jetté was returned for the same seat by acclamation. Appointments to the Bench in Canada are probably too much restricted by considerations of politics and nationality, and in the present case advocates of greater distinction are for this reason passed over. But apart from this, Mr. Jetté's appointment is a good one, and will, we believe, give much satisfaction.

SAUVÉ v. *SAUVÉ.*

We thought we had sufficiently explained (*ante*, p. 385), our opinion that the cases of *Sauvé* v. *Sauvé*, and *Berthelot* v. *Theoret* were essentially different. An esteemed correspondent, however, overlooking perhaps our brief reference to the cases, writes us on the subject, pointing out the material differences between the two suits. He says:

"In the case of *Berthelot* v. *Theoret* it is clear that facts were alleged and proved showing the *cessionnaire* to be proprietor of the debt sued for; hence the *cédant* could not sue. In *Sauvé* v. *Sauvé* there were facts proved, too, showing that the "third party" had no action. His interests, once held by him, he had *resiliated* by an *acte sous seing privé*, but to which *force* had to be given."

We should add that the head notes prefixed to the reports, as we received them from our correspondent, were not in strict accordance with the facts as we view them, but unfortunately were printed without the emendations which we intended to have made.

BANKRUPTCY FRAUDS.

The U. S. Bankrupt law passed out of existence on the 1st September, except for pending cases, and there was a considerable rush of debtors, even in the last days and hours of the Act, to bring themselves under its provisions. In the city of New York there were on the last day 394 petitions filed; in the district including Chicago, 375 petitions; in Cincinnati, 100; in Buffalo, 198; and in Philadelphia, 69. Physicians, lawyers, and even clergymen swelled the number of those seeking relief from the demands of their creditors. Advertisements appeared in journals of New York, inserted by attorneys tendering their services to help clients to a full, free and quick discharge from all their liabilities. These, however, are not so remarkable as a daring announcement in the *N. Y. Herald*, which attracted the attention of a reporter of the *World*. The notice was as follows:—

If you contemplate bankruptcy you can procure $48,000 good, genuine, regular securities; no more of same kind exist; have never been offered; terms to suit contingency. Address, confidentially, Attorney, box 112, *Herald* Office.

Acting in that detective capacity which has been called into play by the press in these latter days, the reporter answered the advertisement under an assumed name, and in due time he received the following reply:—

Henry H. Hadley, Attorney and Counsellor at Law, 307 Broadway, N. Y., Aug. 15, 1878.

Dear Sir,—Your favor referring to bankruptcy, dated 14th inst., was duly received and contents noted.

If convenient, please call on me to-morrow at 11 a.m., or from two to three p.m., here at my office, that we may talk the matter over as requested. I remain, confidentially yours.

H. H. Hadley, Attorney.

The reporter called on Mr. Hadley at his office, and found him busily engaged with two elderly and eminently respectable-looking gentlemen. After waiting some time the reporter was ushered into the lawyer's office. Upon representing himself as the special partner of a firm of hatters who were about to fail, he

received most respectful attention. We continue the narrative in the words of the reporter.

"How much do you owe?" Mr. Hadley asked.
"About $75,000," was the reply.
"How much assets have you got?"
"About $20,000."
"What have you done with the rest?"
"Spent it."
"Who?"
"I and my partners."
"How much have you drawn?"
"About $6,000."
"How much did you put in the firm?"
"Twenty thousand dollars; that is, $12,000 cash, and $8,000 I still owe."
"Ah! Is your book-keeper all right?"
"He is."
"Can he so change the books as to make it appear that you drew all this $12,000, and that, in return for it and as security for the $8,000 you owe, you gave them $50,000 of securities, without further recourse to you?"
"He can."
"Will he?"
"He will, sure."
"That'll do," said Mr. Hadley, "my client has $50,000 worth of Southern land bonds; they are worth nothing in the market; they may (with a smile) some day be worth their face value. They are for lands granted to him on the Chattanooga and Cincinnati Railroad. He will sell them for $1,000 cash."
"Good," replied the reporter, "but how am I to show where I got them from?"
"He shall give you a bill of sale, you shall turn over to him some stock in exchange—he will furnish it for you—and you give him the $1,000 besides. His bill of sale will be dated back as far as you like, so as to make the whole transaction look genuine, and, of course, you explain to your creditors that your unfortunate land speculation has led to your failure. You give them a few thousands in cash, then bonds and what stock you have on hand, and go on your way rejoicing. Twig?"

Some further conversation occurred with reference to the best mode of covering up the tracks and giving the swindle a genuine look. The reporter was informed of others who had successfully played the same game, and it is stated on good authority that a great deal of business has been done in the way of buying cheap or worthless stocks, and holding them for use, by intending bankrupts who desire to make a show of assets, the purchase in such case being made to date back to the time when the securities were quoted higher. This is but one, and a small, part of the gigantic network of fraud which envelops every part of the bankruptcy system, and it is not wonderful that through such revelations the law has come to have an evil odor, and dies regretted by few save those who have turned it to their profit.

CONTRIBUTORY NEGLIGENCE.

[Continued from p. 426]

Ernst v. *Hudson River R. R. Co.*, 35 N. Y. 9.—Plaintiff's testator was killed while crossing defendants' track with his team, on his way to a ferry at Bath-on-the-Hudson. It had been customary to keep a flagman at this crossing, but on this occasion there was none; at least the evidence strongly preponderated that way. As he approached the crossing, Ernst looked north, above the station-house, and saw no train. The ferryboat was just starting, and a by-stander hailed the ferryman to wait, and beckoned Ernst to hurry on. Signals were made from the boat for him to come on; he started up his horses on a trot, when just as they were within two or three rods of the track, the engine appeared from behind the station-house. At the same instant two men shouted to him from different directions, he vainly tried to rein in his horses, they plunged on the track, and he was struck by the engine and killed. At the circuit the plaintiff was nonsuited, and this was now set aside.

The court say, that the omission of the customary signals is an assurance by the company to the traveller on which he may rely that no engine is approaching within eighty rods on either side. If the usual warning is withheld, the wayfarer is not bound to stop and look up and down the track, but may assume that the crossing is safe. It is no answer to his claim for redress for injury, that notwithstanding the omission of the signals, he might, by greater vigilance, have discovered the approach of the train, if he had foreseen a violation of the statute instead of relying upon an observance of it.

Remarks.—This is the most celebrated railroad case in our books. It had been once before to the Court of Appeals, and a new trial had been granted upon a very different state of facts, as we learn from the opinion of Judge Porter on this hearing. The former decision is not reported in the regular series, but one of the opinions was reported in 24 How. 97, with erroneous head notes and statement of facts. In the present decision all the judges concurred. The

opinion of Judge Porter is one of the ablest to be found in our reports. He makes these excellent observations on nonsuits: "Our law is framed upon the theory that on such questions the citizen can rely with more security on the concurrent judgment of twelve jurors, than on the majority vote of a divided bench. Unanimity is not required in our decisions on questions of law. It is otherwise with jurors charged with the duty of determining issues of fact; and such issues should not be withheld from the usual arbiters, unless the evidence leads so clearly to one result, that there is no room for difference between honest and upright men. A nonsuit should always be granted where the proof is so clear as to warrant the assumption, in good faith, that if the question were submitted to the jury, they would find that the culpable negligence of the plaintiff contributed to the injury. But we have had occasion, recently, to hear nonsuits of this kind justified on the novel ground, that unless the fact be determined in one way by the judge, it will be sure to be determined the other by the jury. The correctness of judicial opinions on mere questions of fact may well be distrusted, where we find them confessedly opposed to the common sense of mankind."

The case came up a third time in 39 N. Y. 61, when a verdict for the plaintiff was sustained. The views of the court above expressed as to the absence of the flagman were approved; but the judges differ as to the extent that the defendants' negligence excuses the plaintiff's want of vigilance. Judge Clarke thinks the omission of the customary warnings and signals may excuse the plaintiff from looking up and down the track just before crossing; and that "the court, in its last review of this case, in no respect relaxed the salutary rules which it had in many previous cases adopted in relation to the negligence of persons who are on railroads." Judge Woodruff, in a following opinion, on the other hand, says: "Negligence in the railroad company in the giving of signals or in omitting precautions of any kind will not excuse his omission to be diligent in such use of his own means of avoiding danger," and that if by such use he might have avoided the danger, notwithstanding the omission of the signals, his omission is concurring negligence, and where proof of it is clear, he should be nonsuited. But he concludes that in this case the question was so complicated and detailed, that it was properly left to the jury.

Sheridan v. *Brooklyn City, etc., Company*, 36 N. Y. 39.—Deceased was a boy, nine years old, who took a seat in defendants' horse-car, but in order to make room for adults, the conductor put him out of his seat, and the car being crowded, he was pushed by the passengers out on the front platform, and was afterward thrown off by another passenger rushing to get off, and was run over and killed. A verdict for the plaintiff was unanimously sustained.

Renwick v. *N. Y. Cent. Railroad Co.*, 36 N. Y. 133.—The plaintiff, approaching a crossing, stopped when from four to six rods from the track, looked both ways and listened, and seeing and hearing no indications of a train, started his horses, kept looking for the train, and when on the track was struck by the train which he saw close upon him. This was held not necessarily negligent, and judgment for plaintiff was affirmed.

Clark v. *Eight Ave. Railroad Co*, 36 N. Y. 135.—The plaintiff was injured while riding on the steps of the front platform of the defendants' street car, by a passing team. The car was so full that there was no other place for him to stand, and the conductor received his fare and suffered him to stand there. The court said "these facts, if true, authorized the jury to find that the plaintiff had been invited by those having charge of the car to ride in that place, and that an implied assurance had been by them given that that was a suitable safe place for him to ride," and judgment for plaintiff was affirmed; but the court say that without such explanation the position of the plaintiff would have shown him negligent, and it would have been the duty of the court to nonsuit.

Remarks.—The observation last quoted is an excellent example of what is called an *obiter dictum*, although, at the risk of being accused of uttering the same thing, we will say that the learned judge was quite right in that position.

Curran v. *The Warren Co.*, 36 N. Y. 153.—Defendants were distillers of coal tar. The deceased was engaged by them in manufacturing boilers, and was obliged to work inside of the defendants' boiler, entering through an orifice

opened for the purpose. He entered the boiler as usual, and instantly fell dead in consequence of inhaling the poisonous gas collected in it. It appeared that the ventilator in this boiler, which acted as a safety valve for the escape of the noxious gas, had been closed by the direction of the deceased. This was held contributory negligence, and a verdict for plaintiff was set aside. As there was no dispute about these facts, it was held that a nonsuit should have been granted as requested.

Ferris v. *Union Ferry Co.*, 36 N. Y. 312.—Plaintiff was a passenger on defendant's boat. On the arrival of the boat at the slip, the guard chain was let down before the boat was completely fastened, and the plaintiff proceeding to leave the boat, her foot slipped into an opening between the boat and the floating dock or bridge, and she was injured. She was held not negligent, the dropping of the chain being an assurance to passengers that the boat was properly secured and exit was safe.

Milton v. *Hudson River Steamboat Company*, 37 N. Y. 210.—Defendant agreed to tow plaintiff's boat to New York and to place it between two other boats. Defendant did not place the boat between two others, and part of the cargo was washed overboard. The referee found that the crew on plaintiff's boat did not exercise proper care over the boat, but that, if defendant had placed the boat between two others as he had agreed, the injury would nevertheless not have happened, and he reported in favour of plaintiff. This judgment was reversed.

McIntyre v. *N. Y. Cent. Railroad Co.*, 37 N. Y. 287.—Deceased was a passenger on defendants' train, and had no seat. He was directed by one of defendants' servants to pass forward, while the train was in motion, to another car where there were unoccupied seats. In attempting to do so, in some unknown manner, he fell between the cars and was killed. A recovery was affirmed, the court holding that it was for the jury to decide whether the deceased was guilty of any negligence in attempting to carry out the defendants' directions.

Davenport v. *Ruckman*, 37 N. Y. 568.—The plaintiff, who was partially blind, walking on the sidewalk, fell into an excavation suffered by defendant to exist on his premises and was injured. A recovery was approved, the court holding that the question for the jury was, "had the plaintiff sight enough to go, with reasonable assurance of safety, through the streets if they were kept in good condition?"

Wolfkiel v. *Sixth Ave. Railroad Co.*, 38 N. Y. 49.—Plaintiff was injured while getting on the front platform of a street car run by defendant. The testimony was conflicting as to whether the car was then in motion, and the question was properly submitted to the jury.

Nichols v. *Sixth Ave. Railroad Co*, 38 N. Y. 131.—Plaintiff, while on the front platform of defendants' street car, asked the driver to stop, and the driver brought his horses down to a walk when the plaintiff stepped down on the step to get off, and the car stopped; while he stood there, a sudden start of the car threw him off. The court held that the plaintiff had a right to occupy the step, and whether he was negligent while in that position was a question for the jury. They say: "While passengers have no right to jump off a car while in motion, or to make an attempt to do so, yet they are authorized to prepare to leave when there is evidence of an intention to stop or any signal given for such a purpose."

Gonzales v. *N. Y. & Harlem Railroad Co.*, 38 N. Y. 440.—Deceased, in stepping from a car, was killed by an express train on an adjoining track. It appeared that he must have been a passenger on this train, lived in sight of the station, and must have known that the express was then due. The court held that, if he did not look out for this train, he was guilty of negligence, and if he did look, he must have seen the train within a few feet of him, and his attempt to cross in front of it was reckless. Judgment for plaintiff reversed.

Wilcox v. *Rome, etc., Railroad Co.*, 39 N. Y. 358.—The plaintiff's intestate was killed at a village street crossing with which he was familiar, and where, if he had looked, he could have seen a train for seventy or eighty rods. There was evidence that there was no bell rung or whistle sounded. It was held that it must be presumed that he did not look for the train, and thus was negligent, and that the defendant's omission of signals did not excuse him.

Remarks.—Here, for the first time, we find an explicit avowal of Judge Porter's doctrine in the *Ernst* case. Judge Miller says, of that case:

"The opinion of one of the judges holds that the omission of the customary signals is a breach of duty, and an assurance to the traveller that no engine is approaching from either side within eighty rods of the crossing, and that he may rely on such assumption without incurring the imputation of a breach of duty to a wrong-doer. Upon a re-trial of the case a verdict was rendered in favor of the plaintiff, and, on an appeal to this court, the judgment was affirmed. Several of the judges placed their decision upon other and different grounds than the failure to give the necessary signals, and I do not understand that a majority of the court held that such neglect was an assurance of safety, which relieved the wayfarer, who did not look, from the imputation of negligence."

Havens v. *The Erie Railway Co.*, 41 N. Y. 296.—The intestate was killed at a railroad crossing. There was evidence that no warning was given by bell or whistle. The court charged that the deceased was not bound to stop and look up and down the railroad unless there were signals given, and, if he heard no signals, he had a right to assume that there was no train within eighty rods of the crossing, and refused to charge that if, at any point within ten rods of the crossing, he might easily have seen the approaching train nearly a mile off, he was bound to look up and down the road, and if, by omitting so to do, he lost his life, he cannot recover. This was held error.

The court remark: "At the time the case was tried some doubt existed as to the law upon these points in this State. Opinions given in this court, published in the reports, had laid down the law as it was given by the judge to the jury in the present case; but a close examination of the cases in which they were given will fail to show that such was the doctrine of the court. On the contrary, the rule that any negligence of the party injured contributing thereto will bar a recovery therefor, has been uniformly adhered to. It may now be regarded as settled, by this court, that a traveller approaching a crossing is bound to use his eyes and ears in looking and listening to ascertain whether trains are approaching, irrespective of the question whether the signals required by the statute are given upon the train, and that, if an injury is received in consequence of his omission so to do, he cannot recover therefor."

Two judges dissented, on the ground that, although the judge had refused to charge as requested, yet the judge had charged that men approaching a railroad in plain sight are bound to look for approaching trains.

Baxter v. *Troy & Boston Railroad Co.*, 41 N. Y. 502.—Plaintiff was injured by defendant's train while he was attempting to cross their track. The evidence was conflicting as to whether the defendants gave the requisite warnings and as to plaintiff's ability to see the train in time to avoid it; but the plaintiff testified that he did not look for the train, and did not hear it, although it could be heard from his residence, twenty rods west of the crossing. The court, by Grover, J., said: "My impression, from the evidence, is, that the plaintiff could, by looking, have seen the train and avoided the danger, and should, therefore, have been nonsuited, but, as a new trial must be granted on other grounds, I will not further consider it." The ground on which the new trial was granted was the refusal of the judge to charge that the plaintiff was not relieved from the duty of exercising ordinary prudence in approaching the crossing, by the omission of the defendants to give the required signal on approaching said crossing.

Remarks.—The *Wilcox* case is cited as the authority for this position, and we may, therefore, consider these two cases as an authoritative disavowal of the contrary doctrine in the *Ernst* case. Judge Grover limits the duty of looking out to looking along the track *when unobstructed*, and says it is not necessary for a driver to leave his team and go upon the track.—*Albany Law Journal.*

—A woman charged with burglary in Liverpool, and found with a full set of tools in her possession, was lately brought to trial, and set up as a defence that she was subject to attacks of neuralgia, and had taken chloral to deaden the pain until she didn't know what she was about. The jury acquitted her, which led the presiding judge to exclaim that in the whole course of his experience he had never heard of a verdict that so shocked him.

THE TRIAL OF ELECTION PETITIONS.

The London *Times*, referring to the renewal of the Election Petitions Act of 1868, has some observations upon the trial of election petitions, which are of interest in Canada :—

"It (the Election Petitions Act) was passed for three years on the understanding that by the close of that time the light shed upon the subject by the trials held under it would enable Parliament to affirm it once for all or to supersede it by some more scientific procedure. But at the termination of the three years the accumulation of experience appeared insufficient for condemnation or for absolute approval ; and once given a certificate of mortality it promises to be immortal. Seven times, complains Mr. Charles Lewis, this three years' Act has been renewed, and seventy times seven, for all we can see, may it be renewed. In truth, the theme is a very delicate and not a very palatable one to broach in the House of Commons. Members do not like to be ejected from their seats and punished for bribery by a single Common Law Judge ; but, like the eel with its objection to be skinned whether headwards or tailwards, they would find ground to criticise the process however and by whomever conducted. The old trial by Committee of the House was an offence to all reasonable men, who doubted the legal shrewdness, and in former times the impartiality, of the tribunal. The present system offends Mr. Lewis, because leaving, as he phrases it, "the liberties and "privileges of constituencies at the mercy of "the decision of judges from whom there is no "appeal."

"Mr. Lewis produces a formidable indictment against the Chancery Courts of First Instance by way of evidence that *à fortiori* the representation of the kingdom ought not to depend on the irresponsible verdict of a single judge. The statistics of the Court of Chancery, according to a return produced by him, show that out of 253 decisions pronounced in the course of fifteen months, only 106 had remained undisturbed by Superior Courts. He might have added that in many suits in which the defeated side cannot afford to appeal a reversal might similarly have been obtained. On the other hand, we believe examination would elicit that the Court of Appeal had merely varied a large number of the balance of 147 decisions in some collateral and minor points. A considerable difference, moreover, exists between the perplexed problems of mixed law and fact which come before a Vice-Chancellor or Master of the Rolls, and the simple charges of bribery which form the general substance of an Election Judge's inquiries. When a point of law arises in an election inquiry petitioners and respondents have already the right of appeal. Nevertheless, after all deductions, experience of the general and demonstrable fallibility of Courts justifies a suspicion that even on matters of fact, Election Judges are not more infallible than their fellows, and that several of their decisions would probably have been reversed by an appellate tribunal. Different minds draw very different inferences from the same circumstances, and one Election Judge may have connected the successful candidate with corrupt practices for which another judge might have held him in no way accountable. As the Attorney-General remarked on Monday, intelligible principles have now been laid down with reference, for example, to what does and does not constitute agency; but though the bare principle may be formulated beyond dispute, it will still admit of a dozen diverse applications. It is of the very essence of an election petition that the corrupt ingenuity which it is the judge's task to track has painfully overlaid the facts with every imaginable degree of shade and colour. An unerring conclusion could not be insured by two or more judges, as Mr. Lewis suggests in conformity with the report of the Select Committee of 1875, nor by one Court of Appeal, for which the Attorney-General avows his own preference. To borrow Mr. Lewis's parallel of other Courts of Justice, it is familiar experience that a decision of a Divisional Court reversed by a Court of Appeal is upheld by the House of Lords Room is left for surmise that a yet more exalted tribunal might even reverse the decision of the House of Lords itself.

"Special difficulties environ the question how to construct a perfect court for the trial of election petitions. We agree with Mr. Lewis in thinking it an anomaly that the highest of an Englishman's rights should be at the mercy of a single judge, from whom, except on points of law, there is no appeal. It is no answer that,

if a single judge can be trusted to try a man for his life, he may be trusted to try the right to sit for the borough of Great Yarmouth. In criminal trials the fact is within the jury's province, and the judge propounds the law. But the addition of a second judge to Election Courts would not be sufficient. Unless the Court consisted of three, sometimes no decision could be arrived at, and the withdrawal of three judges from the ordinary judicial business of the country would create serious embarrassment. To cause a block in the general legal business of the community for the six months following a general election, or to add a superfluous three judges to the judicial Bench for the exigencies of half a year in every six or seven, is a vexatious dilemma. Indeed, a tribunal of two, or even three, would not solve the difficulty satisfactorily. However strong the Court which first heard the case, a defeated litigant desires the ventilation of his grievance by an entirely fresh tribunal. Nothing but a Court of Appeal will content him, and a Court of Appeal in election disputes implies a second investigation of the facts, with all the consequent unsettlement of a neighborhood and reduplication of legal expenditure. The Chancellor of the Exchequer has pledged the Government to put a Corrupt Practices at Elections Bill in the very front of the business of next Session of Parliament; and Sir John Holker intimates that the Bill will grant a right of appeal to candidates adjudged guilty of bribery. But we do not clearly apprehend, nor perhaps, does the Atttorney-General, whether the appeal is to be a matter of general right or limited to a candidate convicted of bribery. In the majority of cases the justice of the primary decision is obvious. No one ever felt inclined to dispute the judgments in the old decisions against Taunton and Norwich. Cases like that of Launceston raised other issues. More satisfaction would have been felt had either the original verdict proceeded from two or three judges, or had the unseated candidate been entitled to appeal. The problem is how to construct a legal strainer through which only questions of real difficulty shall percolate to the Court of Appeal. A Court of Appeal in some shape there must be, and it must have jurisdiction to investigate questions of fact as well as of law. Perhaps means might be found of settling between court and counsel, at the close of the original hearing, what facts and what heads of evidence were to be subjected to the ordeal of a second scrutiny. It is a delicate question, and not the less delicate that Parliament will have to solve it with a general election staring it in the face."

DAMAGES FOR PROSPECTIVE INJURY.

HIGH COURT OF JUSTICE, QUEEN'S BENCH DIVISION, MAY 13, 1878.

LAMB v. WALKER.

The plaintiff sued the defendant for injury to the buildings of the plaintiff by mining operations of the defendant on the land of the defendant. A special referee having found that the plaintiff in addition to injury already incurred, would incur injury in the future, and having assessed the prospective damages in respect of such injury at £150: *Held*, by Mellor and Manisty, JJ. (*dissentiente* Cockburn, C.J.), that the prospective damages were recoverable.

This action was brought by the owner of land for damages caused by an excavation by an adjoining mine owner under plaintiff's land which caused his building to settle. The case was tried before a special referee who reported that the damage which had been done to plaintiff by the excavation at the date of the commencement of the action was £400, and that he estimated the future damages that would be incurred to be £150, the total amount being £550, of which £150 had been paid into court. The plaintiff took out a summons to defendant to show cause why plaintiff should not be at liberty to sign judgment for £400. Subsequently a rule was granted calling upon plaintiff to show cause why he should not accept judgment for £250, the balance found to be due him for the damages already accrued, which rule was duly argued.

Cave, *Q.C.*, against the rule.

Gainsford Bruce, for the rule.

MANISTY, J. (after stating the cause of the action as above.) I am of opinion that the plaintiff is entitled to recover the £150 [the amount of future damage], and that consequently the rule to reduce the damages should be discharged, and the plaintiff should be at liberty to sign judgment for £400 and one farthing, and taxed costs. It is noteworthy that the referee finds as a fact that

further damages to the extent of £150 now in question will be sustained by the plaintiff by reason of the wrongful acts of the defendant complained of in the fifth and sixth paragraphs of the statement of claim. The defendant, by paying money into court generally, has admitted all the material averments contained in the plaintiff's statement of claim. But it was contended on his behalf that, inasmuch as his mining operations in his own land were not *per se* wrongful acts, the plaintiff's only cause of action was the "consequential damage" done to the plaintiff's property up to the time of the commencement of the action. It was contended on the part of the plaintiff that, although he had no cause of action against the defendant until his land and buildings were injured, nevertheless, as soon as they were injured by the withdrawal by the defendant of the support to which they were entitled, he had a good cause of action, and that he could only recover damages once for all. It was further contended on his behalf that the true measure of his damages was the extent to which his reversionary estate was impaired or rendered less valuable by reason of the defendant's alleged wrongful act. I am of opinion that the plaintiff's contention is correct. The cases relied on by the defendant only decided that, without "consequential damage," there was no cause of action. But there is no authority, so far as I know, for the proposition that damage *per se* and apart from a wrongful act can constitute a cause of action. The plaintiff's right was to have his land and buildings supported by the subjacent and adjacent soil or strata, and so long as they were in fact supported he had no cause of action; but as soon as the support which was left proved to be insufficient, and injury to the plaintiff's property ensued, then the defendant's act in withdrawing the necessary support became wrongful. *Damnum* and *injuria* concurred, and the plaintiff's cause of action then accrued. That point is, as it seems to me, concluded by the judgment of the House of Lords in *Backhouse* v. *Bonomi*, 9 H. L. 903. But it is said, on the part of the defendant, that, assuming this to be so, the true measure of the damage recoverable in this action is the injury actually done to the plaintiff's land and buildings up to the time of the commencement of the action, and that his remedy for subsequent injury is by bringing actions from time to time as and when further injury accrues. I am of opinion, both upon principle and authority, that such is not the law. See *Nicklin* v. *Williams*, 10 Exch. 259, as explained and approved upon this point, by the Exchequer Chamber in *Bonomi* v. *Backhouse*, E. B. & E. 646-658, and by the House of Lords in *Backhouse* v. *Bonomi*, 9 H. of L. Cas. 503. See, also, *Hamer* v. *Knowles*, 6 H. & N. 454. It is a well-settled rule of law that damages resulting from one and the same cause of action must be assessed and recovered once for all. And it seems to me that in the present case there is but one and the same cause of action, namely, that which I have already mentioned. It may be said that it would be more just and equitable in a case like the present that the plaintiff should only be entitled to recover the amount of damage actually done to his property up to the time of bringing his action, leaving him to recover subsequent damage (if any), by a subsequent action, or, if need be, by a series of subsequent actions. The same might have been said in many cases in which, however, the contrary principle has for a very long time been, and, as I think wisely, acted upon. Take, for instance, the case of wrongful obstruction of light by means of the erection of a new building, lawful in itself. In that case it might be said the plaintiff ought to be allowed to recover the damage sustained up to the time of the commencement of his action, because, possibly, the obstruction may be removed, and therefore it would be unjust to permit the plaintiff to recover prospective damage unless and until it is actually incurred. If that principle were adopted, one consequence would be that the Statute of Limitations would cease to be operative. A plaintiff might lie by until the expiration of six years without bringing any action, and then not only bring an action for the damage sustained during the period of six years next before action brought, but he would be entitled to bring a series of subsequent actions for the damage subsequently accruing. Again, take the case of slander actionable only by reason of special damage. The speaking of the defamatory words is *damnum absque injuria*, and consequently not actionable without special damage, just as the removal of the necessary support in the present case

was *damnum absque injuria*, and not actionable until the plaintiff's property was injured; but I should suppose it would not be suggested that in such a case the plaintiff could only recover the damage actually sustained up to the time of bringing his action, and that for subsequent damage he might bring a subsequent action or a series of subsequent actions. The fact is that the principle hitherto acted upon— namely, that a plaintiff must recover once for all, by one and the same action, all damage, past, present, and future, resulting from one and the same cause of action—may not always insure perfect justice; but as a rule it is in my opinion, a wholesome principle, and I doubt whether any better could be devised. It may be that in some exceptional cases—such, for instance, as injury sustained by a passenger, owing to the negligence of the carrier—some useful change might be made in the law; if so, that is a matter for the Legislature. As the law stands, the passenger must recover once for all, because there is only one cause of action. And it seems to me that anything more disastrous than that of allowing a series of actions to be brought for damage arising from time to time in respect of the same cause of action could not well be conceived. If in the present case the reversioner must resort to successive actions for injury to his reversion, so must his several tenants for injury to their possession, and the consequence to the defendant would, I should think, be very much worse than that of having the damages assessed once for all in one and the same action. In my opinion, the plaintiff is entitled to judgment for £400 and one farthing and costs.

Mellor, J. The facts of this case are set out in the judgment of my brother Manisty, and it is not necessary for me to repeat them. If I thought that the present case was not concluded by authority, and that we were at liberty to consider whether a better or more equitable rule might not be found in the reasons relied upon by the lord chief justice, as leading to the conclusion at which he has arrived, I might hesitate as to the judgment I might form; but I think that this case is concluded by authority, and that I am not at liberty to treat the question as an open one. The plaintiff in this action complained that he was damnified in respect of his reversionary interest in certain land and buildings, not only by mining excavations made by the defendant under his (the plaintiff's) premises, but also by mining excavations by the defendant made in his own land adjoining, the effect of which was to cause actual damage to the lands and houses to which the plaintiff was so entitled as reversioner; and it is with regard to the latter head of damage that the question upon which we differ arises. It cannot be disputed, since the case of *Backhouse* v. *Bonomi*, 9 H. of L. 503, that the owner of land and minerals adjoining the land or lands and houses of another person cannot be prevented from the fullest exercise of his rights of property in his own land, so long as in the exercise of those rights he does not injuriously affect the corresponding right of the owner of the adjoining property; and no cause of action can arise to the owner of land by the exercise of such rights of ownership by an adjoining owner on his own property until some actual damage has been thereby occasioned to his property. In the language of Lord Wensleydale in *Backhouse* v. *Bonomi*, *supra*: "The plaintiff's right is not in the nature of an easement, but the right is to the enjoyment of his own property, and the obligation is cast upon the owner of the neighboring property not to interrupt that enjoyment." The act of the defendant in this case, therefore, only became wrongful when it interrupted the enjoyment by the plaintiff of his own property. The *damnum* and *injuria* both combined as soon as the act of the defendant became wrongful. It is extremely important to ascertain at this point what it was which constituted the cause of action on the part of the plaintiff. The act done by the defendant, so long as he confined his excavations to his own property, was lawful exercise of his right; but as soon as he, in the otherwise lawful exercise of his right, excavated in his own land to an extent and in a manner which caused actual damage to the plaintiff's property, then the act, *ipso facto*, became tortious, and the plaintiff became entitled to maintain his action. It appears to me that it is not correct to say that the action is for damage only, because it will not lie until actual damage occurs. It is still the combination of *injuria* and *damnum* which gives the right of action

to the plaintiff, and the defendant becomes liable at once to the plaintiff for all the injurious consequences, whether present or in future, which result from the acts of the defendant having become tortious, and whether he will bring his action immediately upon the manifestation of damage or wait for further development of it is at his option; but whether he elects to bring his action immediately or prefers to wait for the complete development of the mischief subject to the risk arising under the Statute of Limitations, he can only, as it appears to me, have one action and one recovery for all the damage occasioned by the defendant's wrongful acts. The result is clearly established by the case of *Nicklin* v. *Williams*, 10 Ex. 259, which, although it must be considered as overruled by the case of *Backhouse* v. *Bonomi* so far as it decided that, under circumstances exactly like the present, the cause of action really arose in respect of injury to the right of the plaintiff to have his premises supported by the land of the defendant independently of actual damage thereto, still is, as it appears to me, a conclusive authority on the point of difference in this case. Parke, B., in delivering the judgment of the court upon the argument on the demurrer in that case, said: "For this wrong the plaintiffs would have a right to recover a full compensation including the probable damage to the fabric; and if they had already obtained a verdict with damages they must be presumed to be satisfied for all the consequences of the wrong; and if, instead of having a verdict, they receive with their own consent a satisfaction, such satisfaction is to be considered to compensate for all the consequences of the wrong." The question in that case was distinctly raised by the new assignment, and was whether, on fresh damage arising after an agreement by way of accord and satisfaction had been made, a new cause of action could arise. That the case of *Nicklin and another* v. *Williams* was rightly decided, so far as it affects the matter now in controversy, appears from the judgment of the House of Lords in *Backhouse* v. *Bonomi*, in which the Lord Chancellor, Lord Westbury, referring to it, says: "With regard to *Nicklin and another* v. *Williams* the decision of that case is beyond all question; some of the dicta which have been relied upon by the counsel in that case are not necessary for the decision that was there pronounced." I cannot see any distinction between the present case and that. In the present case the tortious act which occasioned the damage is identical in character with that in *Nicklin* v. *Williams*, and compensation for the resulting damage must be obtained by one and the same recovery. It might in the present case be a convenient course to wait and see whether further damage will actually result instead of assessing it as probable; but I can only consider that the same suggestion has frequently arisen and been constantly overruled as being inconsistent with an elementary rule of law. In *Bonomi* v. *Backhouse*, E. B. & E. 638, Wightman, J., says: "The plaintiffs can only recover to the extent of the damage they have actually sustained, which may include not merely what they are obliged to lay out in actual repair, but the diminution in the value of the premises by reason of the damage;" and Coleridge, J., at page 641, said: "Where a right of action is thus vested, and an action is brought for the act alleged to have occasioned the injury, the damages given by the jury for that act must be taken to embrace all the injurious consequences of that act, unknown as well as known, which shall arise thereafter, as well as those which have arisen; for the right of action is satisfied by one recovery." And in the same case in error, Willes, J., delivering the judgment of the Court of Error, commenting on *Nicklin* v. *Williams*, says: "For before the former action was commenced it is obvious that actual damage had been sustained; in which case another principle applies, viz.: that no second or fresh action can under such circumstances be brought for subsequently accruing damage; all the damage consequent upon the unlawful act is in contemplation of law satisfied by one judgment or accord." I am unable to see anything in the present case to take it out of the rule so clearly established, viz: that there can be only one recovery for all the damage resulting from the same wrongful act, whether it be all then manifest or is only likely to result from it; for it appears to me you cannot divide the injurious consequences into sections and refer each new damage as it occurs to some new tortious act by the defendant, there being in fact only one tortious act committed; and to stop at a given point, and so divide the damage

already accrued from the damage which may be still further developed, would be a violation of the rule as to one recovery or one award to which I have referred. If I am right in what I have said, that in every cause of action there must combine an *injuria* and a *damnum*, then I cannot doubt that the arbitrator was right in assessing not only the actual manifest damage, but also in assessing the future damage within the fifth and sixth paragraphs of the plaintiff's claim, and that consequently the plaintiff is entitled to the judgment of the court.

COCKBURN, C. J., dissented.

CURRENT EVENTS.

GERMANY.

DR. FORSTER.—The death is announced at Berlin, August 8, of Dr. Forster, an eminent privy councillor and ministerial director of the department of worship in the German ministry of ecclesiastical affairs. Dr. Forster stood in the first rank amoung Prussian lawyers, and had a European reputation for jurisprudence. A few years ago he occupied the post of judge in the Court of Appeals at Greisswald, when he was called to Berlin to take a high position in the ministry of justice. At the outbreak of the political struggle between Prince Bismarck and the ultramontanes, when Dr. Falk was placed at the head of the ministry of ecclesiastical affairs, he selected as his chief lieutenant Dr. Forster, to whom is due a great part of the credit or discredit of the celebrated "Falk laws," which are at the present moment the subject of negotiations between Prince Bismarck and the Roman nuncio. He also devised the recent religious legislation and defended the imperial religious policy in the Landtag.

GREAT BRITAIN.

Baron Blackburn, Lord of Appeal, Sir Robert Lush, Justice of the Queen's Bench, England, Judge Charles Barry, of the Court of Queen's Bench, Ireland, and Sir James Fitz-James Stephen, Q.C., the eminent jurist, have been appointed commissioners to consider changes in the draft of the penal code which was submitted at the recent session of Parliament, and to present the amended bill at the next session.

GENERAL NOTES.

A NEW EDITION OF BRACTON.—An important addition, says the *London Academy*, will shortly be made to the "Rolls Series" of chronicles and documents, illustrative of early English history, by the publication of the first volume of "Bracton de Legibus et Consuetudinibus Angliæ," which is now completed. Sir Travers Twiss, Q.C., has undertaken, at the request of the Master of the Rolls, and under the authority of the Lords Commissioners of Her Majesty's Treasury, to edit the work of the great "Father of the Common Law of England," which has been hitherto almost a sealed book to the law student from its scarcity, and from the repulsive character of the text of the printed book of 1569. It has been recently ascertained that there are about thirty-five ancient manuscripts of Bracton in England, of which more than twenty have been examined by the editor, and he has succeeded by a careful collation of the more important manuscripts in correcting many inaccuracies of the text of the printed book. The editor's view, as announced in his introduction to the first volume, is that Bracton's work was not originally composed in the form in which it has come down to us in the printed book of 1569, but that it consists of various treatises, composed at intervals by the author, and not written *uno tenore*, although ultimately consolidated into an aggregate work. This hypothesis serves to explain certain difficulties arising out of seeming conflicts of statement as to the law in different parts of the work, and it accounts for the variations which are found to exist in certain manuscripts in the mode in which the treatises are grouped under different heads, and are diversely arranged in books or in centuries.

THE CONDUCT OF JUDGES.—*The Chicago Legal News* expresses itself as follows on this subject: "How Judges should act in their intercourse with the Bar and general public is not regulated by any fixed rule. Some Judges mingle freely with the people, and even talk about the cases that are pending before them, while others imagine that there is a line drawn between them and the people, and exclude themselves from society as if it were an enemy to judicial purity. We have stated the two extremes. The former will never have the respect of the

Bar, while the latter will be regarded as too aristocratic for this country. The correct line of conduct is between the two extremes. Judges should mingle freely with the people. The more they know of the wants and necessities of the people, the changes that are taking place in the mercantile, and the improvements that are being made in the mechanical world, the better fitted they will be to decide the cases that come before them. They should, however, treat with contempt every attempt that is made by attorney, client, or other person to approach them out of court, to talk about or discuss the law or facts of any case that may come before them. Such talk or discussion can only properly take place in open court after notice to the opposite side. An attorney never feels safe if he hears that his opponent has been talking privately with the Judge who is to decide his case, about the issues involved. We are glad to be able to say that Judges are generally very careful in this respect, but regret to say that there are exceptions."

REPEAL OF THE BANKRUPTCY ACT.—*The Chicago Legal News* remarks: "Ever since it was known that the law would terminate on the first of September, the uncertainty as to who would avail themselves of the protection of the law has had a very depressing effect upon the business of the country. Among the many important questions that will come before the next Legislature of this State, will be what relief, if any, shall be extended to insolvents? Some will be in favour of a stay-law, while others will be in favour of a more liberal exemption of property from liability to execution and forced sale. Others no doubt will be in favour of a State Bankrupt law. Massachusetts has had a State Bankrupt law for many years; in fact the law now just expiring which has become so odious, was for the most part taken from the Massachusetts law. Vermontin, contemplation of the repeal of the United States Bankrupt Law, has recently passed a State Bankrupt Law, which is amongst the longest laws ever passed by that State. We doubt if the Legislature of this State, with the memory of the present Bankrupt law fresh in the minds of the people, will for some time to come pass a State Bankrupt law."

RIDING ON SUNDAY.—The *Albany Law Journal* says: In *Schmidt* v. *Humphrey*, 12 West. Jur. 475, decided by the Supreme Court of Iowa at its June (1878) term, the action was brought to recover damages for injuries received by plaintiff while travelling in a highway, caused by defendant's dog frightening the horse attached to the buggy in which plaintiff was riding. A defence set up was that plaintiff was at the time violating the statute forbidding riding on Sunday on secular business. The court *held* that this defence was not sufficient. This decision, while a sensible and just one, is in conflict with the doctrine laid down in numerous cases. In *Smith* v. *Boston & Maine R. R. Co.*, 120 Mass. 490; 21 Am. Rep. 538, it was *held* that one who travels on Sunday, to ascertain whether a house which he has hired, and into which he intends to move the next day, has been cleaned, is not travelling from necessity or charity and cannot maintain an action for injuries sustained at a railroad crossing through the negligence of the servants of the railroad company. But in *Welch* v. *Wesson*, 6 Gray, 505, where plaintiff and defendant were racing in the highway in violation of law, it was decided that one could recover for injuries caused by the negligence of the other; an action, however, would not lie in such case for an injury caused by a defect in the highway. *McCarty* v. *Portland*, 67 Me. 167. In *Cratty* v. *City of Bangor*, 57 Me. 423; 1 Am. Rep. 56, it is *held* that a person travelling on pleasure on Sunday cannot maintain an action against the town for injuries resulting from a defect in the highway. But in *McClary* v. *Lowell*, 44 Vt. 116; 8 Am. Rep. 366, it was *held* that where plaintiff, who was travelling to see his children on Sunday, was injured by a defect in the highway, a recovery would not be defeated under a statute forbidding travel on that day, except for attendance at places of moral instruction and from necessity. In *Carroll* v. *Staten Island R. R. Co.*, 58 N. Y. 126, it is *held* that one violating the statute prohibiting travel on Sunday is not without the protection of the law. A carrier of passengers who transports him owes him the same duty as if he was lawfully travelling, and is responsible for a violation of that duty. See, however, *Stanton* v. *Metropolitan R. R. Co.*, 14, Allen 485, where a different view is held. Also *Gregg* v. *Wyman*, 4 Cush. 322; *Sutton* v. *Town of Wauwatosa*, 29 Wis. 21; 9 Am. Rep. 534, and notes to cases 3 Am. Rep. 368; 8 id. 366; 9 id. 544, and 21 id. 540.