DIARY FOR NOVEMBER.

1. Tues. *All Saints.*
5. Sat.. Articles, &c., to be left with Sec. Law Society.
6. SUN. *21st Sunday after Trinity.*
13. SUN. *22nd Sunday after Trinity.*
16. Wed. Last day for service for County Court.
18. Frid. Examination of Law Students for call to the Bar.
19. Sat.. Examination of Articled Clerks for certificate of fitness.
20. SUN. *23rd Sunday after Trinity.*
21. Mon. Michaelmas Term begins.
24. Thur. Last day for setting down and giving notice of re-hearing
25. Frid. Paper Day, Queen's B. New Trial Day, C. P.
26. Sat. Declaration County Court. Paper Day, Common Pleas. New Trial Day, Queen's Bench.
27. SUN. *1st Sunday in Advent.*
28. Mon. Paper Day, Q. B. New Trial Day, C. P.
29. Tues. Paper Day, C. P. New Trial Day, Q. B.
30. Wed. *St. Andrew.* Paper Day, Queen's Bench. New Trial Day, Common Pleas.

THE
Canada Law Journal.

NOVEMBER, 1870.

THE HON. WILLIAM HUME BLAKE.

It is our sad duty to record the death at Toronto, on the 15th inst., of the Hon. William Hume Blake, Ex-Chancellor of Upper Canada, in his sixty-second year.

Although some years have passed since Mr. Blake retired from his position on the Bench, and thus practically severed his connection with the profession, we cannot permit the occasion to pass without a tribute to his memory.

He was born in the County of Wicklow, Ireland, on 10th March, 1809, at Kiltegan. Of this parish his father, the Rev. Dominick Edward Blake, who died at the early age of fifty from the same disease which has now carried off his son, was Rector. He was educated at Trinity College, Dublin, and was at first intended for the medical profession, having studied under Sir Philip Crampton. He subsequently thought of entering the Church, as in fact did his brother, the Rev. D. E. Blake, late Rector of Thornhill.

In 1832 Mr. Blake emigrated to Canada and settled in the Township of Adelaide with other members of his family, having shortly before he left Ireland married his cousin, Catherine Hume, the grand-daughter of William Hume, M. P. for Wicklow, well known in his day as a loyal gentleman, murdered by the rebels in 1798.

He commenced the study of the law in 1834, in the office of Mr. Washburn; and though he began his legal studies later in life than is usual, he set to work with so much energy that he appeared to compress into a few years the work usually allotted to many. He was a careful and pains-taking reader, and as a student he pursued his studies with an amount of diligence and labour which was only fully understood by those with whom he was intimate, but which formed the stepping-stone to his ultimate success.

Mr. Blake was admitted as a member of the Law Society in Hilary Term, 1835, and was called to the Bar in Easter Term, 1835, Mr. Vice-Chancellor Esten being called in the Term following. In Michaelmas Term, 1845, he was appointed one of the Benchers of the Law Society, the names of the present Treasurer, Hon. J. H. Cameron, and the late Vice-Chancellor Esten, being the next on the list.

He formed a partnership with Mr. Joseph C. Morrison, now the senior Puisne Judge in the Queen's Bench, and they were afterwards joined by the late Dr. Connor, who, as well as his partners, was also, in 1863, elevated to the Bench.

Though for several years one of the most able, fearless, eloquent and successful of advocates, Mr. Blake will be best remembered in his intimate connection with the Court of Chancery, as its first Chancellor. The reformation of this Court was undertaken by the Baldwin-Lafontaine Government, of which Mr. Blake was Solicitor-General, in 1848; and it was then established on its present footing mainly through Mr. Blake's exertions. He was naturally selected by his colleagues as the proper and most desirable person to fill the seat of Chancellor, to which he was appointed on the 30th September, 1849; and the wisdom of the choice was proved by the thorough and efficient manner with which he set to work to remodel and thoroughly renovate and reform the then existing system of Chancery practice in every branch and detail.

The condition of the court at that time, and the tiresome, almost endless delays in even the simplest causes and proceedings had become almost a household word, and it was to remedy this great evil—alike felt by the public and the profession—that the new Chancellor applied himself. With undaunted perseverance and grasping intellect he grappled with the difficulties which presented themselves, swept away a multitude of the unwholesome relics of

an effete organization, which impeded the course of equity; and he infused new life into all the branches of the court. Nothing escaped him, and under his able superintendence the most minute details were carefully arranged and organized.

Years have passed since the work in these Augean stables was commenced, and no one who is familiar with what the condition of affairs then was but is ready to testify that the improvements in the practice and procedure in the Court of Chancery of this Province were commenced at the time of Mr. Blake's appointment as Chancellor, and that the abolishment of the then existing evils in the court are to be traced back to that date. That much has been done since there can be no doubt, but it is equally certain that the foundation stone of improvement was successfully laid by him who has just passed from amongst us.

Possessed of a clear and capacious intellect, Mr. Blake's judgments shewed that nothing had been overlooked which could affect the equities between the parties; every point in the case received his careful attention, and had the advantage of being fully digested in a mind that had been stored by years of arduous reading richly with legal lore.

We cannot do better than here quote the interesting and eloquent remarks made by the present learned Chancellor, on the occasion of his first appearing in Court after Mr. Blake's death. No one now living could speak with more confidence than Mr. Spragge on the subject. We copy the following from the *Globe:*

"It fell to the lot of my brother, Mowat, as the first judge of this Court who sat after the death of its first Chancellor, to refer to the event. I desire to express my hearty concurrence in what fell from my learned brother in reference to it. But having sat with the late Chancellor for a number of years, it is fitting also that I should bear my own testimony to his high qualities as a judge. With an intellect that enabled him to grasp more readily than most men the whole of a case, he was yet most patient and pains-taking in the investigation of every case heard before him. He never spared himself, but was always most careful that no suitor should suffer wrong through any lack of diligence on his part. He had, moreover—what every equity judge should have—a high appreciation of the duties and functions of a Court—of the mission, if I may so term it, of a Court of Equity in this country: not to adjudicate drily upon the case before the court, but so to expound the principles of equity law as to teach men to deal justly and equitably between themselves. I have reason to believe that such expositions of the principles upon which this court acts has had a salutary influence upon the country; and Mr. Blake, in the able and lucid judgments delivered by him, contributed largely to this result. He always bore in mind that to which the present Lord Chancellor of England gave expression in one of his judgments: 'The standard by which parties are tried here, either as trustees or co-partners, or in various other relations which may be suggested, is a standard, I am thankful to say, higher than the standard of the world.'

"The death of Mr. Blake has reminded me of the correspondence that took place between him and his brother-judges on the occasion of his retirement from the bench. The first letter is addressed to the late Mr. Esten, and runs thus:

"My dear Vice-Chancellor,—I enclose the copy of a note which I have sent this morning to the Attorney-General. This step has been inexpressibly painful to me, but it has ceased to be a matter of choice, and that being so, I felt that you and Brother Spragge ought to be relieved at the earliest moment from the pressure of extra work.

"So long as life is spared to me I shall recall with gratitude the affectionate kindness with which you have both laboured to spare my weakness.

"That God may bless you both with a long life and usefulness is the heartfelt prayer of your affectionate friend,

"Wm. Hume Blake.

"As I am not very well able to write, I hope Brother Spragge will read this as written to him as well as yourself."

"I have not the answer of Mr. Esten; I must be content to read my own:

"My dear Chancellor,—I deeply regret that the cruel disease under which you suffer has left you no alternative but the painful one of retirement from the bench. During the ten years that I have sat with you, no unkind word, and I feel sure no unkind feeling, has ever passed between us, and I cannot but feel deeply grieved at the severance of such a connection.

"Most sincerely and heartily do I hope that there are yet many years of comfort and happiness in store for you.

"Many thanks for the kind terms in which you communicated to us your intended retirement, and for your good wishes to us personally.

"Believe me always, my dear Chancellor,

"Yours,

"J. G. Spragge."

"Most truly did Mr. Blake say that it was inexpressibly painful to him to leave the bench. I remember well the long, the oft-repeated and painful struggle that preceded his resignation. It was from no love of ease that he retired. It was, on the contrary, a forced withdrawal from active duty, which he was most anxious to continue to discharge; the compulsory inactivity of a most active mind. I have read to you the correspondence that took place on the occasion. The writer of the first letter is now dead. The learned and estimable man to whom it was addressed is also dead, and a twelve-month ago we followed to the grave the kind-hearted and able man who was our second Chancellor. Thus three of the Judges of this Court have passed away. They were all of them men of whom this Court may well feel proud, and I am sure that their memory will be held in high respect by the Court, and by the country that they ably and faithfully served."

Mr. Blake was a warm politician of the Liberal school; and in those days when politics ran high, he was never accused of being lukewarm in his adherence to his party. In fact his ardent, impulsive temperament and high spirit made him enter upon all he undertook—whether we speak of him in the heat of a political contest, in the halls of the legislature, or as an advocate identifying himself with the cause of his client—with a vehement energy which, though it sometimes made him enemies, gained even from them a grudging respect, and made him a reputation which outlives the troublous times when he was best known to the public.

Whilst Sir Edmund Head was Governor General, Mr. Blake was appointed Chancellor of the University, and zealously and earnestly devoted himself to the task of raising the University to the honorable position which it now occupies. All who were brought in contact with him will bear testimony to the conscientious and thorough manner in which the already overworked Chancellor discharged the duties of this office. The magnificent building now occupied by the University was erected mainly through his influence, energy and zeal. He was constrained however by failing health, and the pressing engagements of his judicial life to resign the Chancellorship of the University, when he was succeeded by the late Mr. Justice Burns.

In 1862, ill-health compelled the Chancellor to resign his seat on the Bench; but though he was afterwards appointed one of the judges of the Court of Appeal, he was never able to undertake any judicial duties. He sought relief from the painful disease (gout) which afflicted him by a journey to a milder climate, from which he returned only a few months before his death.

Though the Law Society desired that the remains of one so eminent in the profession should be paid the highest marks of respect by them as a body, the funeral was, at the earnest wish of the bereaved members of his family, quite private, though numerously attended.

ROYAL MARRIAGE ACTS.

We follow the example of a legal cotemporary in England in referring to the legislation which affects the approaching marriage of the Princess Louise to the Marquis of Lorne. It may be that it is not a matter which touches us very closely, but we are glad to feel that the time has not yet come when we can look with indifference upon a ceremony which, though it is to take place so many thousand miles away, is still of much significance in itself and of interest to the subjects of a hereditary limited monarchy.

Much has been said and written about the evils of the law which, as is generally supposed, has prevented a member of the royal family from marrying a subject, but there is much misapprehension as to the effect of the statutes on the point; nor can it be denied that the practice which has prevailed for so many years has some points to recommend it, although productive of some evil; and it may truly be said that in nothing except in the sound of the title is the English nobleman inferior to the petty German princes who have been taken as husbands for the princesses of England.

But we must not wander from the point. The English *Law Journal* gives the following sketch of the legislation affecting Royal Marriages:—

"It was not till the reign of Henry VI. that any legislation took place with the view of controlling marriages contracted by members of the royal family; but the occasion of the marriage of Katherine, mother to Henry VI., with Owen Tudor, a private gentleman, the statute 6 Henry VI. was passed. That statute prohibited the marriage of a Queen Dowager without the consent of the King for the time being, the reason quaintly assigned being 'because the disparage-

ment of the Queen shall give greater comfort and example to other ladies of estate who are of the blood royal more lightly to disparage themselves.' In the reign of Henry VIII., when kings' wives 'began to multiply on the face of the earth,' Parliament took upon itself to control, to some extent, the marriages of some members of the royal family. The statute 28 Hen. VIII., c. 18, made it high treason for any man to contract marriage with the King's children, his sisters or aunts *ex parte paterna*, or the children of his brethren or sisters. This statute went but a small way to effect the purpose contemplated by the legislature; for by the letter of the Act the King's sons, or brothers, or uncles would be excluded from the provisions of the Act. These statutes are now matter of history; indeed the 28 Hen. VIII. c. 18, was repealed by the 1 Edw. VI. c. 12. The Act now in force, commonly known as the Royal Marriage Act, is the 12 Geo. III. c. 11. That statute provides, by section 1, that no descendant of the body of his late Majesty King George II., male or female (other than the issue of princesses who have married, or may hereafter marry, into foreign families), shall be capable of contracting matrimony without the previous consent of His Majesty, his heirs or successors, signified under the Great Seal and declared in Council (which consent to preserve the memory thereof is hereby directed to be set out in the licence and register of marriage, and to be entered in the books of the Privy Council); and that every marriage or matrimonial contract of any such descendant, without such consent first had or obtained, shall be null and void to all intents and purposes whatsoever. Section 2 provides that, in case of any such descendant of the body of his late Majesty King George II., being above the age of twenty-five years, shall persist in his or her resolution to contract a marriage disapproved of or dissented from by the King, his heirs or successors, then such descendant, upon giving notice to the King's Privy Council (which notice is hereby directed to be entered in the books thereof), may, at any time after the expiration of twelve calendar months after such notice given to the Privy Council as aforesaid, contract such marriage, and his other marriage with the person before proposed and rejected may be duly solemnised without the previous consent of His Majesty, his heirs or successors; and such marriage shall be good as if this Act had never been made, unless both Houses of Parliament shall, before the expiration of the said twelve months, expressly declare their disapprobation of such intended marriage. The last section of the Act provides that any person who shall wilfully solemnise or assist at the celebration without such consent shall incur the penalties of a præmunire.

"We had occasion to recite these provisions of the legislature about four years ago, on an occasion less auspicious than the present, but we venture to repeat them now in order that the precise state of the law may be better understood. There is one criticism upon the Royal Marriage Act, 12 Geo. III., c. 11, which may be made, and which seems to us to show that the Act must be amended at a future date. The only descendants of George II. exempt from the Act are 'the issue of princesses who may have married, or may hereafter marry, into foreign families.' Therefore the children of the Crown Princess of Prussia, of Princess Louis of Hesse, of Princess Christian of Schleswig-Holstein, and of the Princess Teck, will be exempt from the Act. But as the Marquis of Lorne cannot be held to be a member of a foreign family, it would seem that the issue of his marriage with the Princess Louise will be subject to the Act, and that the Crown may, at a future day, enjoy the right to dictate its wishes as to any matrimonial alliance sought to be formed by the house of Campbell."

SELECTIONS.

DEGREES OF NEGLIGENCE.

The distinction between the various degrees of negligence is a doctrine which has been affirmed from the earliest period of the common law. It was, however, received from the civil law without question; and, there being comparatively little opportunity for tracing the history and origin of the civil law further back than the days of Justinian, this distinction has always rested upon an apparently arbitrary foundation,* and has of late been very seriously called in question. Indeed we may say that the general disposition of legal critics has for some years been in favor of

* It is, however, a grave mistake to suppose that any of the principal rules of the civil law are arbitrary. Nothing is better understood than that the Code of Justinian was simply the reduction to form of pre-existing treatises on the law; and every section of that code is to be considered as the mature result of the experience, argument and deliberation of hundreds of years preceding. The classification of care and negligenee into three degrees was not invented by Tribonian, but had been found necessary by the practical experience of generations before him, and had doubtless been the subject of repeated discussions, such as are now required to determine the question as a new proposition. Undoubtedly this does not prove that the conclusion reached by the Roman lawyers was correct; nor, even if it was correct then, does it *necessarily* follow that the same classification is adapted to the wants of modern society. But the nature of a bailment is the same in all ages; and there is a strong presumption that rules which were developed by Roman experience, as necessary for the government of such transactions, cannot be safely discarded in our own times. Certainly they must not be set aside, summarily and with contempt, as not evolved from practical experience, simply because we have lost the record of the experience upon which they were founded.

ignoring the classification of negligence into degrees as unpractical and useless. The first criticism of this kind which we find in the reports is contained in an opinion of Lord Denman, delivered in 1843, in which he says, "When we find gross negligence made a criterion to determine the liability of a carrier, who had not given the usual notice, it could perhaps have been reasonably expected that something like a definition should have been given to the expression. It is believed further, that in none of the numerous cases on this subject is any such attempt made; and it may well be doubted whether between gross negligence and negligence merely any intelligible distinction exists" (*Hinton* v. *Dibbin*, 2 Q. B. 646, 661). This was followed by Baron Rolfe in *Wilson* v. *Brett*, (11 M. & W. 113), who, in an action against a gratuitous bailee, told the jury that he could see no difference between negligence and gross negligence,—that it was the same thing with the addition of a vituperative epithet, and further, that the defendant, being shown to be a person skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it. The jury finding for the plaintiff, under these instructions, the court refused to grant a rule for a new trial: Lord Abinger saying, "We must take the summing up altogether; and all that it amounts to is that the defendant was bound to use such skill in the management of the horse as he really possessed." In *The New World* v. *King* (16 Howard, 474), Curtis, J., expressed considerable doubt as to whether any distinction between degrees of negligence could be usefully applied in practice. In *Perkins* v. *New York Central Railroad Co.* (24 N. Y. 207), Smith, J., said, "The difficulty of defining gross negligence, and the intrinsic uncertainty appertaining to the question as one of law, and the improbability of establishing any precise rule on the subject, render it unsafe to base any legal decision on distinctions of the degrees of negligence;" and he also approved the *dictum* of Lord Denman before quoted. In *Wells* v. *New York Central Railroad Co.* (24 N, Y. 181, 190), Sutherland, J., after reviewing the doctrine of degrees of negligence at some length, dismissed it by saying that the classification might be philosophically correct, but was impracticable, and that attempts to make it useful and practicable had produced confusion and made it mischievous. In *Grill* v. *General Iron Screw Collier Co.* (Law Rep. 1 C. P. 612), Willes, J., approved of the *dictum* of Baron Rolfe above cited, and said, "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really an absence of such care as it was the duty of the defendant to use." In support of this view he cited *Beal* v. *South Devon Railway Co.* (3 H. & C. 337); but in that case the court said, "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron, in the Court below, when he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them.'" And in the same case in which Mr. Justice Willes expressed the opinion above cited, Montague Smith, J., said, "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratutious bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence."

After much consideration and examination, we have come to the conclusion that the root of the whole controversy on this point lies in the assumption, on one side, that the meaning of the word negligence is the want of that care which the law requires, and, on the other side, that its meaning is simply the want of *some* care, whether more or less,—whether required by law, or not so required. In short, if "negligence" means in all cases "*culpable* negligence," the controversy is at once decided, and degrees of negligence should no more be heard of. But this would not abrogate the distinction between degrees of *care*; and the argument in favor of drawing such distinctions, and recognizing them in the law, remains unaffected by any thing which the courts have said in respect to degrees of *negligence*. It is not worth while to discuss the question whether negligence must necessarily mean culpable negligence; for that is a question which has no practical application, except where a contract is made stipulating for or against liability for negligence, or where a pleading alleges negligence. It has been generally held in such cases that the word negligence is sufficient to cover all its degrees; * and this ruling may very well stand, without affecting the general question, because it is obvious that in such cases the word negligence is used in the sense of *culpable* negligence. And, with two exceptions, all the cases in which the distinction between degrees of negligence has been mentioned with disapproval have been cases which presented simply this question. The two exceptions referred to were both of them cases in which the judge before whom the cause was tried declined to define gross negligence to the jury, and instructed them particularly what the defendant was bound to do or not to do.† It was contended by the unsuccessful parties in those cases that the judge ought to have left to the jury the question whether or not the defendant had been guilty of *gross* negligence. This the court in *banc* overruled, and, as we think, very properly. If degrees of care and negli-

* *Bissell* v. *N. Y. Central Railroad Co.*, 25 N. Y. 442. But the reverse was held in *Illinois Central Railroad Co.* v. *Read*, 37 Ill. 484. See also *American Express Co.* v. *Sands*, 55 Penn. St. 140; *Pennsylvania Railroad Co.* v. *Henderson*, 51 Penn. St. 315.

† *Wilson* v. *Brett*, 11 M. & W. 113; *Grill* v. *General Iron Screw Collier Co.*, Law Rep. 1 C. P. 600.

gence are to be recognized, they must be reduced to some legal definition; and the courts ought not to leave juries to determine the naked question whether a party has or has not been guilty of "gross negligence," any more than they would leave a jury to determine whether an ouster has been committed, or whether a base fee exists, or any other question containing a technical legal phrase. The court should determine, as a question of law, whether the defendant was bound to exercise great or slight care, and should be prepared to instruct the jury as to what circumstances would constitute sufficient care on the part of the defendant. Phrases having a technical meaning in law should never be left to a jury without full explanation.

The distinctions between degrees of care and negligence has been recognized in so many cases, both before and since the decisions and *dicta* which we have mentioned above, that we shall not pretend to state more than a few of them. Thus for example it has been uniformly held that a plaintiff is not debarred from recovering, by reason of his contributory negligence, unless he has failed to take ordinary care for his own protection, and that his failure to use great or unusual care, in other words, his slight negligence, would not affect his right to recover.*

And it is an established rule in Illinois, and some other States, that a plaintiff, who has been guilty of only slight or ordinary negligence, that is, of the want of *ordinary* care only, can recover notwithstanding this, if the defendant has been guilty of gross negligence.†

The necessity of distinguishing between the kinds of care which must be taken by various persons, under different circumstances, is also fully recognized in numerous cases, of which *Nicholson* v. *The Erie Railway Co.* (41 N. Y. 525) is the latest type.* In that case the plaintiff's intestines were injured by reason of the omission of the defendant to take precautions against the sudden starting of a train of cars, to which no locomotive was attached, but which a violent gale blew along the track. The plaintiff was at the time crossing the track, without any lawful authority, but by virtue of a bare license, which was implied from the fact of the company never having made any objection to persons crossing at that point. If he had been a passenger on his way to the cars, an entirely different question would have been presented, as was conceded by the court. But, being a bare licensee, the court held that the railway company owed him no duty, and was not in fault for omitting to keep watch of the cars, or to have them fastened up. Earl, C. J., was inclined to follow the opinion of Baron Bramwell, who, in *Southcote* v. *Stanley*, (1 H. & N. 247), held that a mere visitor could recover only for some act of positive *misfeasance*, and not for any *nonfeasance*, or simple omission to act. Upon this point the Court of Appeals did not pass; and neither of these cases is a direct judicial authority for the proposition. It having been suggested that a person inviting another upon his land ought to be liable for gross negligence, or, if the phrase is preferred, for a failure to use even slight care for the guest's protection, it has been answered that this would be in effect leaving the whole question to the jury, and would amount to an abdication by the court of its proper province, inasmuch as if the defendant were a corporation the jury would assuredly find a verdict for the plaintiff. But to this we reply, that it ought not to be left to a jury to determine simply whether the defendant has been guilty of gross negligence or not, but that the plaintiff must point out the particular act which the defendant ought to have done, or which he erred in doing. The court should instruct the jury whether the defendant was bound to do or not to do this specific act, and the jury should determine simply whether the defendant did or did not do it. That the rule laid down by Baron Bramwell is an unsatisfactory one, can, we think, be shown by a very simple illustration. If a man should invite a friend to visit him by night, knowing and concealing the fact that a deep ditch lay between the highway and the house, the only bridge over which was a single plank, which might more easily be missed than found, no one would question his liability for an injury suffered by the person thus invited, if the latter should fall into the ditch in the darkness. This would no doubt be considered an act of fraud. But, supposing that the person thus giving an invitation simply failed to mention the fact, and had no fraudulent intent whatever, can it be seriously claimed that he would therefore be exempt

* *Ernst* v. *Hudson River R. R. Co.*, 35 N. Y. 9, 26; *Beisiegel* v. *N. Y. Central R. R. Co.*, 34 N. Y. 622, 628, 632; *Ferd* v. *Buffalo, &c., R. R. Co.*, 22 N. Y. 209; *Cook* v. *N. Y. Central R. R. Co.*, 3 Keyes, 476; *Johnson* v. *Hudson River R. R. Co.*, 6 Duer, 633, 645; affirmed, 20 N. Y. 65; *McGrath* v. *Hudson River R. R. Co.*, 32 Barb. 144; *Willis* v. *Long Island R. R. Co.*, *Id.* 398; *Center* v. *Finney*, 17 Barb. 94; affirmed, 2 Seld. Notes, 44; *Eakin* v. *Brown*, 1 E. D. Smith, 36; *Beers* v. *Housatonic R. R. Co.*, 19 Conn. 566; *Bequette* v. *People's Transportation Co.*, 2 Oregon, 200; *Newbold* v. *Mead*, 57 Penn. St. 487; *Davies* v. *Mann*, 10 M. & W. 546; *Bridge* v. *Grand Junction R. R. Co.*, 3 Id. 244; *Thorogood* v. *Bryan*, 8 C. B. 115; *Clayards* v. *Dethick*, 12 Q. B. 439; *Butterfield* v. *Forrester*, 11 East. 60; *Whirley* v. *Whiteman*, 1 Head, 610; *Munger* v. *Tonawanda R. R. Co.*, 4 N. Y. 349; 5 Denio, 255; *Garmon* v. *Bangor*, 38 Maine, 443; *Owings* v. *Jones*, 9 Md. 108.

† *Kerwacker* v. *Cleveland, &c., R. R. Co.*, 3 Ohio St. 172; *Galena, &c., R. R. Co.* v. *Jacobs*, 20 Ill. 478; *Illinois, &c., R. R. Co.* v. *Goodwin*, 30 Id. 117; *Illinois Cent. R. R. Co.* v. *Middlesworth*, 43 Ill. 64; *Chicago & Alton R. R. Co.* v. *Gretzner*, 46 Ill. 75; *St. Louis, &c. R. R. Co.* v. *Todd*, 36 Ill. 409; *Macon, &c., R. R. Co.* v. *Davis*, 27 Geo. 113; *Augusta, &c., R. R. Co.* v. *McElmurry*, 24 Id. 75; *Hartfield* v. *Roper*, 21 Wend. 615; *per* Harris, J., *Button* v. *Hudson River R. R. Co.*, 18 N. Y. 248; *Rathbun* v. *Payne*, 19 Wend. 399; *per* Johnson C. J., *Chapman* v. *New Haven R. R. Co.*, 19 N. Y. 341; *Chicago, B. & Q. R. R. Co.* v. *Dewey*, 26 Ill. 255; *Stucke* v. *Milwaukee, &c., R. R. Co.*, 9 Wisc. 202; *Whirley* v. *Whiteman*, 1 Head, 110; *Evansville & Crawfordsville R. R. Co.* v. *Lowdermilk*, 15 Ind. 120; *Lafayette, &c., R. R. Co.* v. *Adams*, 26 Ind. 76.

* See also *Hounsell* v. *Smyth*, 7 C. B. (N. S.) 731; *Sweeny* v. *Old Colony R. R. Co.*, 10 Allen, 368.

from liability? Clearly not, as we think; nor do we think it would make any difference, if the ditch were a natural one, for the existence of which the defendant was in no way responsible. Yet this would not be an act of misfeasance, but simply an act of gross negligence.

The common sense and common usage of mankind appear to us to recognize a distinction between the degree of care which is to be required from a person rendering a favor, and that which is to be required from a person to whom the favor is rendered. We do not know that this distinction has ever been disputed, except possibly in the case of *Wilson* v. *Brett* (11 M. & W. 113); and that case is not necessarily inconsistent with the maintenance of such a distinction. It was simply held in that case, if we take the opinions of all the judges together, that when a person taking charge of a horse as a matter of favor was shown to be thoroughly familiar with horses, he was bound to use the same degree of care which would be required of a borrower who was not familiar with horses, or, as Lord Abinger put it, that even a gratuitous bailee was bound to use such skill as he possessed. The difficulty of defining these distinctions is not a conclusive objection to their maintenance. There will be very little for courts to do, when they decline to maintain any rule which is difficult of application. Far too much responsibility has already been evaded on this ground; and it is by no means desirable to add to the excuses for failure to do substantial justice. No person who, on leaving the city for the summer, places a valuable piece of furniture with a friend for safe-keeping, free of charge, would expect the same care to be taken of it which he would have a right to expect if the same thing had been borrowed by his friend for the personal use of the latter; and yet it would not be altogether easy to draw a line between facts which would constitute culpable negligence in the one case and in the other.

We think that the distinction between gross negligence, and negligence of a less degree, is one that is by no means so difficult of defining, in a manner sufficient for general purposes, as has sometimes been thought. In some of the old books it has been said that gross negligence was such negligence as was equivalent to fraud; and this, although a serious mistake, nevertheless contained a certain element of truth, which may assist us in reaching a satisfactory definition. We think that gross negligence can be safely defined as such an extreme want of care as would imply an indifference to the injury which may thereby accrue to other persons: in other words, if, under the circumstances of the particular case, a person of ordinary intelligence would not omit to do a certain act, unless he were indifferent to the consequences which might ensue to others from such omission. Any person omitting to do that act should be deemed guilty of gross negligence,—and this without regard to the question whether he was as a matter of fact reckless of the consequences. He must be judged by the standard which will be applied to ordinary men. This, as it seems to us, would supply a test sufficient for all ordinary cases, and capable of application, under the guidance of the court, to every case. This definition may be illustrated by the case of an engineer on a railroad, who, seeing persons on the track at a short distance in advance of the train, takes it for granted that they will take care of themselves, gives them no warning, and makes no effort to stop his train. Undoubtedly, in such cases, the engineer very rarely, if ever, *intends* to injure any one; but it does sometimes happen that, irritated by the constant presence of intruders upon the track, he becomes indifferent to their sufferings, and feels disposed to let them take exclusive care of themselves. On the other hand, where a passenger jumps from a car, while in rapid motion, it is clear that he is indifferent to the risk which he thereby assumes; and he may be justly said to be guilty of gross negligence.

Ordinary negligence, or, if the phrase is preferred, the want of ordinary care, may be established by proof of a much lower degree. It should not be necessary, in order to establish such a case, to raise any presumption in the mind of the court or jury that the defendant was guilty of indifference to the consequence of his acts. Mere thoughtlessness or forgetfulness, and this of a kind not uncommon, might suffice to establish the want of ordinary care. This degree of care is usually defined as that which men of average prudence and common sense take, under circumstances similar to those of the particular case, and where their own interests are to be protected from a similar injury.*

Great care is perhaps more difficult of definition; and yet it is a degree of care so constantly insisted upon, particularly with reference to common carriers, that it is useless to attempt to abandon the term on account of the difficulty of giving a definition. We do not pretend to be able at present to give an explanation of the term which will meet all cases, more particularly for the reason that the courts have, in some cases, sought to lay down what may be called a fourth degree, or "the utmost care."†

It seems, however, that great care is considered to be such a degree of vigilance and caution as is not usually exercised by the average of the community, but which is known to, and practised by, persons of unusual prudence and foresight. No one seems to be required to use a degree of care which is utterly unknown to the community in which he lives; and no one can therefore be said to lack even great care, simply because he has

* *Rochester White Lead Co.* v. *Rochester*, 3 N. Y. 463; *Duff* v. *Budd*, 3 Brod. & B. 177; *Schwartz* v. *Gilmore*, 45 Ill. 455.

† *Bowen* v. *N. Y. Central R. R. Co.*, 13 N. Y. 408; *Johnson* v. *Hudson River R. R. Co.*, 20 N. Y. 65.

failed to anticipate disasters which might have been foreseen as possible in an extreme case, but which the common sense of a reasonable man must have told him were improbable.* On the other hand, the obligation to use great care is not satisfied by simply taking precautions against those dangers which are commonly regarded in the community as inevitable in the absence of such care. Thus, on the one hand, a person who is bound to take great care of property situated in the United States would not be bound to take precautions against the occurrence of an earthquake; whereas in a country where earthquakes occurred in particular districts two or three times in the year, great care might require, in respect to some kinds of property, that precautions should, if possible, be taken for its preservation even from the consequences of an earthquake; or, to take a more familiar and practical illustration, in districts which are subject to freshets, great care would require that property should be placed out of the reach of any freshet that might be considered even remotely probable, while in other districts, although such a freshet might by bare possibility occur, no one would under any circumstances be required to anticipate and provide against it.† — *American Law Review.*

LEGAL WIT.

The dullness of law documents is proverbial. "As dull as a law book," is everybody's comparison; and some evil disposed persons even say, "As prosy as a lawyer." But there they are wrong; and the gentlemen of the bar have, as they usually have, the best of their lay brethren. "Bar wit" is the sharpest of wit, as any one who has enjoyed the privilege of attending a bar dinner, or any other social gathering of "attorneys and counsellors at law," will readily admit.

The profession of the law is, in England, almost more than among ourselves, the great avenue to political place, honors and emoluments. It is, in fact, the only road by which men of tact and industry, but lacking hereditary rank, may hope to arrive at once at wealth, fame, and titles. Among the men now famous in British history as government leaders and administrators, few can be found who have not studied and practiced the law; and many of the most celebrated were eminent as lawyers long before they became eminent as statesmen. But many years of briefless waiting have been, and are, necessary ere this eminence is reached. Of Scott, afterward Lord Eldon, it was said that "he waited the exact number of years it cost to take Troy (ten), and had formed his determination to pine no longer, but leave the law, to become junior partner in a grocery business, when Providence sent an angel, in the shape of Mr. Barber, with the papers of a fat suit and a retaining fee." His first success was rapidly followed by a heavy business and prosperity which never left him till he was Lord Chancellor.

Lord Erskine was first in the navy, then in the army, for a little while a chaplain, and finally studied law. He had for some years so little to do, that when a friend met him in Westminster Hall, and congratulated him on his good looks and high spirits (which never forsook him in his most desperate straits), he replied: "I ought to look well, for I am like Lord Abinger's trees; I have nothing to do but to grow."

Thurlow, afterward Lord Chancellor, was the son of a poor curate; and for many years after he was called to the bar was wholly unknown. He had to resort to the most extraordinary expedients to pay his expenses; such as once pretending to buy a horse, riding him on trial to the next assize town, and returning him with a threat against the dealer to bring a suit against him for attempt to swindle by selling him a broken-winded hack. When he accidentally found an opening for the display of his talents, he astonished the bar and never after lacked briefs.

Kenyon was doomed, term after term, to sit on the back benches, unknown, with scarcely any chance of success. But he would not be discouraged. He studied dilligently; constantly increased his knowledge of the law; and at last fortune favored him. He was not eloquent; but he had perseverance, industry, and indomitable resolution; and by these qualities raised himself (a noble example for struggling youth), step by step, from obscurity to honor—from the desk of a stingy attorney to the presidency of the first court of justice in Britain.

Pratt, afterward Lord Camden, though the son of a chief justice of the king's bench, struggled with bitter poverty for eight or nine years, and at last determined to give up the law, when a friend, to whom he had communicated his resolve, got him retained as junior counsel to himself in an important suit, and then willfully absented himself, thus throwing the entire duties of the defence on Pratt. The latter so distinguished himself, that he at once secured the admiration and the business of the court. Mr. Holroyd, afterward an eminent judge, was spoken of, when in his fortieth year, as a "rising young man." Murray, the celebrated Lord Mansfield, one of England's greatest lawyers, of whom Pope wrote that noted distich:

"Blest as thou art, with all the power of words,
So known, so honored, in the house of lords,"

* *Bowen* v. *N. Y. Central R. R. Co.*, 18 N. Y. 408; *Corman* v. *Eastern Counties Railway Co.*, 4 H. & N. 781; *Deyo* v. *N. Y. Central R. R. Co.*, 34 N. Y. 9. See *Brown* v. *Kendall*, 6 Cush. 292; *Aldridge* v. *Great Western Railway Co.*, 3 M. & G. 515; *Center* v. *Finney*, 17 Barb. 94; *Blyth* v. *Birmingham Waterworks Co.*, 11 Exch. 781; *Wakeman* v. *Robinson*, 1 Bing. 213; *Vaughan* v. *Taff Vale Railway Co.*, 5 H. & N. 679; *Philadelphia & Reading R. R. Co.* v. *Yeiser*, 8 Penn. St. 366; *Boland* v. *Missouri R. R Co.*, 36 Mo. 484; *Daggert* v. *Bradley*, 8 Wend. 469; *Sawyer* v. *Hannibal, &c., R. R. Co.*, 37 Mo 240.

† *Withers* v. *North Kent Railway Co.*, 3 H. & N. (American ed.) 969. Compare *Brehm* v. *Great Western Railway Co.*, 34 Barb. 256.

was for many years in the greatest straits, hardly known as a lawyer, and unable to support himself by his profession. He was only continued in it by the liberality of a rich friend, who, hearing of his difficulties, allowed him two hnndred pounds per year till he got into business.

Dunning (or Lord Ashburton), studied intensely; lived poorly—taking dinner and supper together to economize time and money, and yet for many years he remained unknown. But once in business, he soon became a leader at the bar, and died, at the age of fifty-two, worth one hundred and fifty thousand pounds. He was three years at the bar without receiving so much as a hundred guineas, all told. During the last twelve years of his life his practice brought in from fifty to sixty thousand dollars per year.

These and many other examples show what patience and industry are necessary, even to genius, to accomplish great results. Young men may treasure them as comforters in those dark hours which almost always precede the dawn of a great success.

We hear of the enormous fees and incomes of lending American lawyers, such as Webster, Choate, David Paul Brown, and others; but the practice of eminent British gentlemen of the long robe is more remunerative than even that of their American brethren. Sir Samuel Romilly realized an income of upwards of $75,000 in the last years of his life; Sir Chas. Wetherell received $35,000 for opposing the Municipal Corporations bill at the bar of the House of Lords; the late Lord Truro's retaining fee in an important cause was $15,000; and these instances by no means stand alone. But, besides fortune, a good position at the bar brings with it an enviable place in the most intelligent and desirable society. Lawyers have been the best clubmen; and the clubs of London have become famous for their wit and wisdom, which they have, in times past, brought together under one roof. Even that exclusive old clique which called itself "The Sublime Society of Beefsteaks," with its "gridiron of 1735 standing out in proud relief from the ceiling of the refectory," and its familiar conceited motto of "Beef and Liberty"—even this, the most snobbish and conservative of clubs, which had no less a man than a drunken and half-paralytic duke for its honored president, gathered its brightest members from the bar. Wilkes, Sergeant Prime (not witty himself, but the cause of wit in others), "Frog" Morgan—so called because he was in the habit of quoting constantly in his arguments in court "Croke Elizabeth, Croke James, Croke Charles," said *Croke* being a reporter who lived in those three reigns—Horne Tooke, and many others more or less famous, were among its members. Cobb was a lawyer, better known in his time as a play-wright, and the author, among others, of an Indian drama called "Ramah Drug," and an English opera, the "Haunted Tower."

"What a misnomer it was," said Arnold, a fellow "steak," to him, "to call your opera the 'Haunted Tower!' Why, there was no spirit in it from beginning to end.'

"The drama was better named "Ramah Drug," exclaimed another, "for it was literally ramming a drug down the public throat."

"True," rejoined Cobb, "but it was a drug that evinced considerable power, for it operated on the public twenty nights in succession."

"My good friend," said Arnold, "that was a proof of its weakness, if it took so long in working."

"You are right," retorted Cobb, "in that respect; *your* play (Arnold had brought out a play which did not survive the first night) had the advantage of mine, for it was so powerful a drug that it was thrown up as soon as it was taken."

The raillery of the Sublime Society was merciless. One Bradshaw was fond of boasting of his descent from the regicide of that name. To whom Churchill, the poet, said: "Ah, Bradshaw! don't crow; the Stuarts have been amply revenged for the loss of Charles' head, for you have not had a head in your whole family since." Sheridan was a Beefsteak, and introduced his brother-in-law, Linley, whose peculiarity was a fondness for telling jokes, of which he always forgot the *point.* He published a biography of his friend Leftly, which, coming up before the society for review, was found to open with the following Johnsonian passage respecting his hero's birth:

"His father was a tailor, and his mother a seamstress; a union which, if not first suggested, was probably accelerated, by the mutual sympathies of a congenial occupation." This, and another passage, excited general applause. The second was a sober truism, stated with admirable seriousness: It is a well-known fact that novelty itself, *by frequent repetition*, loses much of its attraction."

The study of the law does not seem favorable to purity or elegance of style, or exactness of expression. Poor Linley was not alone in his grandiloquence. Mr. Marryatt, a brother of the novelist, once addressing a jury, and speaking of a chimney on fire, exclaimed: "Gentlemen, the chimney took fire—it poured out volumes of smoke—*volumes* did I say?—whole encyclopedias!" "When I cannot talk sense, I talk metaphor," said Curran; and many of his brethren imitate him. Mr. (afterward Sir R.) Dallas exclaimed, in one of his speeches, "Now we are advancing from the *starlight* of circumstantial evidence to the *daylight* of discovery; the *sun of certainty* has melted the darkness, and we have arrived at the facts admitted by both parties;" and Kenyon once addressed the bench: "Your lordships perceive that we stand here as our grandmother's *de bonis non;* and really, my lords, it does strike me that it would be a monstrous thing to say that a party can now come in, in the very *teeth* of an act of parliament, and actually *turn us round*, under color

of hanging us upon the *foot* of a contract *made behind our backs!*"

The technical phrases of British law documents form, however, a serious clog in clearness of expression. Many of the commonest terms of the English and Scotch courts must be worse than Greek to laymen. Thus when, in Scotland, a judge wishes to be peremptory in an order, he "ordains the parties to condescend;" when he intends to be mild, he recommends them to "*lose* their pleas." If a man thinks proper to devise his estates for the benefit of the poor, he is considered to *mortify* them. Witnesses are brought into court *upon a diligence*, and before they can be examined they must be *purged*. If a man loses his deceased elder brother's estate, it is called a *conquest;* and there are current such elegant expressions as "blasting you at the horn," "pounding your estate," and "consigning you to the fire;" to which such phrases as "villians in gross," "seized in fee," and "docking an entail" are mere trifles. Of the last term, by the way, there is a good story. A physician, reproaching a lawyer with what Mr. Bentham would have called the "uncognoscibility" of law technicalities, said:

"Now, for example, I could never comprehend what you meant by *docking an entail.*"

"My dear doctor," replied the barrister, "I don't wonder at that; but I will explain; it is what your profession never consented to—*suffering a recovery.*"

Besides club gatherings, it was and still is customary in the principal circuits in England to hold at certain intervals a court for the trial of all breaches of professional etiquette. The court is held at the circuit table after the cloth is cleared, and the junior member of the circuit presides as recorder; the others, not being prosecutors or culprits, acting as jury. The trial takes place on presentment made by any member of the circuit. If the accused is found guilty he is fined, and the penalty is paid into the wine fund of the mess. Some of the presentments are absurd enough; but all tend to maintain good humor among the rival barristers. An eminent advocate, who has a namesake an eminent comedian, was lately presented on circuit for having inserted the following outrageous puff of himself in a newspaper; "Mr.——delighted us exceedingly on Monday. We do not remember to have seen so much genuine wit displayed ["on the stage" was here erased] without the slightest coarseness. He is the smartest individual in his line whose performances we have ever witnessed." A fine of a half a crown was forthwith imposed on this vainglorious paragraph writer. The papers announce the execution of one John Smith, who had been convicted of murder. On whatever circuit there is a Mr. John Smith, he is immediately found guilty of being hanged, and fined for so heinous an offence. When Lord Abinger was at the bar he presented Mr. Richardson, a great pleader, afterward raised to the bench, for "being the most eminent special pleader of the day!" So grave an offence demanded severe punishment, and Mr. R. was accordingly amersed in a dozen of wine. Mr. Sergeant Hill was very absent-minded, and this made him the target of many a practical joke on his circuit. He once argued a point of law for some time at *nisi prius*, and, intending to hand his papers to the judge, gravely drew forth a plated candlestick from his bag and presented it to the bench. Some one, it appeared, had substituted a "traveller's" bag for the sergeant's own. Hill was much delighted when, as not unfrequently occurred, he got the better of his persecutors. So pleased was he on one occasion, at a party given by the sheriff of Northamptonshire, that, on returning, he, by mistake, gave a shilling to his excellent host, and, to the amazement of all his friends, shook hands in the most friendly way with the servant at the door.

Chief among the wits was Jekyll, a man who had a retort ready for all comers. At a public dinner the bottle had passed freely, and Jekyll, who was slightly elevated, having just emptied his, called to the servant, "Here, take away that *marine.*" A general of marines sitting near the lawyer felt his dignity touched, and said, "I don't understand what you mean, sir, by likening an empty bottle to a marine?" "My dear general," replied Jekyll, "I mean a good fellow who has done his duty, and who is ready to do it again."

To a Welsh judge, famous as well for his neglect of personal cleanliness as for his insatiable desire for place, he said, "My dear sir, as you have asked the ministry for every thing else, why have you never asked them for a piece of soap and a nail brush?" Kenyon, before mentioned, was somewhat noted for parsimony. Some one told Jekyll that he had been down in Lord Kenyon's kitchen, and saw his spits shining as bright as if they had never been used. "Why do you mention his spits?" retorted the humorist; "you must know that nothing turns upon that." A rascally little attorney named Else addressed him: "Sir, I hear that you have called me a pettifogging scoundrel: have you done so?" "Sir," was the reply, with a look of contempt, "I never said you were a pettifogger or a scoundrel; but I said you were *little Else.*" Garrow was examining an old spinster for the purpose of proving the tender of a certain sum of money having been made, but found some difficulty making out his case; Jekyll, who was watching the proceedings, wrote the following and threw it over to his professional brother:

"Garrow, submit; that tough old jade
Will never prove a *tender maid.*"

—*Albany Law Journal.*

Sergeant Cockle, in a suit for the rights of a fishery, asked a witness: "Dost thou love fish?"

"Ay," replied he, with a grin, "but not with *Cockle* sauce."

CANADA REPORTS.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law.)*

Donelly v. Tegart.

Con. Stat. U. C. cap. 126, secs. 3, 8—Setting aside proceedings—Laches—Jurisdiction of Clerk Q. B. in Chambers.

Where (on application to set aside proceedings, as in the case of an action against a J. P., for acts done under a conviction which has not been quashed) the facts relied upon would be a pleadable bar to the action, laches will not be imputed to the defendant because he does not apply before entering an appearance, though it might if he waited until after the expiration of the time for pleading.

The Clerk of the Queen's Bench sitting in Chambers has clearly jurisdiction to entertain such an application.

[Chambers, April 7, 1870—*Mr. Dalton.*]

This was a motion to set aside the proceedings against the defendant in this cause, under Con. Stat. U. C., cap. 126, secs. 3, 8. The action was in trespass against a magistrate, for acts done under a conviction, which conviction was quashed, but not until after the commencement of this action.

By the 3rd section of the above act it is enacted, that no action shall be brought for anything done under the conviction, until the conviction has been quashed; and the 8th section provides that in case such action shall be brought, a judge of the court shall, upon application of the defendant, and upon affidavit of the facts, set aside the proceedings.

The dates of the several proceedings did not clearly appear on the affidavits, but it did appear that the time for pleading had not expired.

Mr. Smith (Cameron & McMichael) shewed cause:

Mr. Dalton has no jurisdiction in the case, as the 8th section gives the jurisdiction to a judge of the court in which the action should be brought.

The defendant was concluded by his laches, inasmuch as he had not moved to set aside the writ of summons until after the plaintiff had declared.

John Paterson, contra.

Mr. Dalton.—As to the first point—The 4th and 5th sections of the act respecting proceedings in Judges' Chambers at Common Law, are perfectly clear as to the jurisdiction—there is jurisdiction.

As to the second point—that there was laches on the part of the defendant in not moving sooner—there is more to be said.

The case of *Moran* v. *Palmer*, 13 C. P. 450, to which Mr. J. B. Read has kindly referred me as in point here, was an action against a magistrate in which the venue was local under the same statute. Then the Common Law Procedure Act provides (sec. 8) that where the venue is local the writ of summons must be issued in the county where the venue must be laid. In that case the writ was issued in York, the cause of action being local in Wellington, and the plaintiff in his declaration properly laid the venue in Wellington. After declaration served, the defendant moved to set aside the writ of summons and all proceedings, because it had been issued in York, whereas it should have been issued in Wellington. The defendant's laches was held to conclude him; and it was held he should have moved against the writ before entering an appearance, and his application was discharged. The language of the Chief Justice is very clear:

On this point, he says, at p. 455—"I think the defendant was bound to raise the question as to the writ at the first possible opportunity. If he received a notice of action, that would be some ground on which to apply to a judge for particulars of plaintiff's demand, and having obtained the particulars, he could then have applied to stay proceedings, because the writ was issued out of the wrong county. I apprehend there is no doubt that particulars could be obtained in an action on the case, and could also be obtained before appearance. All the reasoning which applies to promptness in moving against an irregularity in ordinary cases extends to this. The statute, if applicable, requires the action to be brought within six months from the time of the act committed, * * * and if we set aside the writ the plaintiff's action is gone. * * * Whereas if the defendant had applied promptly, the writ might have been set aside in time to enable him to sue out another. It does not appear to me that in a case like this, any more than in any other case, a defendant can lie by and lull his opponent into security, and afterwards apply to set aside proceedings which he might have attacked before."

Now, the enactment which applies to the present case is, that "*no action shall be brought*" under the circumstances.

In *Moran* v. *Palmer* the objection was to practice and the mere manner of proceeding—it did not touch the cause of action—and the defendant was held precluded by the ordinary rule as to laches in cases of irregularity. But here the defect goes to the very cause of action itself—"*no action shall be brought.*"

Suppose that I discharged this summons and the cause went on—if the facts should appear upon proper pleadings at *nisi prius*, as they now appear, what could the Judge do but direct a a nonsuit? The words of the statute are so clear that the result is inevitable: there must be a nonsuit or verdict for defendant. If I could agree with Mr. Paterson that the statute affords no other remedy than this application, I should probably have discharged this summons. I should have had, at any rate, to inquire whether the plaintiff, not having moved at an earlier stage, was not precluded now, and the case would have been brought within the authority of *Moran* v. *Palmer*. But it is not so. The facts shew a defence to the action which is a pleadable bar—fatal to the plaintiff's case at the trial, and this being so, I think laches cannot be attributed to the defendant, as he has moved before pleading. Had he pleaded it might be argued that he had abandoned the right to this proceeding, and had put himself upon the jury. But at any time before that he has a right to claim that the proceedings should be set aside. It is certainly as much for the interest of the plaintiff as of the defendant that they should be.

The order is to set aside the writ of summons and all proceedings—with costs of the action and of this application to be paid by the plaintiff.

Proceedings set aside.

McInnes et al. v. Western Assurance Co.

Arbitration—Staying proceedings—C. L. P. Act, sec. 167.

By a condition endorsed on a policy of insurance the company reserved to itself the power of having the loss or damage submitted to the judgment of arbitrators.

An action having been brought on the policy, and an application made under C. L. P. Act, sec. 167, to stay proceedings.

Held, 1. That the arbitration intended by the condition was not merely a valuation.

2. That the agreement between the parties was not void for want of mutuality, and that the case came within the scope of the statute.

3. *Per* Mr. Dalton—That the plaintiff was a "party" within the meaning of the 167th section.

Proceedings were accordingly stayed.

[Chambers, July 2, 7, 1870.]

Action on a policy of insurance against loss by fire on certain property of the plaintiffs.

The defendants applied to stay all proceedings in the action under the provisions of the C. L. P. Act, sec. 167, which enacts that when the parties to an instrument have agreed that any difference between them shall be referred to arbitration, and either of them commences a suit against the other, the court or a judge may, if no sufficient reason is shewn why such matters should not be referred, order all proceedings in such action to be stayed.

The application was founded on the conditions endorsed on the policy.

The ninth condition provided that "All persons assured by this Company and sustaining loss or damage by fire are to give immediate notice thereof to the Secretary or Manager of the Company or to the Agent of the Company, should there be one acting for it in the neighborhood of the place where such fire took place, and shall, within thirty days after such loss or damage, deliver to the Secretary or Manager or to the Agent of the Company, as aforesaid, a full and detailed account of such loss or damage, signed with their own hands, and verified by their oath or affirmation," [here follow certain particulars minutely set forth in the conditions] "and also shall produce such other evidence as to any loss or damage by fire as this Company or its Agents may reasonably require. * * * And whenever required in writing, the assured, or person claiming, shall produce and exhibit his books of account, invoices or certified duplicates thereof, where the originals are lost, and other vouchers, to the assurers or their agent in support of his claim, and permit extracts and copies thereof to be made; and until such proofs, declarations and certificates are produced, the loss shall not be payable; and if there appear any fraud or false swearing in the proofs, declarations or certificates, the assured shall forfeit all claim under this policy. When merchandise or other personal property is partially damaged, the assured shall forthwith cause it to be put in as good order as the nature of the case will admit of, aided by a surveyor of the Company, should the board of directors deem it so necessary; and shall cause a list or inventory of the whole to be made, naming the quantity and cost of each article. The damage shall then be ascertained by the examination and appraisal of each article by disinterested appraisers mutually agreed upon; one half the expenses to be paid by the assurers. And it shall be optional with the Company to replace the loss or damage, and to rebuild, or repair the building or buildings within a reasonable time. * * * * * And in case differences shall arise, touching any loss or damage, the Company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators, indifferently chosen in the usual way, who shall, before proceeding with the matter, name a third arbitrator, and the award in writing of the said arbitrators, or any two of them, shall be binding on the parties; each party to pay one half the expense of reference and award."

The next condition endorsed on the policy required that "Payment of losses shall be made in sixty days after the loss shall have been ascertained and proved."

The case was brought before Mr. Dalton, by consent of the parties.

C. Robinson, Q. C., shewed cause:

1. The plaintiff is not a party within the meaning of the C. L. P. Act, sec. 167.

2. There is no mutuality, the power being reserved to only one of the parties, and the plaintiff could not enforce an arbitration.

3. The conditions of the policy provide merely for a valuation, whilst the act speaks of an arbitration.

He cited Russell on Awards, last edit. referring to the corresponding section of the Imperial Act; *Cooke* v. *Cooke*, L. R. 4 Eq. 77; *Vickers* v. *Vickers*, L. R. 4 Eq. 536; *Elliott* v. *Royal Exchange Assurance Co.*, L. R. 2 Ex. 237, referred to in *Griggs* v. *Billington*, 27 U. C. R. 520; *In re Newton & Hetherington*, 19 C. B., N. S, 342.

Kerr, contra, cited *Russell* v. *Pelligrini*, 6 E. & B 1020; *Seligmann* v. *Le Boutillier*, L. R. 1 C. P. 681; *Wickham* v. *Harding*, 28 L. J. Ex. 215; *Randegger* v. *Holmes*, L. R. 1 C. P. 679; Russell on Awards, 3rd ed. 64, 65; *Scott* v. *Avery*, 8 Ex. 487; *Avery* v. *Scott*, 8 Ex. 497; *Scott* v. *Avery*, 5 H. L. C. 811; *Roper* v. *Lendon*, 1 E. & E. 825; *Hirsch* v. *im Thurn*, 4 C. B. N. S. 569; *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; *Tredwen* v. *Holman*, 1 H. & C., 71; 31 L. J. Ex. 398; *Elliott* v. *Royal Exchange Assurance Co.*, *ubi sup.*; *White* v. *Kirby*, 2 Ch. Cham. R. 416; *Griggs* v. *Billington*, 27 U. C. R 535; *Re Anglo Italian Bank & De Rosaz*, L. R. 2 Q. B. 452; *Re Lord*, 24 L. J. Ch. 145; *Vickers* v. *Vickers*, *ubi sup.*

Mr. Dalton.—It is urged by the plaintiff that he is not a "party" in the sense of the clause, because he has not executed. But it is clear that one may be a party to a deed, or contract, both substantially and technically, without executing it.

Then it is said that there is no mutuality: that this is not an agreement of the parties to refer, but a mere power to refer reserved by one of the parties.

Mutuality is necessary in the proper sense in every contract. I am not aware of any thing peculiar to a reference in this respect. Both parties have agreed here to refer, the defendants by their seal, and the plaintiff by his acceptance of the policy. The circumstances in which there is to be a reference are, 1st. Differences touching loss or damage; and, 2nd. The election of the company to refer them. In

such cases both parties have agreed to arbitrate. Before action the company gave notice.

The great object is to give effect to agreements exactly as parties make them. An action would lie by the company against the plaintiff for the refusal to refer, but in that the damages would be nominal. It has been assumed in argument that these stipulations of the agreement do not give a pleadable defence. If so, I see no "sufficient reason" why the matters in difference should not be arbitrated on, and this application is the only means the company have of enforcing that power which the contract reserves to them.

I have been referred to several cases as to the distinction between a "valuation" merely and an arbitration. The former is not within the Common Law Procedure Act, section 167. But I think that it is an arbitration strictly, which is provided for here, not merely a "valuation." See for the distinction, *Mill* v. *Bayly*, 2 H. & C. 36; *Bos* v. *Helsham*, L. R. 2 Ex. 72; *Anglo Italian Bank* v. *De Rosaz*, L. R. 2 Q. B. 452; *Re Hopper and Barningham*, *Ib.* 367; *Re Lord*, 24 L. J. Ch. 145.

Order staying proceedings.

From the above order of Mr. Dalton the plaintiff appealed to a judge, and the matter was subsequently re-argued by the same counsel before Mr. Justice Gwynne, who, on the 7th July, delivered the following judgment, sustaining Mr. Dalton's order:

Gwynne, J.—It was agreed that the matter was brought before Mr. Dalton by consent, and no objection therefore was taken as to his jurisdiction to make the order, and it is now agreed that if necessary this motion may be treated as before me, not only by way of appeal from Mr. Dalton's order, but also by original application for an order for stay of proceedings upon the same material as was laid before him.

The question arises under a condition endorsed on a policy of insurance executed by the defendants with and in favor of the plaintiffs, and set out above.

It was admitted by both parties that these conditions did not make the ascertainment of the loss by arbitration a condition precedent to any right of action accruing as within the principle of *Scott* v. *Avery*, 8 Ex 497, and 5 H. L. C. 811; *Roper* v. *Lendon*, 1 El. & El. 825; *Braunstein* v. *Accidental Death Insurance Co.*, 1 B. & S. 782; *Elliott* v. *Royal Exchange Assurance Co.*, L. R. 2 Ex. 237. This point having been thus withdrawn from my consideration I express no opinion upon it.

In view of the matters in dispute which have arisen in respect of "merchandise or other personal property partially damaged," and of the general language of the 9th and 10th conditions taken together I desire merely to guard myself (as the point was not argued, but on the contrary waived), from being supposed to express any opinion upon the point.

Mr. Robinson's contention was, that the 167th section of the Common Law Procedure Act did not apply to such a provision in relation to arbitration as that extracted above from the 9th condition endorsed on the policy, for the reason, that, as he contended, there was no mutuality, as the plaintiffs could not enforce an arbitration, and whether there should be an arbitration or not rested in the sole will of the defendants.

That the clause was intended to have some effect there can be no doubt, and that, whatever may be its meaning, it forms part of the contract between the parties comprised in the policy of insurance, there can be no doubt. If the intention of the parties by making this clause a part of their contract was that it should operate in any given event to secure a determination of differences between the parties by an arbitration, then, upon the authority of *Russell* v. *Pellegrini*, 6 El. & Bl. 1020, 1029, and *Seligmann* v. *Le-Boutillier*, L. Rep. 1 C. P. 681, it must be admitted now that the intention of the clause in the Common Law Procedure Act was to enable the courts to carry out contracts to refer disputes, as far as might be.

Now the condition of the policy provides only for the case of differences between the parties "touching any loss or damage by fire to the parties insured." From the nature of the contract and of the condition, the assured are the only persons who in respect of such matter could be plaintiffs in an action at law, and the assurers are the only persons who could be the defendants in such action, and who could apply to the court for an order to stay proceedings in consequence of the action being brought in violation of the terms of the agreement to refer. To object then that the agreement is void for want of mutuality by reason of the assured not being placed in a position of being entitled equally with the assurers to the benefit of the 167th section is to object, that there can be no valid agreement in a policy of insurance to refer to arbitration the question touching any loss or damage suffered, if that alone be the matter in difference. What the section contemplates providing for is the case of an action being brought by a plaintiff notwithstanding an agreement contained in the instrument for a reference to arbitration in a given event, which it is contended by the defendants has arisen. Now I do not see how it can be judicially held that the clause in the 9th condition relating to arbitration shall have no effect at all for want of mutuality, because it provides only for a case in which the assured alone ever could be plaintiffs in an action relating to the matter in difference.

The expression in the clause, "The company reserves to itself the power of having the loss or damage submitted to the judgment of arbitrators," may not be a felicitous expression, but I think effect can and should be given to it notwithstanding.

This condition being by the policy declared to be part of the contract involved in the policy, it will then read: "It is agreed between the parties hereto that in case differences shall arise touching any loss or damage the company reserves to itself the power," or, "shall have, the power of having the loss submitted to the judgment of arbitrators." The plaintiffs agree that the company shall have the power of having the loss or damage submitted to the judgment of arbitrators.

The agreement in substance is, that in the event of the plaintiffs making a claim for loss or damage from the risk insured against, and in the

event of differences arising between the parties as to such loss or damage claimed, and in the event of the defendants requiring an arbitration the matters in difference shall be referred. Now all the events, upon the occurring of which the parties have agreed that there shall be an arbitration, have occurred. Some effect surely should be given to this agreement, but there are only two ways in which effect can be given to it, namely, either by holding that the ascertainment of the amount of the loss or damage by arbitration is a condition precedent to any action being brought by the assured in respect of loss or damage claimed, or by holding that the defendants, the assurers, may apply to the court under the 167th section of the Common Law Procedure Act in the event of the assured, notwithstanding defendants request to refer the matter to arbitration, bringing an action to recover the loss or damage claimed; when the court may, upon being satisfied that no sufficient reason exists why the matters in difference should not be referred to arbitration, according to the agreement in that behalf, cause the agreement to be performed by staying all proceedings in the action. In order to give effect to the intention of the parties as appearing on the instrument, I think Mr. Dalton has rightly held that the 167th section of the Common Law Procedure Act does apply to this case.

Mr. Robinson further contended, that the matter in difference was a mere "valuation" and not a matter for arbitration; but I think there can be no doubt that the amount of the loss or damage if any sustained by the plaintiff, whether the mode of ascertainiug that amount be called a "valuation," or a "calculation," or "appraisement," or by any other name, is a proper subject for arbitration as much as it is a proper subject of an action. I am of opinion therefore that Mr. Dalton's order should be affirmed, or if desired, I will make an order in like terms, so as to avoid all objection, if any there can be, after consent of parties, as to Mr. Dalton's jurisdiction.

*Order accordingly.**

Molloy v. Shaw.

Setting aside arrest—Discretion of County Judge—Sufficiency of material—Entitling affidavits.

It is not a valid objection to an order to hold to bail that it was granted upon affidavits which were not entitled in any court; following *Ellerby* v. *Walton*, 2 Prac. Rep. 147.

A Judge of a Superior Court will not interfere where the County Court Judge has exercised his discretion.

[Chambers, July 12, 1870—*Richards, C.J.*]

On the 2nd of June the defendant was arrested upon a writ of *Capias ad respondendum* issued upon the fiat of the Judge of the County Court of the County of Wellington, and gave bail to the limits.

On the 12th of June *M. A. Dixon* obtained a summons calling on plaintiff to show cause why the order to hold to bail, the writ of *capias* issued thereon, the copy and service thereof, and the arrest of the defendant thereunder, should not be set aside with costs; or why the said writ of *capias*, and the copy and service thereof, and the arrest of the defendant thereunder, should not be set aside with costs; or why the arrest of the defendant should not be set aside with costs, and the bail bonds delivered up to be cancelled, on the following grounds,

1. That the affidavits to hold to bail were not nor was either of them entitled in any court;

2. That the affidavits did not show or allege a cause of action against defendant by the plaintiff sufficient to authorise the granting of an order to hold to bail;

3. That the affidavits did not show such facts and circumstances as would justify the granting of the order on the ground, that defendant was about to quit Canada, with intent, &c.;

4. That the defendant was not about to quit Canada with intent, &c.

McGregor shewed cause, and cited *Ellerby* v. *Walton*, 2 Prac. Rep. 147; *McGuffin* v. *Cline*, 3 C. L. J., N. S. 291.

Dixon, contra, cited *Allman* v. *Russell*, 9 U. C. L. J. 80; *Swift* v. *Jones*, 6 U. C. L. J. 63; *Terry* v. *Comstock*, 6 U. C. L. J. 235, and the Statutes and Practice.

Richards, C.J.—I do not feel warranted in setting aside the arrest on the ground that defendant was not about to quit Canada with intent, &c. The learned Judge of the County Court exercised his discretion in the matter, and on the material produced I cannot say he is wrong.

As to the defective entitling of the affidavits, *Ellerby* v. *Walton*, 2 Prac. Rep. 147, is express authority in favour of the plaintiff, and was decided in the full court. In the face of that decision I do not feel warranted in setting aside the arrest. I have less hesitation in arriving at this conclusion, as the amount for which he was held to bail is not large, and he says he is possessed of property, so that he will have no difficulty in procuring bail. As the last Chamber decision was in favor of the view now contended for by defendant, I shall discharge the summons without costs.

Summons discharged.

McMurray v. Grand Trunk Railway Co.

Short notice of trial "if necessary."

[Chambers, Oct. 15, 1870—*Mr. Dalton.*]

By the terms of an enlargement on a summons in Chambers, the defendants were to take "short notice of trial if necessary."

Mr Dalton.—I understand the words "short notice of trial if necessary" to have reference to the state of the cause and not to the convenience of the parties, even though that convenience may be as to their ability to procure evidence and prepare for trial.

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* In Michaelmas Term the plaintiffs moved the Court of Queen's Bench against this order, with what result we cannot yet say.—Eds. L. J.

ASSESSMENT APPEAL FROM COURT OF REVISION.

In the First Division Court in the County of Elgin.

Court of Revision—Appeal.

Power of the Court of Revision to grant time for entering appeals beyond that prescribed by the Municipal Assessment Act—Practice in appeal cases—Notice of appeal, and necessity for stating grounds as causes and matters of appeal—Right of counsel to be heard before Courts of Revision and all other courts.

[St. Thomas, July 7, 1870.]

McDougall and *White* for appellant.

Ellis for respondents.

Hughes, Co. J.—There were several legal points raised which I have to dispose of, the first being as to the notice of these appeals. I decide that all that the 63rd section of the stat. 32 Vic. chap. 36, requires, is that if a person be dissatisfied with the decision of the Court of Revision he may appeal therefrom, and, within three days after the decision, serve upon the Municipal Clerk a written notice of his intention to appeal to the County Judge. The clerk is, thereupon, to notify all the parties appealed against, in the same manner as is provided for notice of complaint by the 60th section. The party appealing is, at the same time, and in like manner, to give a written notice of his appeal to the clerk of the Division Court within the limits of which the municipality or assessment district is situated, and to deposit with him $2, &c.

These notices were given both to the clerk of the council and the clerk of the proper Division Court. But a preliminary objection is taken to their form, and to the ground stated as the cause and matter of the appeals, which it is urged are in most of the cases insensible, inasmuch as the fourth sub-section of section 60 of the Assessment Act of 1869 does not refer to, or require a written notice to be served.

Judging from the analogy which subsists between all these appeals, and the principles which govern appeals from orders and convictions of justices, and appeals against county rates in England, I think the decided cases must govern me in these matters. I find that the Ontario Assessment Act of 1869 does not require the notices of appeal to state any grounds of the causes and matters of appeal. This being the case, a simple notice of appeal properly framed and served is all that the statute requires, and as the grounds of appeal taken are not calculated to mislead, I think what is stated may be treated as surplusage.

It was not complained that the respondent was misled, otherwise I should have adjourned the hearing of the cases to another day, so that the respondents might not be affected by surprise, if alleged.

The case of *The King* v. *The Justices of Westmoreland* was very like the present. It was there held that it was not necessary, in a notice of appeal against a county rate, to specify the grounds of appeal; but if the appellant stated in the notice as causes of appeal *things which were not so*, the court ought to adjourn the appeal if they think the respondents have been misled by the terms of the notices, or otherwise to hear it. I think the preliminary objection was not entitled to prevail in any of the cases referred to in the annexed schedule, where the reason given is, "inasmuch as no written notice was served upon the clerk in conformity with sub-section 4 of section 60 of the Assessment Act of 1869," or where the words of the notice import the same reference to that sub-section. Where the sub-section of a statute is expressly referred to, as was the case in these instances, and where the notices set forth that sub-section had not been complied with, I can, and I think any one could, by referring to the sub-section, easily understand what was meant by the allegation that a notice was not given in conformity with its provisions; because the Court of Revision has the power conferred upon it of extending the time for making complaints ten days further.

Now the extending the time gives to each complainant (and the assessor or any one else may be the complainant) the right to make complaint, and that involves the giving to the assessor and to the party whose assessment, or the omission of whose name or property is complained of, a notice by the municipal clerk, as provided by the 2nd sub-section of the 60th section. And I think it does not require any wide stretch of the imagination to discover what was meant by the complaint that that notice was not given.

It turns out, however, that in several of the cases the cause of complaint was that the Court of Revision, upon the complaint of Mr. McBride, first acted upon the 4th sub-section and extended the time for making complaints ten days further, and adjourned the court, for the purpose of hearing those complaints, to the 23rd of May; and that afterwards, on the 23rd May, they did, at the instance of the assessor, further extend the time for making complaints for another ten days, thus actually going beyond the statute, by extending the time more than *twenty* days. The powers of the court are expressly conferred and limited by statute, so that whatever power the statute gives can be exercised without doubt, but whatever the statute limits or restrains cannot be exceeded. The proceedings of the court are definitely prescribed, and, unlike courts which have no practice laid down, they have no power to frame a procedure for themselves. Their duties, by the 59th section, are to be completed and the rolls to be finally revised, in so far as they are concerned, before the 15th of June in every year; and although under the 55th section they may meet and adjourn at pleasure, or may be summoned to meet at any time by the head of the municipality, they cannot adjourn to a period beyond, nor can they be summoned to meet for performance of their functions on or after the 15th June. Anything done by them on or after that day is void, for the court becomes *functus officio* by effluxion of time, subject to their being summoned to meet again for the discharge of duties or exercising special powers under the 62nd section. The assessor was bound by the 49th section to make and complete his roll not earlier than the 1st of February and not later than the 15th of April. He was to deliver (under the 50th section) the assessment roll completed and added up, with certificate and affidavit attached, to the clerk; and the officer last named was bound to

file and keep the roll in his office, and at all convenient times to keep it open to the inspection of all the householders, tenants, and freeholders, resident, owning or possessing property in the municipality.

A time is to be appointed for the court to meet and try complaints in regard to persons wrongfully placed upon or omitted from the roll, or assessed at too high or too low a sum. Within the time from the return of the roll at the office of the municipal clerk and the assembling of the court, all parties have the power of examining the roll at the clerk's office, and any person complaining of an error or omission in regard to his own or any other person's assessment, may, within fourteen days after the time fixed for the return of the roll, give notice to the clerk that he considers himself aggrieved, &c., and if a municipal elector thinks that any other person has been assessed too high or too low, or has been wrongfully inserted in or omitted from the roll, he may complain, and the matter is to be decided in the same manner as complaints by a person assessed; so that ordinarily the complaints cannot be made under the 1st and 2nd sub-section of the 60th section later than fourteen days after 15th April, which would be the 29th of April. But the court may sit for the hearing of such complaints at any time, and adjourn from time to time, within the limits of their existence, up to the 15th June, on which day, without any power of revival, they become defunct for all purposes of complaints under the 60th section. The 4th sub-section of the 60th section gives no power, no matter what palpable errors need correction, for the court to resume its functions. The court may, within the limit of its existence, but not afterwards, extend the time for making complaints ten days further, and may then meet and determine the additional matter complained of upon palpable errors being made to appear as needing correction. That cannot be done, however, after the 15th of June. The 62nd section, it is true, confers upon the court further powers after the 15th June for certain other purposes, but those powers are so expressly limited and specific that they cannot be held to apply to these appeals.

It was not objected that anything was done by the court on or after the 15th June, but that they once legally exercised, and once after that illegally affected to exercise the powers conferred upon them by the 4th sub-section of the 60th section It very plainly appears that by the last words of the 3rd sub-section the court could do nothing upon its own motion with regard to altering or amending the roll, *except upon complaint.* If after a complaint either party failed to appear, the court might proceed *ex parte*, so that if there were no complaints the court had nothing to do, and its functions would cease from having discharged its duties, provided all the complaints were disposed of.

If, however, in the discharge of its functions, the court itself discovered, or if it was otherwise made to appear, that there were palpable errors which needed correction, the court might extend the time for making complaints *ten days further*, and might then meet and determine any additional matter complained of; and the assessor might for such purpose (supposing there were no other person to make the complaint) be the complainant.

I think this function could only be discharged by the Court of Revision *once*, and they had no power to extend the time for making complaints *twenty* days, but only fourteen days, as limited and allowed by the 4th sub-section.

When Mr. McBride appeared, it was the 9th of May, the first day on which the Court of Revision sat. The assessor had been derelict in his duty in returning the roll, and was punishable. Still, the law, with regard to making complaints, is specific—they must be made within fourteen days after the 15th of April. The time had gone by for further complaints, for at least six days' notice is required by the 11th sub-section of the 60th section. So that I must hold that the application of Mr. McBride for, and the grant by the court of, an extension of time, could have only been legal under the 4th sub-section of the 60th section: that the court could only (legally) once grant such an extension. If they could assume the power of giving it twice—or two extensions—there would be no use in the limit fixed by the statute of confining complaints to ten days. The 4th sub-section does not say the court may extend the time for making complaints *from time to time* for ten days at a time, but *for ten days further*, and the court might then meet and determine the additional matter complained of. Beyond those ten days they could not adjourn, extend, or adjudicate.

I have no doubt, however, that in granting that extension it is general in its nature, and not confined to the person who might happen to make manifest the palpable errors which needed correction; but that it was open for any person to make whatever complaints he might think proper: that the court could not of its mere motion assume powers of extending the time for making complaints to any one in the absence of a complainant, no matter what the injustice might be, nor how illegally or negligently the assessor had acted in the discharge of his duties; that the only power they could invoke after the fourteen days had passed from the time fixed for the return of the roll, for the extension of the time for making complaints, was the provision of the 4th sub-section; and where there is a jurisdiction and power conferred by law, I suppose it will be proper to presume, in the exercise of it, that the principle *omnia rite esse acta* applies; there was certainly jurisdiction to support the proceeding once, that is, the first time it was exercised, but not twice. The second time, therefore, was illegal.

Having stated my view of the law of this case, I proceed now to dispose of the facts *upon the law.*

1st. I decide that the application made to the Court of Revision was, and could only have been, an application, and the extension of time for making complaints under that application could only have been exercised by the court under the 4th sub-section of the 60th section: that the record of the court is incomplete, but the evidence given outside of the record sufficiently shows facts from which I can presume the court acted in order to make their proceedings on the 9th of May legal.

2nd. I decide that all cases which were ap-

pealed upon that extension by any one within the ten days were legally made, whether by Mr. McBride or any one else.

3rd. I decide that the affected granting of the *second* extension of time upon the application of the assessor on the 23rd of May was illegal; that the proceedings upon his appeal were void and *coram non judice;* that all alterations or additions made to the roll by the Court of Revision upon complaints or appeals made after the 23rd of May were entirely *ultra vires*; so that if any such were made in the cases referred to in the annexed list and schedule, they are hereby set aside, and the clerk of the municipality of the township of Bayham is hereby ordered to alter and amend the roll according to this my order, and to restore the roll to its original state in respect thereof, pursuant to the 65th section of the said Assessment Act.

4th. I further decide that the names of the following persons were improperly ordered to be struck out of the said roll by the said Court of Revision, and I order their said names to be restored as they were originally entered therein, viz: Robert W. Locker, Andrew M. High, Jesse Millard, Wm. H. McCollum, Edwin A. Weaver, James H. McKinney, Elisha Howell, Jeremiah McKinney.

5th. I further decide that the names of the following persons were improperly ordered by the said court to be inserted in the said roll, and I order their names to be erased therefrom, viz: Joseph Stansell, Thos. Baker, Andrew Shingler, James Oliver.

6th. I further decide that the names of the following persons were improperly ordered to be left in the said roll by the said court when they ought to have been ordered to be struck off and erased therefrom, and I order them to be erased therefrom, viz: Benjamin Drake, Heman A. McConnell, Robert W. Smuck.

7th. I further decide that the said roll ought to be amended in other respects as follows, viz.: Charles B. Saxton should have been assessed as tenant for six acres, a part of the east half of lot number 9, in the second concession, at $20 per acre—whole value $120.

8th. I further decide that the name of the following person was properly ordered by the said Court of Revision to be left on or inserted in the said roll, and I confirm the decision of the said court with respect thereto, and I order the appellant to pay the costs of this appeal with respect to it, viz: William Stratton.

Were a good purpose likely to be served by any remarks I might make, I should animadvert in terms of strong censure upon the way in which the functions of a court were discharged by the members of this Court of Revision. I shall, however, forbear making them, knowing that when in the discharge of duty men allow themselves to be actuated by strong sectional or political feelings, they are in no mind to listen to or benefit by words which might under usual circumstances serve for the public good. Still, I do insist and maintain that when a member of the bar may be heard before the highest tribunals of the land, and even before the Queen herself in her Privy Council on an appeal from one of his own courts in this Province; that that court, or the members of that court, must be very ignorant, indeed misguided, who would refuse him audience before a petty local tribunal such as a township Court of Revision.

Lastly, With respect to the costs in all the cases (with the exception of those referred to in finding eight, that is to say, regarding the appeal respecting the case of William H. Stratton), I order that all the costs of these proceedings in appeal be borne and paid by the municipality of the township of Bayham to the appellant forthwith.

UNITED STATES REPORTS.

SUPREME COURT OF MICHIGAN.

City of Detroit v. Blakeby and Wife.

A municipal corporation is not liable, in a private action for damages, for injuries caused by neglect to keep its streets in repair.

The cases founded on mere neglect to repair, and on acts of positive misfeasance reviewed and distinguished by Campbell, C. J.

[9 Am. Law R. 670.]

This was an action by defendants in error, against the City of Detroit, for damages received from the defective condition of a cross walk. In the Wayne Circuit Court the defendants in error had a verdict and judgment, to which the city took this writ of error.

The opinion of the court was delivered by

Campbell, C. J.—The principal question in this case is, whether the City of Detroit is liable to a private action of an injured party for neglect to keep a cross walk in repair. The other questions involve an inquiry into the circumstances which would go to modify any such liability in the present case.

There has been but one case in this State decided by this court, where the claim for damages arose purely out of a neglect to repair. In *Dewey* v. *Detroit*, 15 Mich., 307, such a suit was brought, but it did not call for a decision upon the main question. In *Township of Niles* v. *Martin*, 4 Mich., 557, it was held there was no such liability in a township, and this case was followed by us at the present term in *Township of Leoni* v. *Taylor*. It was held in *Larkin* v. *Saginaw County*, 11 Mich., 88, that a county could not be sued for directing a bridge to be built on a plan that was defective and injurious. In *Pennoyer* v. *Saginaw City*, 8 Mich., 534, a city was held liable for continuing a private nuisance which it had created, and in *Corey* v. *Detroit*, 9 Mich., 165, the City of Detroit was held liable for an accident caused by leaving an excavation in a street for a sewer imperfectly guarded. In *Dermont* v. *Detroit*, 4 Mich., 135, it was held the city was not liable for the flooding of a cellar by a sewer, into which it drained. None of those cases presented the precise question raised here, and we are required therefore to consider it as an original inquiry, except in so far as it may be affected by any principles involved in the cases already decided.

The streets of Detroit are public highways, designed like all other roads for the benefit of all people desiring to travel upon them. The duty or power of keeping them in proper condition is a public and not a private duty, and it is an

office for the performance of which there is no compensation given to the city. Whatever liability exists to perform this service to the public, and to respond for any failure to perform it, must arise, if at all, from the implication that is claimed to exist in the nature of such a municipality.

There is a vague impression that municipalities are bound in all cases to answer in damages for all private injuries from defects in the public ways. But the law in this state and in most parts of the country, rejects this as a general proposition, and confines the recovery to cases of grievances arising under peculiar circumstances. If there is any ground for recovery here, it is because Detroit is incorporated, and it depends therefore on the consideration whether there is anything in the nature of incorporated municipalities like this which should subject them to liabilities not enforced against towns and counties. The cases which recognise the distinction apply it to villages and cities alike.

It has never been claimed that the violation of duty to the public was any more reprehensible in these corporations than outside of them; nor that there was any more justice in giving damages for an injury sustained in a city or village street, than for one sustained outside of the corporate bounds. The private suffering is the same and the official negligence may be the same. The reason, if it exists, is to be found in some other direction, and can only be tried by a comparison of some of the classes of authorities which have dealt with the subject in hand.

It has been held that corporations may be liable to suit for positive mischief produced by their active misconduct, and not by mere errors of judgment, and while the application of this rule may have been of doubtful correctness in some cases, the rule itself is at least intelligible and will cover many decisions. It was substantially upon this principle that the case of *Detroit* v. *Corey* was rested by the judges who concurred in the conclusion. *Thayer* v. *Boston*, 19 Pick., 511, was a case of this kind, involving a direct encroachment on private property. *Rochester White Lead Company* v. *City of Rochester*, 3 N. Y., 465, where a natural water course was narrowed and obstructed by a culvert entirely unfit for its purpose and not planned by a competent engineer, is put upon this ground in the decision of *Hickox* v. *Plattsburg*, cited 16 N. Y., 161; *Lee* v. *Village of Sandy Hill*, 40 N. Y., 422, involved a direct trespass.

The injuries involved in these New York and Massachusetts cases referred to, were not the result of public nuisances, but were purely private grievances. And in several cases cited on the argument, the mischiefs complained of were altogether private. The distinction between these and public nuisances or neglects, has not always been observed, and has led to some of the confusion which is found in the authorities. In all the cases involving injuries from obstructions to drainage, the grievance was a private nuisance. In case of *Mayor* v. *Furge*, 3 Hill, 612, which has been generally treated as a leading case, the damage was caused by water backing up from sewers not kept cleaned out as they should have been: *Barton* v. *Syracuse*, 36 N. Y., 54, involved similar questions, as did also *Childs* v. *Boston*, 4 Allen, 41. These cases do not harmonise with *Dermont* v. *Detroit*, 4 Mich, 135; but they rest on the assumption, that having constructed the sewers voluntarily for private purposes, and not as a public duty, the obligation was complete to keep them from doing any mischief, as it would be in private persons. And in *Bailey* v. *Mayor*, 3 Hill, 538; S. C., 2 Denio, 433, the mischief was caused by the breaking away of a dam connected with the Croton water works, whereby the property of the plaintiff was destroyed. In this latter case the judgment rested entirely upon the theory that the city held the water works as a private franchise and possession, and subject to all the responsibilities of private ownership. The judges who regarded it as a public work, held there was no liability. In *Conrad* v. *Trustees of Ithaca*, 16 N. Y., 159, the facts were substantially like those in *Rochester White Lead Co.* v. *Rochester*, and the decision was rested on the principles of that case. Denio, C. J., who delivered the opinion of the court, stated his own opinion to be, that there was no liability, but that he regarded the recent decision in another case referred to as establishing it, and in *Livermore* v. *Freeholders of Camden*, 29 N. J., 245 (and on Error, 2 Vroom, 507), under a statute like that which was considered by this court in *Township of Leoni* v. *Taylor*, it was decided that while a passenger over a bridge could sue for injuries, yet where property adjacent was injured by the bridge, there was no remedy. Upon anything which sustains the liability for such grievances however, it is manifest that the injury is not a public grievance in any sense, and does not involve a special private damage, from an act that at the same time affects injuriously the whole people.

Another class of injuries involves a public grievance specially injuring an individual, arising out of some neglect or misconduct in the management of some of those works which are held in New York, to concern the municipality in its private interests, and to be in the law the same as private enterprises. It is held, that in constructing sewers and similar works, which can only be built by city direction, if the streets are broken up and injuries happen because no adequate precautions are taken, the liability shall be enforced as springing from that carelessness, and not on the ground of non-repairs of highways. *Lloyd* v. *Mayor*, 5 N. Y., 369, and *Storrs* v. *Utica*, 17 N. Y. 104, were cases of this kind. In these cases, as in the case of *Detroit* v. *Corey*, the streets were held to have been broken up by the direct agency of the city authorities, and the negligence which caused the injury, was held to be negligence in doing a work requiring special care, or in other words, the wrong complained of was a misfeasance and not a mere omission. The case of *Weet* v. *Brockport*, 16 N. Y., 161, was also a case where Selden, J., who reviewed and discussed all the decisions, said it was not necessary to consider the wrong complained of as a mere neglect of duty, because it was in itself a dangerous public nuisance, created by the corporation, and not in any sense a non-feasance. In *Delmonico* v. *Mayor*, 1 Sand. 226, the injuries, though in a highway, consisted in crushing in a vault under the street, by improperly piling earth upon it while exca-

vating for a sewer, and there was also a direct misfeasance.

The cases in which cities and villages have been held subject to suits for neglect of public duty, in not keeping highways in repair, where none of the other elements have been taken into the account, are not numerous, and all which quote any authority professs to rest especially upon the New York cases, except where the remedy is statutory. It will be proper, therefore, to notice what those cases are, and upon what cases they are supported. The only cases of this kind decided in the courts of last resort, that we have been able to find, are *Hutson* v. *Mayor*, 9 N. Y. 163; *Hickox* v. *Plattsburg*, 16 N. Y. 161, and *Davenport* v. *Ruckman*, 37 N. Y. 568. This latter case resembles the one before us very closely in its leading features, and would furnish a very close precedent. It is not reasoned out at all, but refers for the doctrine to the other two cases, and to an authority in 18 N. Y., which does not relate to municipal liabilities. The case of *Hatson* v. *Mayor*, does not attempt to find any distinct foundation for the right of action, but refers to the cases in 3 Hill, and *Rochester White Lead Co.* v. *Rochester*, and *Adsit* v. *Brady*, 4 Hill, 630, as having established the liability. This latter case is disapproved in *Weet* v. *Brockport*, and the others are sustained there on the ground of misfeasance, and as Judge Denio, when the decisions in 16 New York were made, stated that he had not supposed there was any corporate liability for mere neglect to keep ways in repair, it is quite possible that the case of *Hatson* v. *Mayor*, was regarded as distinguishable. The circumstances were very aggravated, as it would seem that the city had left a road too narrow to accommodate a carriage without any paving and without protection against the danger of falling down a deep embankment into a railroad excavation. The report is not as full as could be desired upon the precise state of facts. In the Supreme Court, where the judges differed in opinion (two dissenting), the liability seems, from the view taken of that case by Judge Selden, to have rested on the ground that there had been a breach of private duty and not of duty to the public. If this was the view actually taken, it would not bring the case within the same category with the other road cases. But the case of *Weet* v. *Brockport*, 16 New York, 161, is recognized as the one in which the whole law has been finally settled, and it is upon the grounds there laid down, that the liability is now fixed in New York. The elaborate opinion of Judge Selden, which was adopted by the Court of Appeals, denies the correctness of the dicta in some of the previous cases, and asserts the liability to an action solely upon the ground that the franchises granted to municipal corporations are in law a sufficient consideration for an implied promise to perform with fidelity all the duties imposed by the charter, and that the liability is the same as that which attaches against individuals who have franchises in ferries, toll-bridges, and the like. The principle as he states it, is:

"That whenever an individual or a corporation, for a consideration received from the sovereign power, has become bound by covenant or agreement, either express or implied, to do certain things, such individual or corporation is liable, in case of neglect to perform such covenant, not only to a public prosecution by indictment, but to a private action at the suit of any person injured by such neglect. In all such cases the contract made with the sovereign power is deemed to enure to the benefit of every individual interested in its performance."

In order to get at the true ground of liability, the opinion goes on to determine, first, whether townships and other public bodies, not being incorporated cities or villages, are liable, and shows conclusively that they are not, and the court arrives at this conclusion not on the basis of an absence of duty or an absence of means, but because their duties are duties to the public and not to individuals. Full citations are made from the English cases which were cited before us, and also from the American cases. The case of *Young* v. *Commissioners of Roads*, 2 N. and McC., 537, is cited approvingly, and the following language is quoted as expressing the correct idea: "When an officer has been appointed to act, not for the public in general, but for individuals in particular, and from each individual receives an equivalent for the services rendered him, he may be responsible in a private action for a neglect of duty, but when the officer acts for the public in general, the appropriate remedy for his neglect of duty is a public prosecution." In another part of the opinion, sheriffs are given as examples of the former and highway commissioners of the latter class of officers The cases cited do not all require the consideration for the services to come from individuals, but they all require the services to be due to individuals and not to the public, and to spring from contract. The English cases are reviewed in the *Mersey Dock Cases*, 1 H. of L. Cases, N. S., 93; 1 H. & N. 493; 3 Id. 164, and exemplify this. Thus the liability to repair a sea wall is in favor of those who own the property adjacent; the liability to keep docks safe of access in favor of those who have occasion to require their use upon the customary terms; the liability to keep toll bridges safe in favor of those who use them. But there is no instance of liability where the public is interested directly, and in those cases where the obligation rests upon the consideration of corporate franchises, the duty has always been towards individuals, although the consideration moved from the state. The decisions upon this sustain the views of Judge Selden concerning his premises, but there is some difficulty in reaching his conclusions through them. It is admitted everywhere, except in a single case in Maryland, that there is no common law liabaility against ordinary municipal corporations, such as towns or counties, and that they cannot be sued except by statute. It has also been uniformly held in New York as well as elsewhere, that public officers whose offices are created by act of the legislature, are in no sense municipal agents, and that their neglect is not to be regarded as the neglect of the municipality, and their misconduct is not chargeable against it unless it is authorized or ratified expressly or by implication. This doctrine has been applied to cities as well as to all other corporations. *Barney* v. *Lowell*, 98 Mass. 570; *White* v. *Philipston*, 10 Metc., 108; *Mower* v. *Leicester*, 9 Mass., 247; *Bigelow* v. *Randolph*, 14 Gray, 541; *Wolcott* v. *Swanscott*,

1 Allen, 101; *Young* v. *Com'r of Roads*, 2 Nott. & McCord, 537; *Pack* v. *Mayor*, 4 Seld., 222; *Martin* v. *Mayor of Brooklyn*, 1 Hill, 545; *Bartlett* v. *Crozier*, 17 J. R., 438; *Morey* v. *Newfane*, 8 Barb., 605; *Eastman* v. *Meredith*, 36 N. Y. 284; *Hyde* v. *Jamaica*, 27 Vt. 443; *Lorillard* v. *Town of Monroe*, 11 N. Y. 392; *Mitchell* v. *Rockland*, 52 Maine, 168—and the numerous cases which exonerate cities from liabilities for not enforcing their police laws so as to prevent damage, rest upon a very similar basis.—*Howell* v. *Alexandria*, 3 Peters, 398; *Levy* v. *Mayor*, 1 Sandf, S. C. 465; *Proctor* v. *Lexington*, 13 B. Monroe, 509; *Howe* v. *New Orleans*, 12 La. Ann., 481; *Western Reserve College* v. *Cleveland*, 12 Ohio St., 375; *Brinkmeyer* v. *Evansville*, 29 Ind., 187; *Griffin* v. *Mayor*, 9 N. Y. 456. In *Eastman* v. *Meredith*, 36 N. H., 284, the distinction between the English and American municipal corporations is clearly defined. The former often hold special property and franchises of a profitable nature, which they have received upon conditions, and which they can hold by the same indefeasible right with individuals. But American municipalities hold their functions merely as governing agencies. They may own private property and transact business not strictly municipal, if allowed by law to do so, just as private parties may, and with the same liability; but their public functions are all held at sufferance, and their duties may be multiplied and enforced at the pleasure of the legislature. They have no choice in the matter; they have no privileges which cannot be taken away, and they derive no profit from their care of the public ways and the execution of their public functions. They differ from towns only in the extent of their powers and duties bestowed for public purposes, and their improvements are made by taxation, just as they are made on a smaller scale in towns and counties. In the case of *Bailey* v. *Mayor*, 3 Hill, 538, it was intimated by Judge Nelson that the state could not compel the city to accept its charter, and in *Child* v. *Boston*, the fact that the sewerage system had been left to vote and been accepted, was held to make it a private and not a public matter. The sewer cases have, in several instances, gone upon this latter notion. It is not necessary to discuss that question here, because streets are not private and because in this state at least, no municipality can exercise any powers except by state permission, and every municipal charter is liable to be amended at pleasure. The charter of Detroit has undergone most radical changes. It is impossible to sustain the proposition that those charters rest on contract, and it is impossible as Judge Selden demonstrates, to find any legal warrant for any other ground for distinguishing the liability of one municipal body from that of another. There is no basis or authority for any such distinction concerning the consideration on which their powers are granted, and it rests upon simple assertion; and yet the decision stands in New York as authority for all that is claimed here, because although in the case in which the opinion was given in the Supreme Court, it was not called for, yet in the case of *Hickox* v. *Trustees of Plattsburg*, 16 N. Y., 161, in which it was adopted as the opinion of the Court of Appeals, the mischief was a mere neglect to repair, when the street had been obstructed by an individual excavation for a short time.

It is impossible to harmonize the decision with the previous decisions exempting corporations from responsibility, because public officers were not their agents. It is no easier to sustain it in the face of the uniform decisions denying liability for failure to enforce their police regulations. The authorities which make corporations liable on the ground of conditions attached to their franchises, go very far towards compelling them to respond as absolutely bound to prevent mischief, and the general reasoning on which most of the opinions rest, and the criticisms made upon former decisions—which it is asserted, went altogether too far in creating liability—all are designed to show, and do show very forcibly, that simply as municipal corporations apart from any contract theory, no public bodies can be made responsible for official neglect, involving no active misfeasance.

There is no such distinction recognized in the law elsewhere. In *City of Providence* v. *Clapp*, 17 Howard, 161, the United States Supreme Court, through Judge Nelson, held that cities and towns were alike in their responsibility and in their immunity. In *County officers of Anne Arundel* v. *Duckett*, 20 Md., 468, a county was held responsible to the fullest extent. In New Jersey in *Freeholders of Sussex* v. *Strader*, 3 Harrison, 108; *County Freeholders of Essex*, 27 N. J., 415; *Livermore* v. *Freeholders of Camden*, 29 N. J., 245, and 2 Vroom, 507, *Pray* v. *Mayor of Jersey City*, 32 N. J., 394, the cases were all rested on the same principles, and cities were exonerated because towns and counties were. The suggestion of Judge Selden has been caught at by some courts since the decision, and has been carried to its legitimate results, as in *Jones* v. *New Haven*, 34 Conn., 1, where the damage was caused by a falling limb of a tree. But so far as we have seen, even the cases which are decided on this ground, do not hold that towns do not receive their powers upon a consideration as well as cities. That question still remains to be handled in those courts.

It is utterly impossible to draw any rational distinction on any such ground. It is competent for the legislature to give towns and counties powers as large as those granted to cities. Each receives what is supposed to be necessary or convenient, and each receives this, because the good government of the people is supposed to require it. It would be contrary to every principle of fairness, to give special privileges to any part of the people and then deny to others, and such is not the purpose of city charters. In England the burgesses of boroughs and cities have very important and valuable privileges of an exclusive nature and not common to all the people of the realm. Their charters are grants of privilege and not mere government agencies. Their free customs and liberties were put by the great charter under the same immunity with private freeholds. But in this state and in this country generally they are not placed beyond legislative control. The Dartmouth College case which first established charters as contracts, distinguished between public and private corporations, and there is no respectable authority to be found anywhere which holds that either offices or

municipal charters generally involve any rights of property whatever. They are all created for public uses and subject to public control.

We think that it will require legislative action to create any liability to private suit for non-repairs of public ways. Whether such responsibility should be created, and to what extent and under what circumstances it should be enforced, are legislative questions of importance and some nicety. They cannot be solved by courts.

Judgment reversed.

Cooley, J., dissented.

(Note by Editor of *American Law Review.*)

[The foregoing case is one that cannot fail to be of interest to the profession, inasmuch as it concerns an important question affecting a great number of our municipalities to a very large extent, and is, at the same time, a departure from the doctrines, which have been supposed to have been adopted by the English courts and those of some of the American States. The question is by no means free from difficulty; and we cannot fairly say that we have been able to devote sufficient time to an examination and analysis of the cases bearing upon the point, to enable us to speak confidently of the exact weight of authority against the decision here made. There seems to be no question, whatever, that the New York Courts have adopted a rule more in conformity with the dissenting opinion in this case than with that of the majority. In *Davenport* v. *Ruckman*, 37 N. Y., 568, the rule is thus stated: When the streets or sidewalks of the city of New York are out of repair through the neglect of the corporation, it is liable to an action for such neglect, at the suit of the person injured, whether the injury arises from some act done by the corporation, or from an omission of duty on their part. And the same doctrine is found in numerous earlier decisions in that state, most of which are referred to in the opinion in the case under review. The rule is thus stated in a late case in the Supreme Court of New York: "Whatever may be the case in regard to commissioners of highways in towns, a different and more stringent rule appears to have been applied to corporations and the trustees of a village:" *Hyatt* v. *The Trustees of the Village of Rondout*, 44 Barb., 385.

And in *Wendell* v. *The City of Troy*, 4 Keyes, N. Y. Court of Appeal, 261, the city was held responsible for an injury to the plaintiff, by means of the defective construction of a drain under the street, whereby it caved in, although built by a private person for his own convenience by permission of the city authorities. The New York cases seem to go the full length of making cities and villages responsible for all damage caused by any failure to perform the duties imposed by their charters, on the ground that having sought special acts of incorporation they are bound, as corporations, to the performance of all the duties imposed by such charters, as conditions voluntarily assumed by the corporations, impliedly at least, by reason of the acceptance of the charters containing such conditions. And the case of *Jones* v. *The City of New Haven*, 34 Conn. 1, seems to go much upon the same ground, except that there the matter came specially under one of their own by-laws, in regard to which there might seem to be less question than if the duty had been imposed by the legislature as a public duty or burden.

The general doctrine that a public officer is not responsible for the misconduct of his subordinates, although his appointees, has been recognized from an early day: *Lane* v. *Cotton*, 1 Ld. Ray. 646, where the action was against the postmaster general for the default of his deputies. The case of the *Mayor of Lime Regis* v. *Henley*, 3 B. & Ad. 77; S. C. 2 Cl. & Fin. 331, was an action for injury to the defendant's land by reason of the plaintiffs failing to repair certain sea walls appertaining to their municipality, and which the condition of their charter obliged them to maintain and keep in repair. The case was first decided by the Common Pleas, in favor of the present defendant, 5 Bing., 91, and came for hearing on writ of error in the King's Bench. Lord Tenterden, Ch. J., gave judgment for the defendant, upon the ground that the corporation by accepting its charter became bound to perform all its conditions, and whoever suffered damage through any default in that respect, may have an action and the public may have redress for such defaults by indictment.

The subject has been more or less considered by the English courts since that time; but the case of the *Mersey Docks* v. *Gibbs*, and the same v. *Penhallow*, 1 H. Lds. Cases, N. S. 93—128; S. C., 1 H & N. 439; 3 id. 164, seems to have put the question at rest there, so far as the points involved in the latter case are concerned. The injury complained of here occurred by reason of the docks being out of repair. The plaintiffs are a public corporation, created for the purpose of maintaining the harbor of Liverpool, and are required to maintain and keep in repair suitable docks and other harbor accommodations, for the use of which they are authorized to demand certain dues, which are intended to maintain the works, and are to be lessened whenever they produce more than is required for that purpose. The Court of Exchequer gave judgment in favor of the corporation, on the authority of *Metcalfe* v. *Hetherington*, 11 Exch. 258; but this judgment was reversed in the Exchequer Chamber; 3 H. & N. 164, and the judgment of the Exchequer Chamber affirmed in the House of Lords. The case of Gibbs was heard on demurrer to the declaration which contained the averment that the company knowing that the dock and its entrance was, by reason of accumulation of mud, unfit to be used by ships, did not take due and reasonable or any care to put it in a fit state, but negligently suffered the dock to remain in such unfit state, whilst, as they well knew, it was used by vessels, and that the damages arose in consequence.

The case in the Exchequer Chamber seems to have been decided upon the general ground that a corporation created for the purpose of maintaining public works, and receiving tolls or dues for the use of the same, is bound to see that such works are kept in a safe and fit condition for public use. This decision went upon the authority of *The Lancaster Canal Co.* v. *Parnaby*, 11 Ad. & El. 223, 242. And it was here considered that it made no difference whether the tolls were reserved for the benefit of the shareholders, as in the last case cited, or in a fiduciary capacity, as in the present case. And the House of Lords

seem to have decided the case upon this view. Lord Chanworth, Chancellor, said the destruction was one that could be held to affect the rights of those using the docks. Lord Wensleydale said, if the question were *res integra*, and not settled by authority, he would be inclined to hold that it came within the principle of the cases where public officers have been held not liable to a private action for neglect of duty by servants appointed by them. But upon the former decisions he held the judgment below must be affirmed. And Lord Westbury fully concurred with the Lord Chancellor.

And it seems to us that this case is in itself no sufficient authority for holding cities and villages any more responsible for their streets and sidewalks being out of repair than are towns or counties, upon whom the duty of keeping highways in repair is imposed, where it has been long settled there is no responsibility for injuries occurring by want of repairs, unless imposed by statute. But the earlier English cases held a more stringent rule of responsibility in regard to cities and villages having special acts of incorporation, and chiefly upon the ground that they had accepted them voluntarily, and thus assumed the duties imposed by the charters thus accepted. How far this distinction is well-founded, it will not be altogether decisive of the question to inquire. For, since it has been long settled that such corporations are so responsible, it might not be entirely just to the public to now declare their irresponsibility, when, but for the rule of responsibility already established, the legislature might have provided for such responsibility by special enactments, as in the case of towns. For while it may be reasoned with great plausibility that there is no good reason, aside from the former decisions, to hold cities and villages to any higher degree of responsibility in regard to damages occurring by reason of their highways being out of repair, than towns are held; it may at the same time be urged with great propriety that they should be held to the same responsibility. But under the decision here made they could not be so held in most of the States. Since the legislatures have omitted in most cases it is fair to presume, to impose the same duty by statutes upon cities and villages, which they do upon towns, on the ground that it is not required by reason of the general principles of the law having already imposed that duty upon them, this consideration will tend to show that the restoration of the law to symmetry in this particular will more conveniently come from the legislature than from the courts. Beyond this it does not occur to us that any very convincing argument can fairly be urged against the decision of the court in this case. It cannot, we think, as a general rule, be justly held that towns are any less responsible for the consequences of leaving the highway in an unsafe condition than cities and villages are. If it requires a special statutory enactment to impose any such responsibility upon towns, we do not, upon general principles, very well comprehend why it should not require the same in the case of cities and villages. Our only doubt would be whether the symmetry of the law upon this point might not better be restored by the legislature. I. F. R.

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR MAY, JUNE AND JULY, 1870.

(Continued from page 279.)

Marriage Settlement.—*See* Confirmation, 2.

Married Woman.—*See* Husband and Wife.

Marshalling.—*See* Charge.

Master.—*See* Ship.

Misdescription.—*See* Codicil, 2; Construction, 5.

Money Had and Received.—*See* Action, 1.

Mortgage.—*See* Assignment; Charge; Notice, 2; Residuary Clause, 2.

Negligence.

1. The plaintiff was a gardener in the service of the defendant, and accompanied him in a buggy to do some work for him. While crossing a furrow, the kingbolt broke and the plaintiff was thrown out and injured. *Held*, that as the defendant was performing a gratuitous service for the plaintiff, the plaintiff could not recover in the absence of gross negligence, and that there was no evidence to establish gross negligence.—*Moffatt* v. *Bateman*, L. R. 3 C. P. 115.

2. The plaintiff, while attempting to cross the defendant's railway by a road which crossed it on a level, was knocked down and injured by an engine. Originally, gates were erected and a gate-keeper kept at the crossing, but for some years the defendants had ceased to employ a gate-keeper; there had been several accidents before, and attention called to the danger of the crossing. Three years before, the defendants obtained an act authorizing them to make a new road, and to discontinue so much of the old road as crossed their railway; five years were allowed for the exercise of the powers, but nothing was done until after the accident. *Held*, that there was no evidence of negligence on the part of the defendants, and that there was no obligation upon them to employ a gate-keeper or to divert the road.—*Cliff* v. *Midland Railway Co.*, L. R. 5 Q. B. 258.

See Proximate Cause; Towage.

Non-Access.—*See* Evidence, 4.

Non-User.—*See* Highway.

Notice.

1. By a settlement of a Baptist chapel it was provided that, when the church should have to consider the appointment or dismissa of a minister, a notice should be given of the meeting, publicly in the chapel on Sunday

morning, at least four days before the time of holding such meeting, and should expressly state the object thereof; and each decision made at such meeting should be reconsidered at a second meeting, to be convened by notice given in like manner, expressly stating the object thereof; and such decision should not be binding until confirmed at a second meeting. A meeting was called, by notice, "for the purpose of bringing charges against and considering the dismissal of" the defendant, and a resolution was there passed "that he is not a fit and proper person to occupy the position of pastor, and that his office as pastor cease forthwith." Notice of a second meeting was given "for the purpose of confirming and ratifying the resolutions passed at the church-meeting" aforesaid. At this meeting it was resolved that the minutes of the preceding meeting "be passed, confirmed and ratified." *Held*, that the second notice was invalid because it gave no intimation of the resolutions which had been passed and were to be reconsidered.—*Dean* v. *Bennett*, L. R. 9 Eq. 625.

2 In a mortgage deed it was provided that if the mortgagor should make default, "then immediately or at any time after such default," he should hold the mortgaged premises as yearly tenant to the mortgagees at a certain rent, and that they should have the same remedies for recovering the said rent as if reserved upon a common lease. Default having been made, the mortgagees gave no notice of their intention to treat the mortgagor as a tenant, but at the end of a year distrained for the rent. *Held*, that notice to the mortgagor was necessary before the mortgagees could treat him as a tenant.—*Clowes* v. *Hughes*, L. R. 5 Ex. 160.

See Bills and Notes; Injunction; Insurance, 4.

Novation.

A. effected a policy with the X. Co. in 1852 for one year, premium down, and then if he should pay the same premium every year until his death, the company was to remain bound. He paid yearly until, in 1857, the X. Co. made over its business to the Z. Co., notified A. that the Z. Co. would be responsible on the policy instead of the X. Co., and requested him to pay future premiums to the Z. Co., and to have his policy indorsed by it. A. paid as requested, and accepted a bonus from the Z. Co., but did not have his policy indorsed. *Held*, that A had accepted the Z. Co. as his debtor in place of the X. Co.—*In re Times Life Assurance and Guarantee Co.*, L. R. 5 Ch. 381.

Obstruction.—*See* Ancient Light; Criminal Law.

Perpetuity.—*See* Remoteness.

Power.—*See* Appointment; Election.

Practice.

At a trial, the issue was whether the defendant executed a policy of insurance. Notice to produce having been given to the defendant, the plaintiffs proposed to prove its execution by tendering an unstamped document purporting to be a copy which they had received from the defendant's broker. The defendant contended that, before admitting the copy to be read, the judge should hear evidence and decide whether an original stamped policy was executed. *Held*, that as the objection was not a mere stamp objection, but went to the foundation of the cause of action, it was a question for the jury, and not for the judge—*Stowe* v. *Querner*, L. R. 5 Ex. 155.

Principal and Agent.

1. F. and four others, being joint owners of an estate, offered it for sale by an advertisement, intimating that applications "to treat and view" were to be made to F. (among others). *Held*, that this gave F. no authority to enter into a contract for the sale of the estate.—*Godwin* v. *Brind*, L. R. 5 C. P. 299 *n.* (1).

2. Action by a broker for non-acceptance of cotton. The bought note given by the plaintiff to the defendant stated, "I have this day sold you on account of T., &c. E. F., broker." *Held*, that a broker cannot maintain an action in his own name on a contract made by him as broker.—*Fairlie* v. *Fenton*, L. R. 5 Ex. 169.

3. The defendants signed a contract in the following form: "Sold A. J. Paice, Esq., of London, about 200 quarters wheat (as agents for John Schmidt & Co., of Danzig), &c. (Signed) Walker & Strange." *Held*, that the defendants did not show in the body of the contract an intention not to bind themselves as principals; and that by signing it without words importing agency they rendered themselves liable.—*Paice* v. *Walker*, L. R. 5 Ex. 173.

4. M. gave to a company the name of L. as an applicant for shares, and a number were allotted to L. and his name placed on the register. Afterwards, at the request of M., L. sent him a letter of application for shares. M. paid the allotment money, and received the divident on the shares. *Held*, that I.

had constituted M. his agent, and that his name was properly placed on the list of contributories.—*In re International Contract Co.; Levita's Case*, L. R. 5 Ch. 489.

See Evidence, 3; Warranty.

Privileged Communications. — *See* Equity Pleading and Practice, 2.

Probable Cause.—*See* Reasonable and Probable Cause.

Production of Documents.—*See* Discovery; Equity Pleading and Practice, 2.

Proximate Cause.

The defendants' vessel, by the negligence of the captain and crew, ran aground, and, as there was a high wind blowing at the time, was driven against the plaintiff's sea-wall and damaged it. *Held*, that the negligence of the defendants' servants was the proximate cause of the damage, and that the defendants were liable.—*Bailiffs of Romney Marsh* v. *Trinity House*, L. R. 5 Ex. 204.

Racing Debt.

Certain betting creditors of the Marquis of H. threatened to post him at Tattersall's as a defaulter unless he paid the bets which he had lost on horse-races; the consequences of their doing so would have cost him a large sum of money. To prevent this he gave a bond for £10,000, which they accepted. *Held*, that the bond was valid, and could be proved against his estate.—*Bubb* v. *Yelverton*, L. R. 9 Eq. 471.

Railway.—*See* Criminal Law; Negligence, 2; Receiver.

Rape.—*See* Indictment.

Reasonable and Probable Cause.

False imprisonment. The defendant's rifle was stolen, and his servant said to the plaintiff in the presence of R. that there was a row about it, and that R. had seen it in the plaintiff's barn. The plaintiff denied this, and took them to his barn and showed them a gun, which he said was the one seen by R. R. said it was not the gun he had seen before. This was repeated by the servant to the defendant, who gave the plaintiff into custody; he was tried and acquitted. The defendant did not see R. before causing the plaintiff to be arrested. The judge directed the jury that the defendant had acted on hearsay evidence, and therefore without probable cause. *Held*, that the information obtained by the defendant from his servant did constitute reasonable and probable cause; also that what is reasonable and probable cause is a question to be determined by the judge.—*Lister* v. *Perryman*, L. R. 4 H. L. 521.

Receiver.

A railway company agreed to purchase some land, and took possession. The vendor obtained a decree ordering specific performance, and declaring him entitled to a lien for the purchase-money. The company became insolvent, and the vendor obtained an order that the land should be sold, and that until such sale or the payment of the purchase-money the company should be enjoined against running any engine over, or otherwise using or continuing in possession of the land. *Held*, that the injunction was improper, as it rendered the land useless; and that a receiver should be appointed with a direction to the company to give him immediate possession; *held, also*, that the land, when sold, would be free from all claims of the public to a right of way.—*Munns* v. *Isle of Wight Railway Co.*, L. R. 5 Ch. 414.

Remainder.—*See* Residuary Clause, 1.

Remoteness.

Trustees were directed to pay and divide certain property, after the death of the testator's wife, equally between all his children then living and such issue then living of his children then deceased as should attain the age of twenty-three years *Held*, that this bequest was void for remoteness —*Smith* v. *Smith*, L. R. 5 Ch. 342.

Representation.—*See* Appropriation.

Residuary Clause.

1. A testator, by will dated 1832, gave and devised all his freehold estates to his five daughters as tenants in common, for their respective lives, remainder to trustees and their heirs during the lives of his daughters *respectively*, upon trust to reserve contingent remainders; and after the decease of either of his said daughters, then as to the one-fifth share of the daughter so dying, to the use of all the children of such daughter, who had attained or should attain the age of twenty-one, in equal shares, and to their heirs and assigns but if there should be no such child who should attain said age, then to the use of his other daughters in equal shares for their respective lives, with remainder to their children in fee. After certain other bequests, as to all the rest, residue, and remainder of his estate and effects, he gave and bequeathed the same to the same trustees, their heirs, executors, administrators, and assigns, upon trust to lay out and invest the same with power to alter the investments, and to hold said residuary estate upon the same trusts as had been declared with respect to his real estate. The

testator died in 1834. One of his daughters died in 1851, leaving only one son, W., who attained the age of twenty-one in 1860. In a suit upon the same will, *Holmes* v. *Prescott*, 12 W. R 636, it was *held*, that the devise of the freeholds to the children of the daughters was a contingent remainder, which in the case of W. failed owing to the failure of the particular estate; and that the bequest of personal estate upon the same trusts did not fail, and that W. took one-fifth of the residuary personal estate. *Held*, that the second limitation of the same share in the freehold estate to the other four daughters was also a contingent remainder; and that it was devised by the residuary clause to the trustees.—*Perceval* v. *Perceval*, L. R. 9 Eq. 386.

2. A testatrix devised and bequeathed all the residue of her property to her four children, to be equally divided between them She was mortgagee in fee of an estate which was sold after her death under a power of sale in the mortgage, but the purchaser refused to complete the purchase unless the residuary devisees joined in the conveyance. *Held*, that the intention of the testatrix was to give by will the property of which she was beneficial owner, and the legal estate in the mortgaged property passed to her heir-at-law.—*Martin* v. *Laverton*, L. R. 9 Eq. 563.

Reverter.

By virtue of an Act of Wm. III. certain land belonging to the corporation of Liverpool was taken by the parish for a church-yard, and by the sentence of consecration the corporation renounced all right and title to the church-yard, which was used as a burial-ground until it was closed by an Order in Council in 1854. In 1866, the corporation, being authorized to take part of this land for widening the street, gave the usual notice to treat to the incumbent, ordinary, and patron, and the incumbent made a claim to compensation. The question was referred, and a sum awarded as compensation, but the corporation refused to pay, claiming that the land reverted to them when it was closed against burials. *Held*, that the Act of Wm. III., followed by the act of consecration, forever excluded the corporation from any right in the land. *Held, also*, that the notice to treat was not an admission that the property must be paid for, but left that question open.—*Campbell* v. *Mayor and Corporation of Liverpool*, L. R. 9 Eq. 579.

Revivor.

A bill was brought by two persons, one claiming to be tenant for life of an estate, and the other to be tenant in fee of one-third, subject to the life-estate of the first, praying for an injunction against a defendant who claimed by an adverse title. The tenant for life, one of the plaintiffs, having died, it was *held*, that the other plaintiff was entitled to go on with the suit without a bill of revivor.—*Wilson* v. *Wilson*, L. R. 9 Eq 452.

Revocation.—*See* Election.

Sale.—*See* Insurance, 1; Principal and Agent, 2, 3.

Separate Property.—*See* Husband and Wife, 1; Wife's Separate Estate.

Settlement.

1 In making a settlement of wife's property, courts of equity will not interfere with the husband's legal rights more than is necessary to make provision for the wife and her children by the present or any future marriage, and after that the fund ought to go back to the husband, whether he survives her or not.—*Croxton* v. *May*, L. R. 9 Eq. 404.

2. Three sisters were joint tenants in fee of a reversion. In their respective marriage settlements it was recited: that upon treaty for the marriage it was agreed that the property, as well real as personal, to which the intended wife "is entitled and may be entitled," should be settled in a certain manner, and that it was further agreed that the intended husband should enter into a covenant for settling it for the purposes aforesaid; and the indenture witnessed that the intended husband covenanted with the trustees that all the estate of which the intended wife "is now seised and possessed, or of which she shall hereafter become seised and possessed," should be settled. No other settlements were made, and the sisters and their husbands all died before they became entitled to possession. *Held*, that it was the intention that the property should be settled, and that the joint tenancy was thereby severed.—*Caldwell* v. *Fellowes*, L. R. 9 Eq. 410.

See Charge; Class; Confirmation, 1; Construction, 9; Investment.

Ship.

Beans were shipped by the plaintiffs on the defendants' vessel, to be carried under a bill of lading from Alexandria to Glasgow. At Liverpool the vessel was damaged by a collision, and the beans were saturated with salt water. The vessel was ready to proceed on her voyage in a few days, but nothing was done to dry the beans or prevent further damage to them. The plaintiffs protested against

their being carried on in such condition, and offered to receive them at Liverpool, paying freight *pro rata*, but the defendants refused to deliver them without payment of full freight; they therefore carried them to Glasgow, where they were sold at great loss. *Held*, that the defendants had no right to insist on carrying on the beans in such a condition that they would deteriorate on the voyage, in order that they might earn freight, and their doing so rendered them liable for the damage.—*Notara* v. *Henderson*, L. R. 5 Q. B. 346.

See Collision; Foreign Judgment; Towage.

Specific Performance.

1. An agreement was made between a husband and the father of the wife, and executed by them and the wife, that the husbond and wife should live apart, and that the husband would execute a deed of separation, to contain all usual and proper clauses, and to secure £40 a-year for the maintenance of the wife and child. Specific performance decreed. —*Gibbs* v. *Harding*, L. R. 5 Ch. 336; s. c. L. R. 8 Eq. 400; 4 Am. Law. Rev. 471.

2. The plaintiffs leased to the respondents a coal mine for £720 and a royalty upon the coal gotten; the respondents covenanted to work the mine uninterruptedly, efficiently, and regularly (except in the event of strikes of workmen or other casualties), according to the usual or most approved practice. The respondents raised only a small quantity of coal. *Held*, that the lessees were not obliged to work the mine at all, but if they did work it they must do so efficiently; also, if their covenant did require them to work it on a larger scale the plaintiffs would have no remedy in equity.—*Wheatley* v. *Westminster Brymbo Coal Co.*, L. R. 9 Eq. 538.

Statute.—*See* Charge; Construction, 2.

Statute of Frauds.—*See* Damages.

Sunday.—*See* Construction, 2.

Telegraph.—*See* Damages.

Title.

The plaintiff owned two adjoining houses in London, and sold one to the defendants by a conveyance which correctly marked out the ground site of the house conveyed. One of the rooms on the first floor of the plaintiff's house projected into the defendant's house. *Held*, that the plaintiff owned only the space filled by the projection; the column of air over it belonged to the defendants.—*Corbett* v. *Hill*, L. R. 9 Eq. 671.

Towage.

A tug towing a barque up the Thames, ported her helm in order to cross the bows of a brig which was on the port tack beating up the river; the tug passed ahead of the brig, but the stern of the barque struck the brig amidships. A licensed pilot was in charge of the barque, but gave no orders before or after the tug ported her helm; if he had given the proper order, the collision would have been avoided. *Held*, that the neglect of the pilot contributed to the accident, and that the tug was not liable to the owners of the barque for the damages occasioned by the collision.—*The Energy*, L. R. 3 Ad. & Ecc. 48.

Trust.

A testator left all his property to trustees, and directed them to lay out and invest £15,000 in government, real, or personal security, or in such stocks, funds, or shares, as they might in their absolute discretion think fit, and to pay the income to his wife for life, and after her death to divide the capital among his children. By an arrangement between the widow and trustees, £15,000 was set apart for her benefit for life, part of which was invested in railway stock bearing seven and four and a-half per cent. interest. At the death of the widow the stock was greatly depreciated in value. *Held*, that the trustees should have invested in permanent securities, and it was evident from the rate of interest that these investments were not permanent; therefore the appropriation was invalid, and there must be an appropriation of £15,000 for the children.—*Stewart* v. *Sanderson*, L. R 10 Eq. 26.

See Insurance, 1.

Ultra Vires.

A memorandum of association mentioned among the objects of a company, "the making of purchases, investments, sales, or any other dealings," in shares of all joint-stock companies, and any other property; and power was given to the directors to accept the surrender and forfeiture of any shares from any member on such terms as they might think fit; and to let, mortgage, sell, or otherwise dispose of any property of the company, and accept payment in shares, or partly in shares and partly in cash, or in any other manner. The directors, in order to keep up the price of the shares of the company, purchased shares in the market. *Held*, reversing the decision of the Master of the Rolls, that the company had no power to purchase its own shares, and that such purchase was *ultra vires* —*In re London, Hamburg, and Continental Exchange Bank; Zuluetu's Claim*, L. R. 5 Ch. 444.

Vendor and Purchase of Real Estate.—*See* Damages; Principal and Agent, 1; Receiver.

Voluntary Conveyance.—*See* Charge.

Wager.—*See* Racing Debt.

Waiver.—*See* Confirmation.

Warranty.

Two directors of a mining company notified the company's bank by a letter that they had authorized C. to draw cheques on account of the company. The company's account was then overdrawn, and the bank, on the faith of the letter, honored the cheques so drawn by C. In fact C. had no such authority, but no fraud was charged. *Held*, in an action by the bank against the two directors, that there was an implied warranty on the part of the directors that C. had authority to draw cheques upon which an action of assumpsit would lie. —*Cherry* v. *The Colonial Bank of Australasia*, L. R. 3 P. C. 24.

Waste.

Certain real estate was devised to Richard B. for life, remainder to his first and other sons successively in tail-male, remainders to William B., Thomas B, and J. L. W., successively for life, and their first and other sons in tail-male, remainder to the heirs of the testator. Richard B. entered and took the profits during his life, and died without issue. By his will, he devised his real estate, which included the reversion in fee, to William B., whom he appointed executor. William B. took the profits during his life, and died without issue, appointing the defendant executor. The bill was brought by Thomas B., and alleged waste by Richard B. and William B, the first two tenants for life, and prayed for an account and payment. It was found by the court that during their lives there had been inconsiderable cuttings of wood not timber on the estate. *Held*, that a remainder-man, who is not entitled to an immediate estate of inheritance in remainder, can maintain a bill for waste where there is fraudulent collusion between the tenant for life and the owner of the inheritance; but where the tenant for life and remainder-man are the same person, the acts must be such as would amount to fraud and collusion had there been two persons.—*Birch-Wolfe* v. *Birch*, L. R. 9 Eq. 683.

Way.—*See* Commitment; Highway; Receiver.

Wife's Separate Estate.

Real estate was conveyed to the use of a married woman for her own separate use and benefit exclusive of her husband, and she by a written agreement demised it to the defendant. *Held*, that in equity the defendant was entitled to protection against any interference of the husband.—*Allen* v. *Walker*, L. R. 5 Ex. 187.

See Husband and Wife, 1.

Will.

1. A testatrix gave property "in trust for such of M. P.'s own family or next of kin, and in such parts as M. P. should appoint." M. P. appointed a share to her grand-niece. *Held*, that the word "family" was not confined to the statutory next of kin, and would include a grand-niece.—*Snow* v. *Teed*, L. R. 9 Eq. 622.

2. A testator devised lands to trustees to the use of Robert Gillett, the fourth son of George Henry Gillett, and his heirs, in case he should attain the age of twenty-one years; but if he should die under that age, then to the use of the fifth son and his heirs, in case he should attain the age of twenty-one; if he should die under that age, then to the first son after the fifth who should attain twenty-one. George Henry Gillett had seven sons; Robert Henry Gillett was the third, and John William Gillett the fourth, and both attained twenty-one. *Held*, that Robert was the one intended to take, although erroneously described as the fourth son; and if he had died under twenty-one the estate would have gone to the son next in order of birth.—*Gillett* v. *Gane*, L. R. 10 Eq. 29.

3. Bequest by testator upon trust for his daughter for life, and after her death, if she shall leave issue, unto such, her issue, share and share alike, if more than one, when and so often as they shall severally attain twenty-one, and to apply the dividends meanwhile for their maintenance. His daughter had four children, and all attained twenty-one; three died before her, and one survived. *Held*, that the gift to the issue was intended for such only as survived the daughter, and that the one survivor took the whole.—*In re Watson's Trusts*, L. R. 10 Eq. 36.

4. Testator gave all his property, real and personal, to his wife, so long as she should continue his widow, and upon the decease or second marriage of his wife he gave his real and leasehold estates, and his personal estate and effects then remaining unconsumed, to his children and their heirs, with the proviso that, if all his children should die "before attaining a vested interest" under the will, then the property should go in equal shares to the next of kin of the testator and next of kin of his wife. The testator left one son, who died a bachelor. The wife afterwards married and

died. *Held*, that the words "vested interest" were not used by the testator in their technical sense, and that his son did not take a vested interest under the will.—*Greenhalgh* v. *Bates*, L. R. 2 P. & D. 47.

5. H. executed a will disposing of his property in Tasmania; he subsequently executed another will disposing of his property in England, and confirming his former will. *Held*, that the two constituted but one will, and should be proved together.—*Goods of Harris*, L. R. 2 P. & D. 83.

6. Testator executed a will in India which was deposited in a bank there. Afterwards he executed a codicil in England, in which was this clause: "Of which will I, along with this codicil thereto, execute a copy, and homologate and confirm the same in all particulars, except in so far as altered or revoked by this codicil." At the execution of the codicil he showed the witnesses a copy of the will. *Held*, that the copy of the will shown was incorporated in the codicil.—*Goods of Mercer*, L. R. 2 P. & D. 91.

7. A Scotchman, domiciled in England, and having estates in England and Scotland, made, according to the law of Scotland, a "trust disposition and settlement" of his Scotch estate, which was revocable. In his will he recited and confirmed the settlement, and gave the residue of his real and personal estate to trustees to sell, and out of the proceeds to pay and discharge all his just debts and legacies. Afterwards he borrowed of trustees £14,000, in which he had a life-interest, and gave them as security a heritable bond charging the debt on the Scotch estate. By the law of Scotland, the Scotch estate thus charged was primarily liable to discharge the debt. *Held*, that the provision in the will to pay all debts, included the debt charged on the Scotch estate, and that the residuary estate must discharge it.—*Maxwell* v. *Maxwell*, L. R. 4 H. L. 506.

See Ambiguity; Codicil; Construction, 3-8; Cy Pres; Devise; Election; Evidence, 1; Remoteness; Residuary Clause, 1, 2.

Words.

"*Buildings.*"—*See* Covenant, 1. "*Cargo.*"—*See* Contract, 1. "*Family.*"—*See* Will, 1. "*Obstruction.*"—*See* Criminal Law. "*Obtain.*"—*See* False Pretences. "*Seller by retail of wine.*"—*See* Covenant, 2. "*Treat and view.*"—*See* Principal and Agent, 1. "*Vested Interest.*"—*See* Will, 4. "*Warrant, Authority, or Request*"—*See* Forgery. "*Younger sons.*"—*See* Class.

REVIEWS.

Harrison's Common Law Procedure Act. Second Edition. Copp, Clark & Co., 1870.

Six parts of this invaluable work have been issued. The next part, which will contain the Index, Table of Cases cited, &c., will complete the labours of the author.

The first edition had become of little use for ready reference, owing to the changes affected by subsequent legislation, nor of course does it contain the recent cases; and though without that which the first edition had taught us to look upon as a necessity for so long a time, the practising lawyer had not succeeded, as is sometimes the case under such circumstances, in doing without it, and every day he looked forward for the new edition (as we now do for the Consolidated Digest which Mr. Robinson is preparing). It will be like re-establishing an old land-mark to have the new volume bound and complete on our shelves.

From what we have seen of it so far, it is evident the author has spared no pains to make it as reliable as the first edition, and it will be more complete and full, not only as to the number of acts annotated, but as to the cases referred to. We shall speak of it again when the last part has been issued.

The education of the Roman youth was, under the republic, deemed incomplete until he committed to heart, and thoroughly understood, the twelve tables constituting the fundamental law of his country. The individuals who control our public school system deem a knowledge of the law of the land of so little use that its principles are not, even in a remote manner, brought to the notice of the school children of to-day. Reading and writing imperfectly acquired, with a dim and hazy comprehension of arithmetic and geography, make up the fundamental culture gained in the common schools, and the scheme of education is rendered complete by an accurate understanding of that least practical of all abstract sciences, English grammar. That our public school system has many excellent features cannot be denied, but its main object seems to have been lost sight of. That object is not to produce great linguists or men cultivated in literature or profound in science, but to so train the citizen that he may better perform the duties appertaining to his citizenship. Without neglecting those fundamental acquirements which are necessary conditions of all knowledge, the educational scheme of a common school should make provision for a study of the laws of the society within which it has its existance, and not, while pretending to impart to its pupils all necessary knowledge, keep them wholly ignorant of their duties and their rights as members of that society.—*Albany Law Journal.*