DIARY FOR MARCH.

1. Tues. *St. David. Shrove Tuesday.* Sub-Treasurer of school moneys to report to County Auditors.
2. Wed. *Ash Wednesday.*
6. SUN. *1st Sunday in Lent.*
8. Tues. General Sessions and County Court Sittings County York
13. SUN. *2nd Sunday in Lent.*
17. Thur. *St. Patrick's Day.*
20. SUN. *3rd Sunday in Lent.*
25. Fri.. *Lady Day.*
27. SUN. *4th Sunday in Lent.*

THE

Canada Law Journal.

CRIMINAL LAW CONSOLIDATION.

A good work was done last Session by the Minister of Justice in placing on the Statute Book of the Dominion a series of Acts assimilating and consolidating with valuable amendments the whole body of the Criminal Law. Something was accomplished the previous Session, and something yet remains to be done in respect to minor outlying enactments to make a perfect whole, but we can even now boast of a more complete consolidation than they have in England, and we refer to cap. 29 of 32 & 33 Vic., "An Act respecting procedure in Criminal cases and other matters relating to Criminal Law," in proof of the assertion. All the leading acts are founded on the Consolidated Criminal Statutes passed in England as models, with such alterations and modifications as were required to suit these enactments to the condition of Canada, and such as were necessary to suit the tribunals and mode of procedure in courts of the several Provinces.

These measures were all prepared after the most careful consideration by the Minister of Justice and upon conference with leading jurists and public men from the several Provinces, and were put into shape under the direction of the Minister of Justice by that very able lawyer and most experienced legal draftsman Mr. Wicksteed, the Law Clerk of the House of Commons, assisted by the Deputy Minister of Justice. Other able and experienced men, on the Bench and at the Bar, are understood to have given their advice and assistance. Indeed nothing was left undone by the Minister of Justice to secure to the Dominion a valuable and complete code of Criminal Law.

The bills were introduced in the Session of 1868 and passed the House of Commons, but owing to influences that ought not to have prevailed with any man in a matter of science, the bills were for the most part thrown over till last Session. Although great disappointment was felt at the time, the postponement had this good effect, that the bills were all again gone over by the Minister of Justice with the most searching care to discover any error and test their correctness and completeness in every particular. The bills thus prepared, matured and perfected, finally became law and came into force on the 1st day of January last.

As already observed, the standard for most of them is the English Criminal Law Consolidation, and the value and importance of this is obvious to every professional man, and indeed must be so to any intelligent person who takes the trouble to consider the subject. Such a course opens to us at once the whole of the English cases decided on these Statutes, and the learned light they cast upon the enactments will be of the greatest possible value in assisting the numerous tribunals throughout the Dominion in determining any question that may arise upon our own enactments.

We are led to make these remarks by seeing the notices given by members for amendments to the Criminal Law—laws just come into force, and we cannot but think that any attempt to alter a code only just completed, and before even a single assize has past or sittings of the Court of Sessions taken place, untimely and uncalled for. If any positive error has been discovered let it be pointed out to the Minister of Justice, and let him, as the responsible Minister, amend it. But for independent members who have not had the whole system in view to be allowed to cut and hack at a bit here and a bit there because they may deem, or their constituents may deem some alteration expedient or necessary, is not defensible on any ground, and we trust it will not be allowed. If for no other reason the move is premature, and if the door be once opened to a "tinkering" legislature, the value of the consolidation will soon be lost. We trust that the House, in the public interest, will repress those adventurous members who endeavour to make up in courage what they lack in knowledge, training and experience.

INTERPLEADERS.

Nothing, probably, in the ordinary administration of justice strikes the observation of the uninitiated public as a grievance more than the expense too often attending the litigation of matters of minor importance, or of trifling value. There is a very natural and a very common idea that the costs of a suit should in some degree be proportioned to the amount in dispute, and this view is becoming more prevalent every day; and such is the tendency of legislation.

In one class of cases, however, no step has been taken in this country to reduce the costs in proportion to the sums litigated: we refer to interpleader suits or issues from the Superior or County Courts. These issues, being creatures of the Court, may from such fact have escaped the changes that have from time to time been made in the direction referred to; but it may well be urged that the time has come to follow the example of the legislation in England on this subject, or to take some other course which may secure the desired result, even in a more effectual manner.

It is provided by section 14 of the English Common Law Procedure Act of 1860, that,

"Upon the hearing of any rule or order calling upon persons to appear and state the nature and particulars of their claims, it shall be lawful for the Court or Judge, whenever, from the smallness of the amount in dispute, or of the value of the goods seized, it shall appear to them or him desirable and right so to do, at the request of either party, to dispose of the merits of the respective claims of such parties, and to determine the same in a summary manner, upon such terms as they or he shall think fit to impose, and to make such other rules or orders therein, as to costs and all other matters, as may be just."

In this country, and in England previous to the above enactment, the consent of both parties was necessary to give the Court or a Judge jurisdiction.

Section 15 of the same Act provides that,

"In all cases of interpleader proceedings, where the question is one of law, and the costs are not in dispute, the Judge shall be at liberty, at his discretion, to decide the question without directing an action or issue, and, if he shall think it desirable, to order that a special case be stated for the opinion of the Court."

As regards the first of the two sections above quoted, the inconvenience and difficulty of satisfactorily deciding questions of fact on affidavit may be urged as an objection; and there might perhaps be some force in this, were the difficulty one which could not be obviated. This, however, is not so; for nothing could be simpler than to provide that in all cases where the appraised or sworn value of the goods seized and claimed by any one claimant, does not exceed a certain amount —say $100—the issue to decide the right to the goods shall be tried in the Division Court most contiguous to the residence of the judgment debtor.

There would seem to be no objection to some such procedure as this, as an alternative in case the Judge before whom the interpleader application might come should think it a case in which the facts should be brought out by *viva voce* testimony, and not by affidavit only. The details necessary to carry out a procedure such as this could be easily arranged.

This proposition can scarcely even be said to have the claim of novelty, for there is an analogous provision with respect to disputes as to the liability of a garnishee on applications to attach debts. The wonder is, rather, that a change has not been made before this, such as we now suggest.

A very slight experience of a lawyer's office is sufficient to prove the propriety of some such alteration of the law as we propose. Many a claimant has been prevented from litigating his claim to goods seized under an execution against another person by the mere fact that whether successful or otherwise, the costs would be more than the value of the goods. Thus it is possible that an execution creditor who is proof against costs may recover a debt by simply causing the sheriff to seize the goods of a third party; for the action against the sheriff will, under ordinary circumstances, be barred, and the claimant will (if venturesome enough to go to law), vainly perhaps, seek damages against the execution creditor or his attorney.

There is a pleasant fiction known to the law, that there is no wrong without a remedy. The only difficulty lies in this, that the remedy is very often more injurious than the wrong. We might indulge in a long train of reflections suggested by these thoughts; but as we might perhaps at length arrive at the conclusion that going to law at all is a species of insanity, we had better, perhaps, in the interests of the profession, say no more.

STATISTICS.

We were, some time age, in common with other Editors of newspapers and periodicals in Ontario, requested to call the attention of our readers to the requirements of the Acts, 1868-'9, cap. 30, and 1869, cap. 22, respecting the registration of Births, Marriages and Deaths in Ontario. Probably, however, our delay herein has not been prejudicial to the cause so strongly advocated by the Registrar-General for Ontario in his circular, as the class of readers that we reach has sufficient intelligence to be fully alive to the importance of having a complete and accurate record of every birth, marriage and death occurring throughout the Province. In fact lawyers and public officials, more than others, necessarily see from actual experience of every-day business, the trouble and difficulty frequently arising from the want of authentic information on these subjects. In a variety of ways this information is required, and can only be obtained with much trouble and expense, and often without that certitude which alone makes it of value. Whilst urging the importance of a faithful compliance with the provisions of the statutes for the numerous purposes for which these statistics may be useful, it does not appear that the returns are to be looked upon as legal evidence, nor would it be proper that they should be at least without sufficient safeguards to prevent mistakes or frauds. At the same time, these returns will often be used for purposes where something less than legal evidence will suffice.

SELECTIONS.

ON PRIMOGENITURE.

The measure which Mr. Locke King has introduced into Parliament, having for its object the assimilation of the law of descent of freehold estate to that which governs the succession to personal property—in other words the abolition of the custom of primogeniture—may render some explanation of the question useful to our readers; and this, less by way of controversy on a subject which is one of admitted difficulty, than in order to aid in forming a correct opinion on a matter which comes near to the interests of a large section of the community.

1. It is then in the first place material to bear in mind that there is a very large class of interests in lands which, as not coming within the strict meaning of "real estate," is now, and from the most ancient period in our legal history has been, subject to the same law as that which regulates the title to personal property, and which is therefore free from the objections which, be they real or fancied, are considered to attach to the descent of freehold, or as the lawyers term them "fee simple," estates.* These are well known as leases for terms of years of any duration whatsoever, short or long, from one to 999 years. If the owner of this kind of property dies intestate it is divided amongst his next of kin in the proportions settled by the well-known Act called the Statute of Distributions,† as if it was so much money or goods, a system remarkable for its fairness. With respect therefore to this class of interests in land, no objection can be made as to the proportions in which it is divided amongst those who are entitled to succeed an intestate owner; in other words primogeniture, as a consequence of law, has no bearing on leasehold estate. The large districts, or parcels of land, in which so much money is invested are divided—or the value of them—amongst the widow and children or the near relatives of the intestate. He may of course by his act give the entire estate to his eldest or any other son, as he may give it to a more relative, or to one who is no relative at all. But this is not the act of the law, nor is properly chargeable as a defect in our legal system; it results simply as a consequence of ownership.

The rule—or custom as it may properly be termed—of primogeniture as an act of law distinct from the act of the party, which operates, generally speaking, on small estates held in fee simple, and then only in cases of intestacy, has it will be seen, but little if any bearing on the excessive accumulation of land in the possession of individuals, to which exception is taken as being an enjoyment of property so aggressive as to create an evil which the Legislature should interpose to remove, or at least to mitigate. Such undue accumulation arises from the acts of parties availing themselves to the fullest, and perhaps to even a vicious extent, of the power which they enjoy, and which as incident to ownership may or may not be exercised, of limiting estates so as to run, as it were, in a certain groove and be taken out of the track of commerce for a period, speaking generally, of twenty-one years beyond a life or any number of lives in being: and of tying

* The term "freehold" it may be observed, which is in such general use, was in its original meaning such an estate as a free man would deem worth the holding; and therefore in early times denoted an estate for life merely. The modern idea annexed to the terms "freehold" or "freeholder," signifies the whole extent of the fee: the entire interest that is, which a man can have in lands.

† This is the Act—or Acts rather, for there are two—22nd and 23rd Car. II. and 1 Jac. II. cap. 17. They were originally taken from the Civil Code, having their origin in the 118th Novel of Justinian; a source which Sir W. Blackstone (Com. ii. p. 516) is unwilling to admit, although Lord Holt and Sir J. Jekyll in former, and Chancellor Kent in modern times (Com. vol. i. p. 191) have declared that the Statute was, as they expressed it, "penned by a civilian," and to be governed and construed by the civil law.

up rents and profits for a lesser though still a considerable period. Such powers are, it is obvious, wholly unconnected with, and are indeed in their origin directly opposed to, what is known as the custom of primogeniture; a right which, supposes the owner of the estate *wholly to abstain* from the exercise of any disposing power over his property, and to leave it, by the negative act, as it were, of dying intestate, to the law to settle the course of descent; in other words, to the operation of the custom under which the estate goes to the eldest son to the exclusion of all other descendants.

Two things, therefore, are to be kept clearly distinct if we would form an accurate opinion on the merits of this controversy. One is the entire exemption of leasehold interests in land from the custom of primogeniture; and the other is, that the rule itself is an act of law, a consequence of intestacy, as opposed to an act of the party, the owner of the estate. That law, as it at present stands, will indeed give the estate to the eldest son to the exclusion of his brothers and sisters, provided the owner, before his death does no act to disturb its efect by such a procedure, as making his will, or executing a deed of gift; but the influence of this law is, for the reasons we have already stated, compartively restricted and exceptional. In fact, primogeniture, as a feature in our law of real property, is kept alive and perpetuated by the voluntary acts of individual owners. The evils which spring from the prevalence of this custom arise from the settlors and testators themselves, who, while still in the enjoyment of their property, and in the exercise of what are considered as the legitimate privileges of ownership, choose of their own will, and tax to the utmost the skill and ingenuity of lawyers to secure, that their land shall be so settled as to devolve in a fixed and certain channel to the furthest limits which Acts of Parliament and the decisions of courts will allow. And hence it may be inferred that the allowed partiality for limiting estates to the eldest son is more than a mere consequence of defects in our system of law, or an exceptional employment on the part of testators of the privileges which that law confers. It has a deeper root in the nature of the English people and their attachment to the soil; the desire to become holders of land, and to found a family which shall inherit it. These motives are so powerful that, as is well-known, every Act of Parliament which has been passed to encourage the alienation of land and to place it *intra commercium* earlier than would otherwise be the case, has been eluded and sometimes wholly set aside by the ingenuity of lawyers, who, instructed by testators—not unfrequently persons of obscure origin who have acquired wealth in trade—frame conveyances which have the effect of settling property to the utmost limits which an artificial and strained construction of the existing law will allow, and quite opposed to, nay, almost in fraud of, the intention of the Legislature.

II. It will be seen therefore that the measure proposed by Mr. Locke King will be very restricted in its operation, and can have comparatively but slight effect in checking the excessive accumulation of land in the hands of individual owners; which is supposed popularly to be the chief evil attached to the custom of primogeniture. In what way then it will be asked can we best deal with that tendency which leads men to acquire and entail land, and which in these days so much occupies the attention of economists and statesmen? For unless the difficulty is now fairly examined, and if possible solved, without violent or undue interference with proprietary rights, a solution of this problem, attempted at a future time and under less favourable conditions, may be attended with grave results. The remedy will probably be best found in the imposition of additional restraints on that power of testamentary alienation of real estate which seems in modern times to have reached an excessive growth. For in truth if we examine the matter, the conception of a will, especially as known to English law and English lawyers, and viewed as a method of transferring property, is one of the most artificial of all possible ideas. That a man should have during his life and while his faculties remain to him, the fullest control over what he possesses as long as such control is not at variance with public policy, seems just and right; although the Roman law, it is worthy of note, which is the most perfect model of philosophlical legislation, went further than the English system in placing limits on what at the present day would be considered as a reasonable exercise of the right of ownership and testamentary capacity. But that a testator should have the power, simply at his caprice, to impose restrictions on the enjoyment of property for years after he is in his grave, and in favor of persons of whose very existence he is ignorant, and of whom it is doubtful whether they will ever come into being at all, seems *ultra vires* in the highest sense of the words. It is here, far more than in other branches of the law, that the highly technical character of the English law of real property is seen. For while bequests of personal estate, that is to say, money, chattels, leasehold interests, &c., are dealt with in the larger and more equitable spirit of the civil law, with reference to which every will of personal property is expounded, and from which the law governing such instruments has been derived, devises of real estate, that is freehold interest in the land itself, rest on principles having their origin in the feudal law, in the light of which they are still interpreted. The differences between these two classes of instruments may simply be stated thus: a will of personality is regarded as the expression of the last wishes of a testator as to what he desires should be done with his personal estate; and accordingly in this class of instruments certain fixed limits, arising partly from the nature of the property itself

and partly from the source from which the law that regulates it is taken, have from the earliest times in our legal history been imposed, which the testator is not allowed to transgress. But wills of *real estate* are not in contemplation of law regarded as testaments at all in this sense, but are viewed and conveyances, documents of title—the fact of death being as it were eliminated—operating to transfer particular lands to a particular devisee, subject to all the limitations and conditions by which the caprice or vanity of the settlor or testator may choose to fetter the enjoyment of the lands granted or devised.

III. The amendment needed, therefore, is in the law of testate rather than of intestate succession; and the reform should be made to include those cases where property is limited by instruments other than wills, such as, for instance, marriage settlements. Further, the law which regulates the limit during which the *corpus* of an estate can be tied up should be assimilated to the period during which the accumulation of rents and profits is permitted. But the chief step should be in the direction of restraint on the excessive power of alienation now enjoyed, by preventing as well the estate itself as the rents and profits issuing thereout from being settled or devised so as to accumulate for any period longer than the survivor of three lives in being at the same time. This period is analogous to that allowed by the Roman jurists;* it is already familiar to lawyers as a not unreasonable restriction upon dispositive powers; it would, it is believed, not be unfair towards the tenants either for life or in remainder under existing limitations, while it would have the effect of enabling the owner to make the land an article of commerce one generation earlier than is now the case.

Another point—which can here be noticed only in outline—deserves attention as bearing upon this difficult and interesting subject. In cases of intestate succession the descent of real estate to distant heirs and the devolution of personalty to distant kindred, commonly involves, as has been remarked by a learned writer, an amount of litigation, the abolition of which would be desirable. In these cases, while the claims of those who set up a title to the estate are remote, questions are raised of great intricacy, which in many cases lead to property being wasted in protracted and expensive contention. It is open to argument how far—that is to say, extending to what degree of kinship—such claims should be recognised as conferring a title to property at all; especially where, as sometimes happens, the estate or interest devolves unexpectedly upon persons who, from ignorance or other causes, are incapacitated from making a proper use of the wealth which they never at any time had reasonable grounds for regarding as their own. In such cases as these it would seem just that the claims of the public, of the country that is, in which a man has lived, and which has extended to him and his property the protection of its laws, should be held paramount to those of one who, as in the case of real estate, may found his title on his descent from the *most remote* male paternal ancestor of the intestate, or who claims a share in the personalty because he chances to be a survivor of many, standing, probably, in the fifth or sixth degree of kindred to the deceased owner.*

The proposal to apply in these cases the property to State purposes in diminution of public burdens, has the support, amongst others, of Mr. Hill;† and besides the equity of the proceeding itself, it is to be kept in mind that its adoption would inflict no injury on those from whom is merely withheld that which they never looked to enjoy. And as against persons who stand in such a remote degree of relationship to the ancestor, there is also the presumption, arising from his testamentary silence, that if he was not in favour of, he was at least, not opposed to, the appropriation of his property by the State; a body which may not unreasonably be considered as having as strong demands on such undisposed of interests as remote relatives for whom he cannot be shown to have any partiality, and of whose very existence perhaps he was not even aware.—*Law Magazine.*

* See Justinian's Institutes, Bk. ii., tit. 16. Maine's Ancient Law, p. 227.

SECURITY FOR COSTS.

The principles upon which the law as to security for costs is founded have not as yet been carried to their legitimate consequences. The existing legislation on the subject is based on the principle that it is productive of individual hardship and public inconvenience that a man should be brought into court to answer a complaint without reasonable security that he will be repaid his expenses in the event of the complaint turning out to be unfounded. If some such principle of natural justice, or public policy (whichever it be called), were not recognized, it would be impossible to justify the law which requires security to be given by a plaintiff residing out of the jurisdiction. On the other hand, if this principle be well founded, why is its application confined within such narrow limits, and not applied to all cases in which the defendant is without security for the payment of his costs, if successful? This is a question which has often been asked, and to which no satisfactory answer has as yet been given. On the one hand, it would be monstrous to shut the doors of the courts to all but the rich. A man's disabillity to give "security for costs" may be owing to the very wrong for which he seeks redress. It would

* See Mr. Joshua Williams' work on Personal Property, p. 195, where this view is advocated.

† Political Economy, Vol. I. p. 272.

be iniquitous to place it in the power of a wrongdoer to leave his victim without legal redress by the simple expedient of completing his ruin. This would be a violation of the fundamental principle of Magna Charta, "*Nulli negabimus justitiam aut rectum.*" Nay, it would deny justice precisely where it is most needed; for a debt or injury of which the rich man thinks little, may be a matter of life and death to the poor. To enact that in no case should a pauper plaintiff be permitted to proceed with an action at law or suit in equity, without giving security for costs, would therefore offend against a fundamental principle of natural justice far more sacred and inviolable than that upon which legislation has acted in affording to defendants their existing protection.

The practical question is, how these principles may best be reconciled: the poor man enabled to enforce his just rights, and the public protected against groundless litigation, undertaken by those to whom their liability to costs, if unsuccessful, has no terrors. *Cantabit vacuus*—as well before the sheriff's officer as before the robber. There is a class of actions known as speculative which are by no means identical with those in which the plaintiff is a pauper. An action, for example, by a pauper on the foot of a bill of exchange, or a suit in equity by a pauper for the construction of a will or deed under which he claims, could scarcely be called "speculative," unless by a very wide extension of the term. Can no means be devised of distinguishing between the two classes of cases in which the plaintiff is not a mark for costs, allowing him to proceed in any proceeding which is legitimately instituted to enforce a fair claim, or to obtain redress for a substantial injury, but requiring sufficient security where the action really belongs to the class known as "speculative?" It is perfectly impossible to notice this distinction by any hard and fast line, drawn by the Legislature. If it is to be made at all, it must be by virtue of a discretion vested in some tribunal. We are strongly in favor of the creation somewhere of a discretionary power to require security for costs from litigants—plaintiffs or defendants—in any proceeding where it is shown, first, that in the absence of such security, the opposite party, if successful would lose his costs; and secondly, that having regard to the nature of the action, the relation of the parties, and the circumstances of the case, it would be productive of hardship or injustice that proceedings should be carried on without such security. Probably this power might best be conferred upon the master of the court; but these and other questions of detail must be considered at a future time. We desire at present to call attention to what we cannot but consider a serious blot in our judicial system.—*Irish Law Times.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

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

Orok v. Garvin.

Certificate for full costs—Overflowing land—1s. Damages.

Under the Statute of Ontario, 31 Vic. ch. 24, sec. 1, a judge should certify for costs where he would have done so under the repealed section of the C. L. P. Act.

In an action for overflowing plaintiff's land, the defendant pleaded not guilty, and the jury found for plaintiff and 1s. damages.

Held, that under the circumstances of the case (there being important rights at stake, and it being such a case as would properly be removable from an inferior Court by *certiorari*), the plaintiff was entitled to a certificate for full costs under 31 Vic. ch. 24, sec. 1 (Ont).

[Chambers, December. 1869.]

This was an action for overflowing plaintiff's land by a dam maintained by defendant. The plea was not guilty. The jury found for plaintiff and one shilling damages. The plaintiff's counsel moved for the necessary certificates to entitle him to full costs, and to deprive defendant from setting off costs.

McCarthy, for plaintiffs, subsequently, on notice to the other side, renewed his application before the Chief Justice who tried the case. He contended that the action was really brought to try a right besides the right to recover damages, and that it was not a case of the kind proper to be tried in the County or Division Courts: that the act of defendant was such as might, if permitted, ripen into a right; and plaintiff was bound to bring an action to prevent this, and his action could only properly be brought in a proper court of record, so that, in the event of it being necessary to shew a recovery by the plaintiff in answer to a plea of enjoyment as of right for twenty years or more, he could prove the recovery by record made up with pleadings, postea, judgment, &c. If it were a case that was completely within the jurisdiction of the County Court, and the plaintiff could have known that at the outset, yet as the decision of the question raised in it might deprive the owner of the mill occupied by the defendant of a valuable right—viz., to raise the water to work the mill—plaintiff might well think that if he had brought the action in the County Court, the defendant would have applied to remove it by *certiorari*. Independently of this the law on the subject of riparian rights has recently been much discussed in England, and a question of great difficulty might arise in a suit of this kind.

Boys, for the defendant, contended that in this action it was simply decided that defendant had by his act injured the plaintiff to the extent of one shilling. The pleadings raised no question of right, and there was no more necessity for bringing this action in the superior courts than there would have been if defendant had cut a tree on the plaintiff's land, and the latter had brought an action to recover damages for the trespass, defendant setting up no right to commit the trespass, but merely denying the fact: *Emery* v. *Iredale*, 7 U. C. L. J. 181; *Thompson* v. *Crawford*, 9 U. C. L. J. 262; *Mitchell* v. *Barry*, 26 U. C. Q. B. 416; *Marriott* v. *Stanley*, 9 Dowl.

P. C. 59; *Shuttleworth* v. *Cocker*, *Ib.* 77; *Morrison* v. *Salmon*, *Ib.* 387.

Richards, C. J.—The words of the section of the Common Law Procedure Act were the same as those of the Imperial Statute 3 & 4 Vic. cap. 24, sec. 2. The first part of section 1 of the Statute of Ontario, 31 Vic. cap. 24, sec. 1, is to the same effect as the Imperial Statute referred to. "If the plaintiff in any action of trespass, or trespass on the case, recovers by the verdict of a jury less damages than eight dollars, such plaintiff shall not be entitled to recover, in respect of such verdict, any costs whatever, whether the verdict be given on an issue tried, or judgment has passed by default, unless the judge or presiding officer before whom such verdict is obtained, immediately afterwards, or at any future time to which he may postpone the consideration of the matter, certifies on the back of the record, in the form hereinafter provided, to entitle the plaintiff to full costs," &c. Under the Imperial Statute and the Common Law Procedure Act the proviso is to the effect, that the statute should not apply if the judge "certifies on the back of the record that the action was really brought to try a right besides the right to recover damages for the trespass or grievance complained of, or that the trespass or grievance in respect of which the action was brought, was wilful and malicious." In the Statute of Ontario this proviso is entirely omitted, and it is left quite in the discretion of the judge to certify, to entitle the plaintiff to full costs or not. The decisions under the repealed act may nevertheless be looked at, for I apprehend that under the existing statute the judge would certify when he would have done so under the repealed section of the Common Law Procedure Act.

In *Shuttleworth* v. *Cocker*, 9 Dowl. P. C. 82, Tindal, C. J., in referring to the English act said, "I take the object of this act to be to prevent plaintiffs from bringing actions of a vexatious and litigious nature, where only a small damage has been sustained, and where no right whatever is in issue between the parties; and if actions are brought in such instances, certificates cannot be granted, and the plaintiffs lose their costs." That was an action wherein the plaintiff, the owner of a house, complained of the defendant, who was the owner of a mill and workshop, that he used the engine, &c., on his premises, so that noise, smoke and injurious dust came from them and injured the plaintiff's house, and rendered it uninhabitable. The defendant in answer pleaded not guilty, that is, he denied that that which was stated on the face of the declaration had taken place. The learned Chief Justice then proceeds: "Looking at these circumstances the plaintiff declares that his house is rendered uninhabitable by reason of the defendant's acts, and on the other side the defendant, insisting on going on with the works which he has commenced, and which the plaintiff says form the ground and gravamen of his charge, who can say that a question of right does not arise between the parties. The plaintiff complains that his right to his house, free of the nuisance which is alleged on the record, is invaded, and the defendant says on the other side that this, which is alleged to be a nuisance, is in fact none at all. Therefore looking at the facts of the case it does not appear to be one in which the plaintiff is going on vexatiously, or for small damages only, but that it is a case in which the right came in question. On the evidence which was adduced the case took the same course. The defendant strove not so much to prove that the plaintiff had sustained very small damages only, and the cross-examination was very much directed to that point, as that the defendant had adopted modes of carrying on his manufactory with as little injury as possible, still maintaining his right, however, to carry on the same business. Therefore, in my opinion, it is an action really brought to try a right besides the mere right to recover damages; and one cannot but ask why, if it were not so, the defendant did not admit the right of action and proceed only on that part of the case which would be directed to the mitigation of damages."

Bosanquet, J., in his judgment, said: "In order to support the defendant's view, the action must not have been brought to try the right, and the defendant must have admitted he had no right to do the act; and if the real question was as to the damages only, there is no doubt that it would be a case in which the judge should not have certified. * * * The defendant insisted that he was not in the wrong, that he was right; and, in consequence, the plaintiff had no right to maintain the action."

In *Morrison et al.* v. *Salmon*, *Ib.* 392, the case above cited is approved of, and in reference to it, Bosanquet, J., said: "Nuisance may either be brought to recover damages for an injury to an acknowledged right, or to try a question whether the defendant has or has not a right to do that which he has done, which is very commonly the subject of question in an action of this sort." Maule, J., said: "Supposing the plaintiffs had proceeded in the Court of Chancery for an injunction * * * and the Court had said that there was some uncertainty as to their rights, and that they must establish it in a court of law. The plaintiffs must in that case bring their action in order to substantiate their right; and if the argument which has here been brought before the Court were to prevail, they would be deprived of their costs."

It appeared at the trial of this case that the persons under whom defendant held had taken a lease of the land overflowed from the plaintiff, which had expired, and plaintiff was willing to grant a lease to defendant for the term for which he had agreed to take the mill, at a small rent, and that defendant had declined to take this lease.

Under the facts of this case, and under the decisions referred to, I am of opinion, if this action had been one which was exclusively within the jurisdiction of the Superior Courts, I should have felt bound to certify under the first section of the act of Ontario to entitle the plaintiff to full costs.

The defendant did not content himself with admitting he had overflowed defendant's land, and contending that only small damages were committed, but, as stated by Chief Justice Tindal, in the case referred to, had stoutly con-

tended that his dam did not overflow plaintiff's land at all. He did not admit that he had not the right to keep his dam up to its then height, and pen back the water as it was then penned back, but contended that the right he exercised did not interfere with plaintiff's land. Surely this right was tried, and comes within the principle of the case referred to.

It is contended that this suit is of the proper competence of the Division or County Court. The action in form is not out of the jurisdiction of either of these Courts, and the amount given by the jury as damages does not put the case properly in a superior court. The plaintiff contends, and the jury have found, that the defendant has prevented the water of the stream passing through his land from flowing in its natural course, and has penned the same back on the land of the plaintiff. He contends, if this had been allowed to continue for twenty years, it would create a right, and therefore he was acting properly in bringing this action to prevent an easement prejudicial to him being acquired as to his property. And he was equally warranted in bringing the action in this court, on account of the difficult questions of law likely to arise in the course of the action, and the propriety of having the action in a superior court of record to prove the recovery when necessary.

In this particular case the defendant contended at the trial, and called witnesses to prove, that the plaintiff's land was not overflowed by the dam used by him. The jury, nevertheless, found against him on the facts brought out on the plaintiff's case. The defendant had refused to take a lease at a small rent, and both parties went down to try a case involving apparently important interests to them, and each called a large number of witnesses, including a surveyor on either side. Suits such as these are not usually tried in the inferior courts, and when commenced there would be bound to be removed into the superior courts almost as a matter of course, on the application of the defendant. If the plaintiff, however, went on in the inferior court, and the title to land was raised on the pleadings, or on the trial, the suit would at once stop. Whilst the law is in this state, I do not think it unreasonable that actions like the present, under the facts shewn, should be commenced in the superior courts.

If the law is changed so that when the question involving jurisdiction is raised in the inferior court the case can be readily transferred to the superior court, then the court and judges will feel less embarrassment in disposing of questions of costs when verdicts for an amount within the jurisdiction of the inferior court are rendered in cases tried in the superior court, when the excuse suggested for taking the cause into the superior court is that they feared the defendant might take a course not necessary to try the merits of the cause, to oust the inferior court of its jurisdiction.

Certificate granted.

The Queen v. Murdoch McLeod

Change of venue in criminal cases—32, 33 Vic., cap. 29 sec. 11.

Held, that 32, 33 Vic., cap. 29, sec. 11, does not authorize any order for the change of the place of trial of a prisoner, in any case where such change would not have been granted under the former practice, the statute only affecting *procedure*.

[Chambers, Jan. 5, 1870.]

The prisoner in this case was under recognizance to appear at the next Assizes, at Kingston, in the county of Frontenac, to answer a charge of manslaughter.

W. Mortimer Clark, on behalf of the prisoner, applied under the provisions of 32, 33 Vic., cap. 29, sec. 11, entitled "An Act respecting procedure in criminal cases, and other matters relating to criminal law," for an order to change the venue from the county of Frontenac, to the county of York, upon an affidavit in which the prisoner stated that he was informed and believed that all the witnesses intended to be examined on behalf of Her Majesty at his trial, resided at the City of Toronto: that any witnesses to be examined on his own behalf at his trial, resided at or near the City of Toronto, and that he was unable to pay the expense of the attendance of witnesses on his behalf, and the counsel he desired to retain at his trial, if it should take place at the City of Kingston.

Leith, shewed cause for the Attorney-General.

It would be a bad precedent to allow a change of venue on the grounds disclosed. The Act gives no jurisdiction to a judge to change the venue on these facts and the mere poverty of the prisoner is no sufficient reason.

The statute is not intended to give any new ground for changing the venue, but merely to simplify procedure, and to prevent the necessity of proceeding under the old and inconvenient practice of removing the case into the Queen's Bench by certiorari, and then moving to change the venue. The affidavit at all events is insufficient, as it does not shew the particulars as to witnesses, &c., required by the practice on applications to change the venue.

Clark, contra.

It is a mere matter of discretion with the judge, and owing to the poverty of the prisoner "it is expedient to the ends of justice" that the place of trial should be changed.

Galt, J.—Section 11, is as follows: "Whenever it appears to the satisfaction of the court or judge hereinafter mentioned, that it is expedient to the ends of justice, that the trial of any person charged with felony or misdemeanor should be held in some district, county, or place, other than that in which the offence is supposed to have been committed, or would otherwise be triable, the court at which such person is, or is liable to be indicted, may at any term or sitting thereof, and any judge who might hold or sit in such court, may at any other time order, either before or after the presentation of a bill of indictment, that the trial shall be proceeded with in some other district, county, or place within the same Province, to be named by the court or judge in such order; but such order shall be made upon such conditions as to the payment of any additional expense thereof caused to the accused, as the court or judge may think proper to prescribe."

In the affidavit there is no allegation that the accused is apprehensive that a fair trial cannot be had in the county of Frontenac, as was the case in *The King* v. *Holdew*, 5 B. & Ad. 347, and *The Queen* v. *Palmer*, 5 El. & Bl. 36 In the former case the application was refused, but it was granted in the latter on the consent of the Attorney-General.

It appears to me that the contention of Mr. Leith in this case is the correct view of the intention of the Legislature, namely, to substitute proceedings like the present for the old practice of removing the case by certorari into the Queen's Bench, and then moving to change the venue, and that an order such as prayed for, should be made, only in cases when under the former practice, a change of venue would have been granted; in other words, "when it is expedient for the ends of justice that the trial should be held in some other place than that in which the offence is supposed to have been committed." It is quite clear that no such change would have been made in this case, and therefore the present summons should be discharged. There is no saying to what inconvenience the granting of applications like the present might not lead.

Summons discharged.

COUNTY COURT CASES.

In the matter of Sutton, Landlord, v. Bancroft, Tenant.

Overholding Tenants Act—Assignee of reversion.

Under the Overholding Tenants Act, 31 Vic. cap. 26, the word "landlord" includes the assignee of the reversion. The late Act affords a more extensive as well as a more expeditious remedy than any former statute.

[Hughes, Co. J., St. Thomas.]

The facts of the case were, that one Burtch demised the premises to this tenant for a term which had expired, but before the end of the term conveyed the reversion to Sutton, who claimed the possession as landlord.

Ellis, as attorney for the tenant, denied the relation of landlord and tenant within the meaning of the Act, upon which alone the County Judge had jurisdiction. Proof of title and of the lease having been made from Burtch to Bancroft, and no attornment shewn from Bancroft to Sutton, Mr. Ellis claimed to have the proceedings quashed and the application discharged for want of privity between the parties, and that the fact of his being in possession did not constitute Bancroft Sutton's tenant: nor did the assignment of the reversion constitute Sutton Bancroft's landlord. The notice to quit and demand of possession were admitted.

McDougall, counsel for the landlord, cited the 13th section of the Act as to the meanings of the words "tenant" and "landlord," whereby they have assigned to them interpretations which their ordinary signification do not import, and referred to *Nash* v. *Sharp*, 5 C. L. J., N. S., 78, as good authority under the former statute, but not under the Ontario Act, for by the interpretation of the 13th section no room whatever is left for doubt.

Hughes, Co. J.—In the Act, 4 Wm. IV. Cap. 1, I find an interpretation clause (sec. 59), but no such meanings attached to the words "landlord" and "tenant" as are assigned them by the 13th section of the Ontario Act, nor do I find them in the Con. Stat. of U. C. Cap. 27. The Act 27 & 28 Vic. cap. 30, affords a more expeditious remedy for cases coming within the meaning of the previously existing statute, but I find no extension as to the kind of cases which might be reached by that remedy, so that up to the passing of the Ontario Statute, 31 Vic. Cap. 26, any decision of the Superior Courts as to the extent of the remedy and the class of cases coming within the purview of the then existing statutes would apply and be authoritative Not so, however, since the passing of the statute now in question, because the word "tenant" is thereby declared to mean and include an occupant, a sub-tenant, under-tenant (if there be any difference between "sub" and "under") and his and their assigns and legal representatives: and the word "landlord" is declared to mean and include the lessor, owner, the party giving or permitting the occupation of the premises in question, and the person entitled to the possession thereof, and his and their heirs and assigns and legal representatives. I think that *Bonser* v. *Boice*. 9 U. C. L. J. 213, does not apply as an authority in this case, for the statute in question affords not only a more expeditious but a more extensive remedy than was ever devised or contemplated by any previously existing statute, and no room is left for a well founded doubt that the word landlord includes the assignee of the reversion.

I therefore decide, 1st. That this is a case clearly coming within the meaning of the second section of the Act. 2nd. That the tenant, Bancroft, holds without color of right, and was tenant, &c., for a term which has expired, and wrongfully refuses to go out of possession thereof, &c.

*Writ of possession ordered.**

In the County Court of the County of Elgin.

Decow v. McCallum et al.

Trial by proviso.

Trial by proviso, *held* not to be in force in this country.

[Hughes, Co. J., St. Thomas.]

This was an application by the plaintiff to set aside a nonsuit had upon a trial by proviso, the defendant having carried down the cause, and the plaintiff not appearing,—on the following grounds.

1st. That the defendant did not give the plaintiff notice to proceed as required by the 227th sec. of the C. L. P. Act.

2nd. That trial by proviso is abolished in the Courts of Record in Ontario and a new practice substituted for it by the C. L P. Act, and

3rd. Because no issue book or copy of issue was served or delivered by the defendants before proceeding to trial.

* By an error of the press in the last number an editorial note to this case, which should have appeared in another place, was inserted as part of the judgment; therefore insert the case again. See *ante*, page 33.

Hughes, Co. J.—I shall dispose of the 2nd ground of objection first, because it is the most important, and a disputed point in the profession, and it would seem not as yet settled by any definite authoritative decision of the Courts. I find, however, that the present learned Chief Justice of Upper Canada in the Practice Court, in *Carscallen* v. *Moodie*, 2 Prac. Rep. 254, said, "I see nothing in the statute to deprive a party of his right to bring a cause down by proviso, &c." and further on,—"I see nothing in the statute to prevent defendants from taking the cause down in the way they have done." This decision I must take at present to be binding upon me in this matter. The judgment of Mr. Justice Gwynne, in Chambers, in *Summerville* v. *Joy et al.*, 5 C. L. J. N. S. 208, goes undecidedly to confirm the same view, for he says, "It would seem that our courts do not consider that the trial by proviso is abolished, for we have also a rule which is in the words of the statute, that no Rule for trial by proviso shall be necessary," and again, "I am not prepared to say that this mode of proceeding is abolished;" and, further on, "it is a proper point for the court to determine, and I shall not make an order which might probably deprive the defendants of what might prove to be their right, &c." These opinions negatively affirm the right, but were it not for their existence I should not have hesitated to set aside the nonsuit in this case as irregularly obtained, from the fact that I should have regarded the defendant's proceeding as a nullity, because the old mode of trial by proviso is legally abolished; it would, however, be presumptuous in me to set up an opinion against those of the two learned judges who have expressed opinions to the contrary (although neither of them was very decided) upon this subject. I feel it my duty however, in vindication of my own opinion, to say, that in examining the various statutes passed from time to time containing provisions for regulating the practice of our Superior Courts of Common Law; I find none which ever expressly or impliedly introduced the system of trial by proviso, and none which expressly embodied the practice of the Superior Courts of Common Law in England with that of our Courts. Of course the provision of 2 Geo. IV. c. 1 sec. 24, whereby the statutes of jeofails and of limitations, and the several statutes for amendment of the law (excepting those of mere local expediency in England) in so far as they provided for the practice of our courts were embodied; the provision of that statute, I apprehend, brought into force in this Province the provision of the statute 14 Geo. II. c. 17, which provided for the moving for judgment as in the case of a nonsuit, where the plaintiff did not proceed to trial according to the practice of the court. By the rule of M. T., 4 Geo. IV., the practice was no doubt provided for, because it sets forth that "in future the practice of the court is to be governed (where not otherwise provided for), by the established practice of the court of King's Bench in England; and we find the practice of trial by proviso expressly recognised before the passing of the C. L. P. Act, in *Doe Davidson* v. *Gleason*, 9 U. C. Q. B. 607. Chief Justice Robinson said with regard to it, "although the trial by proviso is now in a great measure disused, the remedy by obtaining judgment as in case of a nonsuit being commonly resorted to." And further on, "The trial by proviso is given for his (defendant's) protection in proper cases, that the case may not be kept hanging over his head vexatiously." The practice however, since that decision, appears to be otherwise provided for, and the rule of M. T., 4 Geo. IV., abrogated, and all the statutory provisions settling the practice appear to be also swept away, for our C. L. P. Act in section 1 provides, that in the Superior Courts of Common Law and County Courts the process and procedure shall be as therein set forth. The 227th section provides for a case like the present. If the plaintiff neglects to go to trial within the time therein specified after issue joined, a certain procedure is prescribed, and the old procedure being done away by the 223rd section, so far as related to judgment as in case of non-suit, I think, with all submission to the opinions I have already referred to, we have no practice but that which is to be found in the C. L. P. Act, or in the rules of practice framed and passed by the Judges since it was passed, and the rule of M. T., 4 Geo. IV.; and, all previous rules being abolished by the Rule of Trinity Term, 20 Vic. (Har. C. L. P. Act 1st ed., 591). and the new practice rules, providing nothing on this subject beyond what the statute prescribes—this mode of proceeding to trial by proviso is abolished. It is true the Imperial C. L. P. Act preserves this right of trial by proviso in the Superior Courts of Common Law in England, but, whilst I candidly admit that no inference ought to be drawn from that circumstance, or because of its omission from our statute, (for our courts cannot take judicial notice of the fact that our Legislature adopted very largely the provisions of an Imperial Statute, and omitted or changed others), and that the mind of our Legislature is not to be interpreted by what has been copied from the Acts of other Legislatures, whether British or Foreign: that it is only proper to gather and interpret what is intended by what is expressed in our local or Provincial Acts, and by what has been the course of legislation and what authority the courts have exercised in establishing the practice on a given subject, I think the mere negative reference to the mode of trial by proviso in the 227th section of the C. L. P. Act, and the new rules by enacting that "*no rule for trial by proviso shall hereafter be necessary*," with all the old practice abolished and a new mode of proceeding provided, suggests very little from which it may be inferred that the right to that mode of trial is preserved to a defendant.

As to the other grounds urged, I think they do not form reasons for setting aside the nonsuit; the first would be a valid objection to the entry of a judgment for defendant's costs if the notice referred to had not been given. The *rule* for trial by proviso is abolished and made unnecessary, and the notice of trial by proviso is all that is necessary of that proceeding were correct: 1 Pat. Mac. and Mar. 316. The third objection, if it were a ground for setting aside the notice of trial, is a matter of practice (if necessary) which should have been moved against promptly and not kept in reserve for an application like the present; in my view however, it was unne-

cessary for the defendants to deliver the issue which had not been at all changed since the plaintiff delivered it on 31st May, 1869, and as Mr. Hallowell, the defendant's attorney, swears the plaintiff delivered it then, I can see no occasion that existed for the defendant to deliver it afterwards, on taking the next step in the cause: there is no time limited for making up the issue, when the pleadings on both sides are concluded. The plaintiff's attorney, according to the practice in the Imperial Courts of Common Law, makes up and delivers the issue to the opposite party for the purpose of proceeding to trial; if the plaintiff will not do so nor proceed to trial within the time allowed by the practice, the defendant may make up and deliver it to the plaintiff's attorney, in order that he may proceed and (in England), carry down the record to trial by proviso: 1 Pat. Mac. and Mar. 207. If the issue has been delivered once it answers for all purposes—I think therefore, there is nothing in this objection, and if there were, the plaintiff should have moved against it in Chambers long ago,—and not deferred it until the Term as a motion to set aside a non-suit.

Rule discharged.

ENGLISH REPORTS.

PRIVY COUNCIL.

Martin v. Mackonochie.

Practice—Disobedience to monition—Evasive compliance—Church of England—Communion service—"Kneeling."

A clerk in holy orders having been admonished not to kneel during the prayer of consecration in the communion service, and it having been afterwards his practice to bend one knee in sign of reverence at certain parts of the prayer, in such a manner that occasionally his knee momentarily touched the ground, though without any intention on his part that it should touch the ground, and the genuflexion being such that the congregation could not distinguish whether his knee touched the ground or not.

Held, that there was a disobedience of the monition, there having been a literal non-compliance, or, if a literal compliance, such an evasive compliance as must be treated as a non-compliance.

[18 W. R. 217.]

In this appeal a motion was now made to enforce a monition issued against the respondent, the Rev. A. H. Mackonochie, in pursuance of an Order of Her Majesty in Council, of the 14th of January, 1859, confirming a report of the Judicial Committee, of the 23rd December, 1868: 17 W. R. 187, L. R. 2 P. C. 365.

The appeal was from a decree of Sir Robert Phillimore, official principal of the Arches Court of Canterbury, in a cause of the office of judge, promoted by John Martin against the Rev. A. H. Mackonochie, incumbent and perpetual curate of the new parish of St. Albans, Holborn, in the diocese of London. The articles exhibited in the Arches Court charged the respondent with having offended against the laws ecclesiastical in the following respects:

By having during the prayer of consecration in the order of the administration of the Holy Communion, elevated the paten above his head and permitted and sanctioned such elevation; and taken into his hands the cup, and elevated it above his head during the prayer of consecration, and permitted and sanctioned the cup to be so taken and elevated; and knelt or prostrated himself before the consecrated elements during the prayer of consecration, and permitted and sanctioned such kneeling or prostrating by other clerks in holy orders.

By having used lighted candles on the communion-table during the celebration of the Holy Communion at times when such lighted candles were not wanted for the purpose of giving light, and permitted and sanctioned such use of lighted candles.

By having used incense in the manner in the articles mentioned.

And, by having, as in the articles mentioned, mixed water with the wine used in the administration of the Holy Communion.

In the articles as originally framed the charge against the respondent with regard to the elevation of the cup and paten was wider (see the judgment of the Judicial Committee), but on account of its vagueness in a certain part it was reformed by order of Dr. Lushington, then dean of the Arches Court, and as reformed it stood as above.

By decree of 28th March, 1868, Sir Robert Phillimore (16 W. R. 604, L. R. 2 A. & E. 116) monished the respondent to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, as also from the use of incense, and from the mixing water with the wine during the administration of the Holy Communion, "as pleaded in the said articles." From this decree the promoter appealed in so far as the decree did not admonish the respondent against kneeling or prostrating himself before the consecrated elements during the prayer of consecration, and against permitting and sanctioning such kneeling or prostrating by other clerks in holy orders, and against using lighted candles on the communion-table during the celebration, and against permitting and sanctioning such use. The Judicial Committee reported to her Majesty, on the 23rd December, 1868 (17 W. R. 187, L. R. 2 P. C. 365). their opinion that the decree ought to be amended, that the principal cause ought to be retained, and therein, that, in addition to the matters from which the respondent was by the decree monished to abstain, the respondent ought to be admonished to abstain from kneeling or prostrating himself before the consecrated elements during the prayer of consecration, and also from using lighted candles on the communion-table during celebration, when they were not wanted for the purpose of giving light. Her Majesty in Council, by Order in Council, dated the 14th January, 1869, approved of the report, and ordered that it should be observed and carried into execution. A monition, in the name of her Majesty, under seal of her Majesty's Court of Appeals, issued on the 19th January, 1869, commanding the respondent "to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and from the use of incense, and from the mixing water with the wine during the administration of the Holy Communion, and from kneeling or prostrating himself before

the consecrated elements during the prayer of consecration, and also from using lighted candles on the communion-table during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of giving light."

December, 2, 4 —A motion was now made before the Judicial Committee on the part of the appellants, praying the Committee to declare that the respondent had not complied with this monition, inasmuch as he continued (1), to elevate the cup and paten during the administration of the Holy Communion; (2), to kneel or prostrate himself before the consecrated elements during the prayer of consecration; (3), to use lighted candles on the communion-table at times when such candles were not wanted for the purpose of giving light; the appellants further prayed that the monition might be enforced in such a manner as to the Committee might seem fit.

In support of the motion affidavits were filed, stating, amongst other things, that on certain days therein mentioned, the respondent in celebrating the communion service, when he came to that part of the prayer of consecration, at which the rubric directs the priest to take the paten into his hands, paused in reading the prayer; that during such pause, and before taking the paten into his hands, he bowed himself down to the communion-table, so that his forehead nearly touched it, he then stood upright, and immediately afterwards knelt down upon the steps leading to the communion-table, that, after kneeling for a few seconds, he rose and again stood up and took the paten into his hands, and raised it level with his head; that he then replaced the paten upon the communion-table; that he then again bowed down to the communion-table so that his forehead nearly touched the same; he then again stood upright, and immediately afterwards knelt down upon the steps leading to the communion-table; that after kneeling for a few seconds he again rose, stood up, and proceeded with the said prayer of consecration, until he came to that part at which the rubric directs the priest to take the cup into his hands; he then again paused in reading the prayer; that during such pause, and before taking the cup into his hands, he bowed himself down to the communion-table, so that his forehead nearly touched it; he then stood upright, and immediately afterwards knelt down upon the steps leading to the communion-table; that after kneeling for a few seconds, he again rose and stood up, and took the cup into his hands and raised it level with his head; he then replaced the cup upon the communion-table; he then again bowed down to the communion-table, so that his forehead nearly touched it; he then rose and stood upright, and immediately afterwards knelt down upon the steps leading to the communion-table; that after kneeling for a few seconds he again rose, stood up, and proceeded with the prayer of consecration; that at the commencement of the morning prayer there were eight lighted candles upon a shelf, about six inches above the level of the communion-table, and which appeared to form part thereof, two of such candles being in candlesticks, and six in two candelabra, holding three candles each, such candlesticks and candelabra standing upon the shelf; the eight candles were extinguished immediately before the commencement of the communion service, up to which time they were kept continuously burning; such candles were not required for the purpose of giving light.

In opposition to the motion affidavits were filed, in which the respondent denied that since the service of the monition upon him, he had ever prostrated himself or knelt upon steps leading to the communion-table or elsewhere when celebrating the Holy Communion, during any part of the consecration prayer; but he admitted that it was his practice, during the prayer of consecration, when celebrating the Holy Communion, and whilst standing before the holy table, reverently to bend one knee at certain parts of the prayer, and occasionally, in so doing, his knee momentarily touched the ground, but such touching of the ground was no part of the act of reverence intended by him; and he alleged that ever since the monition was served upon him he had endeavoured to obey it, and had never, intentionally or advisedly, in any respect disobeyed it, or sanctioned any practice contrary to its provisions. The Rev. H. A. Walker, curate to the respondent, deposed further that, having regard to the position of the celebrating and assisting priests during the consecration prayer as well as to the length and nature of their dress, he did not believe it possible for any person in the body of the church to say whether the respondent did kneel or not.

A. J. Stephens, Q. C. (*Archibald* and *Droop* with him), in support of the motion, contended that the monition must be construed in accordance with the Book of Common Prayer; that the elevation of the cup and paten to the level of the head was inconsistent with the directions of the rubric, and in contravention of the monition; that the respondent according to his own admissions, had, during the prayer of consecration, done acts which amounted to a kneeling; and that he had prostrated himself in disobedience to the monition.

Mr. Mackonochie, in person, contended, in opposition, that even if the monition had been disobeyed, the Judicial Committee had no power to enforce obedience to it; and that the monition had not been disobeyed; for the monition could not go beyond the articles, and since the monition he had not done any of the things which had been complained of in the articles, having only elevated the cup and paten to the level of his head, and made genuflexions which were not kneeling, kneeling implying an intentional touching of the ground with the knee; he contended that the monition must be strictly construed, this motion being a criminal proceeding.

A. J. Stephens, in replying, was relieved by the Committee, from the necessity of supporting their power of enforcing obedience to the monition issued.

Lord Hatherley, L. C., delivered the judgment of the Judicial Committee.*

In this case a motion has been made calling upon their Lordships to take proceedings in order to enforce the monition which has been served upon the reverend respondent with regard to the execution of a sentence pronounced in the first instance by the Court of Arches. This sentence

*The Lord Chancellor, the Archbishop of York, Lord Chelmsford, Sir James W. Colvile, Sir Joseph Napier.

was in some degree extended and modified by the judgment which this Committee was called upon to pronounce, or rather by the decision which they were called upon, after argument, to recommend as fit to be made by an Order of her Majesty in Council.

The Order provided for several matters; as to three of which only it is now alleged that there has been a breach by the respondent of the monition issued in pursuance of the Order. Those three matters are:—First, that he continues to elevate the cup and paten during the administration of the Holy Communion; secondly, that he continues to kneel or prostrate himself before the consecrated elements during the prayer of consecration; and thirdly, that he continues to use lighted candles on the communion-table at times when such lighted candles are not wanted for the purpose of giving light.

In order to see how far that which is complained of has been a breach of the monition, we must of course in the first instance look to the monition itself. The monition having recited that the respondent was pronounced to have offended against the statutes, laws, constitutions, and canons of the Church of England, by having knelt or prostrated himself before the consecrated elements during the prayer of consecration, and also by having within the said church elevated the cup and paten during the Holy Communion, and also by having used lighted candles on the communion-table, during the celebration of the Holy Communion, at times when such lighted candles were not wanted for the purpose of light, proceeds to direct him to abstain for the future from the elevation of the cup and paten during the administration of the Holy Communion, and from kneeling or prostrating himself before the elements during the prayer of consecration, and also from using, in the said church, lighted candles on the communion-table during the celebration of the Holy Communion, at times when such candles are not wanted for the purpose of giving light.

The evidence which is before their Lordships is addressed to these three several heads. We will deal with them in a different order from that in which they appear in the prayer of the application, and take the use of lighted candles on the communion-table at times when such candles are not wanted for the purpose of giving light, in the first instance, because with reference to that part of the case it appears to their Lordships that the affidavits do not make out the offence charged. In the first place, it appears that the offence charged is not in strict conformity with the monition, because the monition is itself confined to using those candles on the communion-table *during the celebration of the Holy Communion;* and the charge which is made in the motion now before this Committee is, that they were used *on the communion-table at times when they were not wanted for the purpose of giving light*, leaving out the words "*during the time of Holy Communion.*"

Of course it is not competent for their Lordships to proceed beyond the actual monition which has been served upon the respondent. It is that which he has said to have disobeyed, and it is to disobedience of the monition only that their Lordships can address themselves.

It is plain upon the affidavits that the candles have not been lighted during the Holy Communion, for the course taken by the respondent has been this, that the candles are lighted as he says they always have been, and were at the time of the proceedings herein being taken, and are kept buring up to the period of the Holy Communion, and then immediately before the commencement of the Holy Communion they are extinguished.

There is no doubt, therefore, in this case, of a literal compliance with the terms of the monition. The candles are not lighted during the period of the Holy Communion. They are lighted, indeed, when there is no necessity for their being lighted for the purpose of giving light, but they are extinguished before the Holy Communion; therefore the compliance with the terms of the monition has been literal and complete, and not, in that sense, evasive, for the respondent was limited to a particular time, in reference to the candles; and whatever one may feel as to the course of the reverend respondent, looking to the spirit of the monition, of course the monition could not go beyond the matters that were charged: the offence charged was one which he has abstained from; and in this respect, therefore, their Lordships are clear that the prayer of this motion cannot be complied with.

The next charge is that he continues to elevate the cup and paten during the administration of the Holy Communion; and, with reference to this matter, their Lordships feel that the case is placed in a position that is eminently unsatisfactory. On a former occasion the sentence of the judge in the court below was approved with reference to this particular subject-matter; therefore, that sentence is the sentence to which recourse must be had by their Lordships when interpreting the monition, which cannot, of course, proceed further than the sentence itself. The sentence in the court below was thus worded: the respondent was ordered "to abstain for the future from the elevation of the cup and paten during the ministration of the Holy Communion, and also from the use of incense and from the mixing of water with the wine during the administration of the Holy Communion, as pleaded in the articles."

Their Lordships think that the words "as pleaded in the articles" must be applied to those several offences which were charged in the passage just quoted—namely, the elevation of the cup and paten, also the use of incense, and the mixing of water with wine; and their Lordships are thrown back, therefore to the articles to see what it was that was there pleaded, and they find this state of circumstances. Originally the third article pleaded that there was an elevation of the cup and paten beyond what was necessary for the purpose of complying with the terms of the rubric, which directs that at a particular part of the prayer of consecration, when the sacred elements are dealt with, the paten shall be taken into the hands, and at another part that the cup shall be taken into the hand or hands (for there is some little variation in the two parts of the rubric itself) of the officiating minister. That would have been, as it appears to all their Lordships, a charge which would have raised a distinct and definite issue, whether the elevation of the paten or the elevation of the cup were or were not a *bonâ fide* raising it so far only as is necessary for

anything to be raised—that is, to be taken from the table; or whether or not there was some ulterior purpose—that is to say, an act of elevation wholly distinct from and going beyond, what was necessary for the mere purpose of taking the paten and cup into the hands of the officiating minister.

But the words "*and otherwise*" were also inserted in the same third article in a part which rendered it very difficult to attach any definite sense to them. Those words are so vague that the learned judge before whom the case first came, Dr. Lushington, conceived that he could not admit the article in that form, and that the words introduced such a degree of vagueness as to render it improper to call upon the respondent to answer the charge in its then shape, and therefore the learned judge said that the article must be reformed.

In the reforming of that article, those who reformed it appear to have gone beyond anything that was required by the decision of the learned judge in the course of the argument upon the admission of the articles. They not merely struck out these words, "and otherwise," but they also materially varied the language by describing definitely in the reformed article the act which had been performed—namely, that it was an elevation of the elements "*above the head of the respondent.*"

The article then became confined to that particular mode of elevation, instead of being a charge of elevation beyond what was necessary for the proper compliance with the rubric; and, therefore, when the sentence of the judge, which directs that he shall abstain for the future from the elevation "as pleaded in the articles," is considered, it appears to their Lordships that they are necessarily confined to that particular charge which is there contained, and that particular mode of elevation which is there complained of.

We have been thus particular in going through all the circumstances of this case, which is left, as it appears to their Lordships, in a very unsatisfactory position, because it is most desirable, and their Lordships are all of opinion that it should be distinctly understood that they give no sanction whatever to a notion that any elevation whatever of the elements, as distinguished from the mere act of removing them from the table and taking them into the hand of the minister is sanctioned by law. It is not necessary for their Lordships to say more (but most undoubtedly less we cannot say) than that we feel nothing has taken place in the course of this cause that can possibly justify a conclusion that any elevation whatever, as distinguished from the raising from the table, is proper or is sanctioned. All that their Lordships can say upon the present occasion is, that the point has never yet been in these proceedings raised, that a particular and definite mode of elevation only has been averred and complained of, and with that particular and definite mode of elevation we have nothing further to do, because it is conceded on all sides that such particular mode has been departed from.

It is not for us to say how far the letter to which the respondent himself has referred, and in a part of which he says that the simple compliance with the rubric—namely, taking the cup and the paten into his hands, would be sufficient for the purpose of satisfying a certain portion of his parishioners as regards the elevation of the elements, may or may not have misled the judges who had this case before them.

They say that the matter complained of having been discontinued, had not been complained of—that is, by the articles, and we have felt it to be right and proper to say that nothing we are now determining, can therefore be pleaded hereafter as a justification for any mode of elevation which is to be distinguished from the mere act of removing the elements from the table, and taking them into the hands of the minister.

Inasmuch, then, as the reverend respondent has said upon oath, and it is not now contravened, that his course of procedure has only been that which he says he adopted at the time of the first hearing of the matter, owing to the complaint made of the higher elevation spoken of in the articles, their Lordships think they cannot in that state of circumstances say that he has thereby committed a breach of the monition which has been served upon him.

The third matter which has been complained of is as follows: and as to this matter their Lordships think the case is open to very different considerations:—

The respondent was admonished "not to kneel or prostrate himself before the consecrated elements during the prayer of consecration;" and without going through the affidavits, the exact state of circumstances may be taken to be as they appear upon the affidavits made by the respondent himself, and by Mr. Walker, the gentleman who was present on the several occasions referred to in the motion. The affidavits in support of the motion stated distinctly acts of prostration and of kneeling during the period of the prayer of consecration. Into the details of those affidavits it is unnecessary to enter, because in the affidavit of the respondent there is this which seems to set the case in a very clear light as far as the facts are concerned. The respondent says:—"I did not on either of the days or times mentioned in the affidavits on which this motion is founded, nor have I ever since the service of the said monition on me, prostrated myself or knelt on steps leading to the communion table, or elsewhere, when celebrating the Holy Communion during any part of the consecration prayer. I admit that it is my practice during the prayer of consecration when celebrating the Holy Communion,"—the time, therefore, is exactly fixed to which the monition would apply—"and whilst standing before the holy table, reverently to bend one knee at certain parts of the said prayer, and occasionally in so doing my knee momentarily touches the ground, but such touching of the ground is no part of the act of reverence intended by me. Whether my knee may have thus momentarily touched the ground on either of the days mentioned in the said affidavits on which I am stated to be the celebrating priest, I am, of course, unable to say." Mr. Walker is a little bolder upon that point, because he says this—he was present on these days,—"I say that the respondent did not prostrate himself or kneel upon the steps leading to the communion table or elsewhere at any time during the prayer of consecration on the 18th day of

July and on the 14th day of November, 1869, as mentioned in the affidavits; and to the best of my belief, he did not touch the ground with either of his knees at all during that time on the occasions on which the respondent is accused of doing so." Then he further says this: "And having regard to the positions of the celebrating and assisting priests during the consecration prayer, as well as to the length and nature of their dress, I do not believe that it is possible for any person in the body of the church to say whether the respondent did kneel or not."

Therefore, the case as stated is this, Mr. Mackonochie, being enjoined against kneeling during this prayer, admits a gesture which he contends is not kneeling, but he admits a bowing of his knee, a bowing of it to an extent which occasions it at times momentarily to touch the ground, a bowing of it to an extent which renders it impossible (according to Mr. Walker's affidavit) for anybody to see whether he is or is not kneeling—that is the distinct statement in the affidavits—viz., that nobody could see whether he is kneeling or not.

First of all their Lordships would consider the literal question which is before them, whether there has been even a literal compliance with the monition in this act of Mr. Makonochie. Their Lordships are all of opinion that there has not been even a literal compliance; and that bowing the knee in the manner which he has described is kneeling: and that it is not necessary that a person should touch the ground in order to perform such an act of reverence as will constitute kneeling. Of course there may be such a bowing of the knee as would amount to kneeling in the sense of the monition, but Mr. Mackonochie very properly says that he takes no advantage of any suggestion of that sort—there may be an accidental bowing of the knee, arising from fatigue or otherwise; but here is a knee bent for the purpose of reverence and in such a manner that those who behold cannot tell whether or not what Mr. Mackonochie and Mr. Walker call kneeling—that is, touching the ground with the knee, has been arrived at, and indeed Mr. Mackonochie says that at certain times his knee has momentarily touched the ground. This seems to their Lordships to be literally kneeling.

But the case must be put much higher than that, because neither this tribunal nor any tribunal will suffer its orders to be tampered with by mere evasion; and a mere evasion it would be, to allow a person when ordered not to kneel (*the whole gist and purport of the order, as I shall presently show, being the kneeling by way of reverence*) to say, "I did all that I could do towards so kneeling; I bowed my knee; I nearly touched the ground with it—I did not quite touch the ground, but I did it in such a manner that all my congregation, all who were attending and seeing that which I did, could not possibly tell whether I were kneeling in that sense or not." It would be intolerable to allow any order to be trifled with in such a manner as must be implied if their Lordships were to give place for a moment to any such argument on the part of Mr. Mackonochie as that this was a compliance with the order.

Now, with reference to this particular matter of kneeling, it is one, undoubtedly, of very great importance as regards the judgment which has been pronounced, and the occasion of that judgment. We cannot do better, with reference to this part of the subject than call attention to the purport and intent of the Book of Common Prayer, when prescribing what is to be done, and in omitting to prescribe that which it does not intend to be done. For that purpose I will refer to the judgment which was pronounced by Lord Cairns, as the judgment of the Judicial Committee on the former occasion. His Lordship thus expresses himself, in page 7 of that judgment: "Their Lordships are of opinion that it is not open to a minister of the Church, or even to their Lordships, in advising her Majesty, as the highest ecclesiastical tribunal of appeal, to draw a distinction, in acts which are a departure from or violation of the rubric, between those which are important and those which appear to be trivial. The object of a statute of uniformity is, as its preamble expresses, to produce an 'universal agreement in the public worship of Almighty God'—an object which would be wholly frustrated if each minister, on his own view of the relative importance of the details of the service, were to be at liberty to omit, or add to, or alter any of those details. The rule upon this subject has been already laid down by the Judicial Committee in *Westerton* v. *Liddell*, and their Lordships are disposed entirely to adhere to it: 'In the performance of the services, rites, and ceremonies ordered by the Prayer-book, the directions contained in it must be strictly observed; no omission and no addition can be permitted." And then upon this very subject-matter his Lordship furtner proceeds to say.—"There would indeed be no difficulty in showing that the posture of the celebrating minister during all the parts of the communion service was, and that for obvious reasons, deemed to be of no small importance in the changes introduced into the Prayer-book at and after the Reformation. The various stages of the service are, as has already been shown, fenced and guarded by directions of the most minute kind as to standing and kneeling—the former attitude being prescribed even for prayers, during which a direction to kneel might have been expected. And it is not immaterial to observe that whereas in the first Prayer-book of King Edward VI., there was contained at the end a rubric in these words:—'As touching kneeling, crossing, holding-up of hands, knocking upon the breast, and other gestures, they may be used or left as every man's devotion serveth, without blame,'—this rubric was in the second Prayer-book of Edward VI., and in all the subsequent Prayer-books omitted."

We may further add an observation as to the extreme care which is taken in the Prayer-book to guard all persons who might feel a scruple with reference to kneeling at the reception of the Holy Communion from any inference that might thereby be raised in their minds of a nature contrary to that which was intended by the Prayer-book itself to be expressed, namely, any intention of adoration of the holy elements. This is most particularly and carefully guarded against, and the reason for such kneeling is explained, and said to be, "for a signification of our humble and grateful acknowledgment of the benefit of Christ, therein given to all worthy receivers, and

for the avoiding of such profanation and disorder in the Holy Communion as might otherwise ensue." Then it is explained:—"Yet lest the same kneeling should by any persons, either out of ignorance or infirmity, or out of malice or obstinacy, be misconstructed and depraved, it is hereby declared, that thereby no adoration is intended, or ought to be done, either unto the sacramental bread and wine there bodily received, or unto any corporal presence of Christ's natural flesh and blood. For the sacramental bread and wine, remain still in their very natural substances, and therefore may not be adored; for that were idolatry, to be abhorred of all faithful christians."

And again, carefully does our Church provide in her 28th Article against any such adoration as we have spoken of by this declaration—"The sacrament of the Lord's Supper was not by Christ's ordinance reserved, carried about, lifted up, or worshipped."

Now that being so, and it being of the utmost importance that for the purposes of common prayer such union should be preserved as is essential to the happiness and comfort of all who are joining in this most holy ordinance; what can be a greater offence than the offence of either by addition or omission occasioning trouble or confusion in the minds of those who are invited to join in common prayer, and in one common act of reverence? Acts of reverence, where necessary, are enjoined; and the use of additional acts of reverence, where they are not enjoined, is, according to the judgment which has been pronounced in this very matter, a thing prohibited.

If, therefore, the reverend respondent, in performing his own special act of reverence, does it in such a manner that no one can tell whether he is not doing the very thing which he is prohibited from doing, and has performed that special act of reverence at a time when there is no direction in the Book of Common Prayer for that performance, he certainly does that which militates, in every possible view of the case, both in letter and spirit, against the monition which he has received, and the reasoning which occasioned that monition to be issued.

Whether or not Mr. Mackonochie can reconcile it with his view of what is right, that a judgment of this kind should be so narrowly scrutinized, that every possible limit should be placed upon it, and that, notwithstanding the reasons which are assigned for it—namely, the desire of promoting uniformity in common worship, it should be, as far as possible, evaded, it is not for their Lordships to say. There may be some who feel great grief and sorrow at any act which may appear to be at variance with the common charity and love that should induce us at all times when assembled for worship, and most especially this highest and holiest act of worship, to be as far as possible of one mind, so that then at least our unity be not disturbed.

But what one is justified in saying, as regards the act which is now complained of as a breach of the monition, is this, that it is not possible, happily, to reconcile with the administration of our law in its narrowest sense, any mere evasion of that which the law sanctions, of that which the law has ordered, by an authority which binds this reverend gentleman, as it binds every subject of the realm, to strict obedience. That obedience may be rendered grudgingly, if so it must be; it may be rendered in a manner which I am sure the reverend gentleman would not tolerate on the part of any of his flock, if it were a question of obedience to a higher power; it may be rendered, therefore, strictly within the limits which are exactly prescribed by the monition, but that monition may not be evaded. A mere literal compliance is not all that even the law requires; the compliance must not be literal in a sense which is but evasive.

I will not, in the name of their Lordships, say more upon what I confess presses upon me individually very strongly, the narrowness of obedience shown by the course taken, as to keeping the candles lighted until the very moment when they are forbidden, and then extinguishing them, and as to the elevation of the elements to something which, even on the affidavits themselves, appears to me to be more than necessary for simply taking the cup and paten into the hands of the officiating clergyman, since we have been obliged to hold that these acts were, nevertheless, in literal compliance with the monition having reference to the articles.

But here, in this matter of the kneeling, their Lordships find that there is, first, not even a literal compliance with the order; and secondly, if, upon any strained interpretation of the word "kneeling" (for strained as it appears to their Lordships it would be), they could arrive at the conclusion that it did not preclude the act of bowing one knee so low that it must at times touch the ground, and in a manner which cannot possibly be distinguished from kneeling by those who witness the act; still, if it was a representation of the forbidden act, as nearly as the party charged dared to represent it, and in such a guise as to convey to all at a distance the impression that the act of kneeling was really performed, that would be a species of evasion of the order which a court of justice would find it right and due to the maintenance of its own force and vigour to visit as being itself a breach of the order which had been made.

For these reasons it has seemed to their Lordships (and it is the opinion of us all) that there has been a clear breach of this special monition.

Their Lordships next take into consideration what is proper and right to be done. They did not hear Mr. Stephens upon the question as to whether or not this tribunal has the means of enforcing its orders. Happily it has been supplied (and I say "happily," because it would be in vain to establish a tribunal which has no power to enforce its orders) with abundant means for that purpose by the statutes which have been passed in that behalf; but into the examination of those means, and the different modes that might be adopted for that purpose, we are not, for the reason I am presently going to mention, about to enter. In declining to take any more severe step than that of compelling Mr. Mackonochie to pay the costs of this discussion, their Lordships have had to consider the affidavit which was last made by him, and to which they have been desirous to give the most favourable construction and allowance; and in that affidavit Mr. Mackonochie very properly says that he never, intentionally or advisedly, in any respect,

disobeyed the monition, or sanctioned any practice contrary to its provisions. I confess I think, as I have already intimated, that Mr. Mackonochie takes an extremely narrow view of that which the word "obedience" ordinarily implies, when he says that he has endeavoured to obey this order; but he does say that which, in a sense, for the purpose of clearing his contempt, he may have a right to claim the benefit of, that he never intentionally or advisedly, in any respect disobeyed the monition.

He now, we hope, will learn that mere literal compliance in a merely evasive manner will not suffice. Literal compliance with regard to the actual limits of the order is, of course, all that he is held to in law; for an obedience to the spirit of the order we can only trust to his own feelings and his own conscience. And when he thus tells us that it has not been, and is not his desire wilfully to disobey the law, or to disregard its monition, their Lordships think that they are bound, upon this first occasion of the matter being brought before them of any non-compliance with the order, to allow Mr. Mackonochie the benefit of that affidavit; and they do not think it necessary, on the present occasion, to do more, after expressing their opinion judicially than the monition has been disobeyed with reference to kneeling during the prayer of consecration, that to mark their disapprobation of such a course of proceeding by directing that he should pay the costs of the present application.

UNITED STATES REPORTS.

SUPREME JUDICIAL COURT OF MAINE.

Geo. W. Prentiss v. Elisha W. Shaw et al.

(*Continued from page 44.*)

Kent, J.—The case, as presented to the jury under the rulings, was, in substance and effect, one where a default had been entered and an inquisition of damages had been allowed before a jury. The jury had no discretion allowed to them, except as to the amount of damages to be inserted in a verdict for the plaintiff. The main question is whether the directions given by the Judge to the jury to govern them in the assessment of damages were correct.

The plaintiff claimed damages for several distinct matters, and asked that the jury should found their verdict on these principles, viz.:—

1. The actual injury to his person and the detention and imprisonment.

2. The injury to his feelings, the indignity and public exposure and contumely.

3. Punitive or exemplary damages in the nature of punishment, and as a warning to others not to offend in like manner.

The judge very unequivocally instructed the jury that the defendants had shown no legal justification for their acts, and must be found guilty, and that the only question for them was the amount of damages,—that they were bound to give damages at all events for the injuries to the plaintiff's person, and for detention to the full extent of said damages; that they could not consider the testimony put in by defendants in mitigation of such actual damages, but must give a verdict for matters named under the 1st head to the full amount proved without diminution, on account of any matters of provocation, or in extenuation.

The judge further instructed the jury that they might consider the testimony put in by defendants under the 2nd and 3rd heads, above stated, in mitigation of any damages they might find the plaintiff had sustained under either or both of said grounds. These rulings present the question whether the evidence objected to was admissible for the special purpose to which it was confined. It was not in the case generally, but its consideration and application was restricted to the special grounds of damages set up beyond what may properly be termed the actual damages. It was entirely excluded as a justification, or as mitigating in any degree the actual damages.

The distinctive points of the rulings which perhaps distinguish them from some cases in the reports, and some doctrines in the text-books, are, first, that they exclude entirely this species of evidence in mitigation of actual damages,—and, secondly, that they admit it in mitigation of damages, claimed on the other grounds of injury to the feelings, indignity, and punitive damages, although the evidence related to matters which did not transpire at the instant of the assault, but on the same day, and manifestly connected directly with the infliction of the injury complained of.

It is unquestionable that many authorities can be found which seem to negative the proposition that acts or words of provocation, except those done or uttered at the moment, or immediately connected in time with the infliction of the injury, can be given in evidence in mitigation of damages. But most of these cases seem to be predicated upon the idea of mitigation of the positive, visible damages,—those damages to which the party would be entitled on account of the actual injury to his person or his property.

It is important to settle, as well as we can, the general principle which lies at the foundation of the law applicable to damages, occasioned by the illegal acts of the defendant. We understand that rule to be this—a party shall recover, as a pecuniary recompense, the amount of money which shall be a remuneration, as near as may be, for the actual, tangible, and immediate result, injury, or consequence of the trespass to his person or property. But, in the application of this general principle, there has been great diversity in the decisions, and in the doctrines to be found in the text-books touching the point of mitigation or extenuation.

In reference to injuries to the person, it was soon seen that this literal and limited rule, if applied inexorably, would fail to do justice. The case is at once suggested, where an assault and battery is shown to have been wanton, unprovoked, and grossly insulting; inflicted clearly for the purpose of disgracing the recipient, and to the act, and yet the actual injury to the person very slight, or hardly appreciable. Shall the law, in such a case of wanton insult and injury, give only the damages to the face or the person, as testified to by a surgeon?

On the other hand, a case is suggested, where the injury to the person was severe, a broken limb or grievous wounds, or permanent or partial disability, and yet the party suffering had been guilty of gross abuse, provoking the assault by insulting language or false accusations, or most offensive libels upon the defendant or his family, or had outraged the community in which he lived, by a series of acts or declarations which justly aroused and kept alive the indignation, which at last found vent in the infliction of some personal indignity, accompanied by force and violence, which resulted in the serious manner above stated. What is the rule as to such damages, applied to the aggravations in the one case, and the mitigations in the other?

If we take the case of such an assault, which has been provoked by words or acts at the time of the trespass, and so immediately connected therewith that all authorities would agree in admitting the evidence in mitigation, the precise question then is, for what purpose can it be used, and what damages can it mitigate?

All agree that these facts cannot be a legal justification, and be used in bar of the action. The plaintiff is undoubtedly entitled to a verdict, with damages. It is said these facts may be used to mitigate the damages. But what damages? If the assault was illegal and unjustified, why is not the plaintiff, in such case, entitled to the benefit of the general rule, before stated—that a party guilty of an illegal trespass on another's person or property, must pay all the damages to such person or property, directly and actually resulting from the illegal act? Admit that the defendant was provoked, insulted, irritated, and justly indignant at the acts or language of the plaintiff If those provocations did not reach the point of a legal justification of the assault, then, so far as the question arises for which party the verdict shall be given, they are immaterial, and out of the case. The assault was wholly legal or wholly illegal. There can be no such thing as apportioning the guilt; making the act half legal and half illegal. It is not one of the class of cases where the suffering party contributed to the injury, and thereby lost his right of action. The contribution, to work that effect, must be co-operation in the doing of the act itself, which is complained of,—*i. e.*, the assault and battery; or whatever the alleged specific act may be.

If then the act is confessedly an illegal one, and unjustified in law, why must not the defendant answer for and pay the actual damages to the person? On what principle of law can he be exonerated?

In the case before us the presiding judge took this view. He made a distinction which has not often been attended to, between a recovery for the actual personal damage and loss of time and other direct injuries, and a recovery for other damages based on injury to the feelings, indignity, insults, and the like, and also on the claim for punitive damages.

Is there not such a distinction in law and common sense? Take the simple case of the meeting of two men in a public street. One addresses the other with opprobrious and insulting language, calling him a thief or a liar. The other, at the moment, naturally excited to almost uncontrollable anger, strikes a blow which breaks the arm of his antagonist. The law says the words were no legal justification for the blow. It was therefore a trespass and a wrong. What damages shall be awarded? Can they be more or less, according to the provocation on one side or the natural anger on the other? There is the broken arm, neither more nor less, with the pain and suffering and expense of cure, and the loss of time, all which are open and appreciable, and are the direct and immediate consequences of the legal wrong. If the law holds, as it does, sternly and unwaveringly, that the words are no excuse or justification, why should it "keep the word of promise to the ear but break it to the hope," by allowing a jury to evade the law, whilst in form keeping it by a verdict for nominal damages, which is in effect one in favor of the defendant? Why not say rather that the provocation might be shown in defence of the action, and that if the plaintiff morally deserved to suffer the injury by reason of his language, that should be a legal excuse? It seems to be a legal anomaly to say,—true, it is an undefended, naked trespass and wrong, but no real damages or recompense shall be given. It is giving the benefit of a justification to what the law expressly says is no justification. The restriction of the rule to the provocation given at the time of the assault, does not obviate the objection that it is against a well-settled principle which gives real and substantial redress for every unjustified trespass. Where the trespass or injury is upon personal or real property it would be a novelty to hear a claim for reduction of the actual injury based on the ground of provocation by words. If, instead of the owner's arm, the assailant had broken his horse's leg, in the case before stated, must not the defendant be held to pay the full value of the horse thus rendered useless? Or in case of trespass on land, can the actual damage be mitigated by showing that it was provoked by unfriendly or unneighborly words? Or in case of a damage at sea, could an intentional and unnecessary collision be mitigated, so far as the actual injury was in question, by proving that the navigator was insulted and irritated by taunting and exciting language from the deck of the injured vessel?

But there is no doubt that the law has sanctioned, by a long series of decisions, the admission of evidence tending to show on one side aggravation, and on the other, mitigation of the damages claimed. Verdicts for heavy damages have been sustained where the actual injury to the person was very slight or merely constructive, and other verdicts for merely nominal damages have been confirmed where the actual injuries were shown to have been serious. In the first class of such cases the plaintiff has not been restricted to proof of the injury to the person, but has been allowed to show the circumstances attending the act, and to have damages for the insult, indignity, injury to his feelings, and for the wanton malice and unprovoked malignity of the deed. And it is now settled, certainly in this state, that he may be allowed, in addition, exemplary damages in the way of punishment or warning to the transgressor and others.

Now this opens a wide field for uncertain or speculative damages for matters not tangible or

susceptible of accurate estimation, but based upon principles and considerations different from those which determine the actual injuries as before described. These are such as lie patent, and require only a calculation of time lost, pain suffered, or the value of a permanently injured limb, or the like. But when the injury to the feelings, the insult, the mortification, the wounded pride, or, to sum up all in one word, the indignity, are pressed as grounds for pecuniary indemnity, superadded to the claim for punitive and exemplary damages, they evidently and necessarily require a consideration of all the facts in any way clearly and fairly connected with the trespass, and bearing upon the motives, provocations, and conduct of both parties in the controversy, which has culminated in an assault by one upon the other. How otherwise can a jury fairly estimate what should be awarded by way of punishment, or as a reasonable satisfaction for injured feelings? These damages, as our law now stands, are made up of injuries partly private and partly public in their nature. If evidence of this nature, admitted to enhance the actual damages to the person, may be given, why should not the same kind of evidence be given by way of mitigation of damages claimed on such grounds?

If the plaintiff restricts himself distinctly to the single claim for the actual damages to his person, and the direct, tangible results therefrom, and expressly waives all claim beyond, it would seem that the defendant should be limited to matters strictly in defence or justification of his act, as in other cases of trespass. But if, as in this case, he claims beyond this, for injured feelings and for punishment, the question arises (which is the main question made by the plaintiff), what is the limit of the evidence which may be admitted in mitigation or extenuation? It is not denied that some evidence of this nature is admissible. The precise question is whether it is to be confined to what transpired at the time of, or in immediate connection with the act. If a party claims damages not merely for the naked assault, but for his wounded feelings, and seeks to inflame them by showing that he had been publicly insulted by opprobrious language used with the evident intent to degrade him in the eyes of his fellow-citizens, may not the defendant be allowed to show that the complainant had himself been guilty of using like words, or by his conduct and by insults and provocations had really been the cause of the assault? The plaintiff may have been passive and silent at the moment of the assault, whilst the defendant was violent and denunciatory, and, if no facts can be shown beyond those transpiring at that meeting, the plaintiff would present a case, apparently calling for exemplary damages, whilst, if the whole truth was brought out, the defendant would appear the least in fault, so far as regards provocation.

And so, if the plaintiff claims for damages of this nature, for an assault, not by a personal enemy, but by those whose indignation had been aroused in matters of a general and public nature, may not all damages, beyond those actually suffered in his person, be modified or affected by evidence of his acts or declarations, calculated to arouse a just indignation and disgust? Why should the man who has intentionally and grossly outraged decency, or aroused indignation by his violation of common humanity, be allowed to recover for his injured feelings, and the public degradation to which he has been subjected? Or rather, why should not a jury be allowed to know all the facts, directly connected with the act, although not transpiring at the moment, and from them determine, whether any, and if any, what damages should be allowed beyond the actual injury to the person or property? If facts beyond the act are to be allowed to aggravate, why should not like facts be allowed to mitigate this class of damages? Where, for instance, a man had been guilty of frequent, indecent exposures of his person in public streets, accompanied by obscene language and gross insults to females, and had persisted in such a course, until a body of his townsmen, indignant and outraged, seized him and inflicted punishment, and carried him away and confined him for a day, or other like proceedings; and for this assault and battery and imprisonment an action is brought and a claim set up for recompense for injured feelings, indignity and for punitive damages. At the trial, he proves these acts,—rough handling, and degrading treatment, and personal imprisonment, and makes out a case of apparently inexcusable interference with his liberty and his person, and his sense of self-respect. The defendants cannot show that he did or said anything at the time of the arrest. But are they to be precluded from showing anything in mitigation of such a claim? The law is fully vindicated when it gives such a man his full, actual damages. When he asks for more, he opens a new ground for his opponent, who may well say,—you have no fair claim for damages on this ground, for your own conduct and language aroused the indignation which led to the acts complained of.

There is an instinct, or, if not quite that, a dictate of common sense, which it is neither wise, or hardly possible for the law to disregard,—that a man should not have pecuniary recompense for injured feelings or public degradation, when he has himself outraged the feelings of another, or so conducted as justly to excite public odium by open contempt of the decencies of life. The old legal requirement, that he that asks for redress "must come into court with clean hands," at once occurs to us. The law will protect the hand from actual violence upon it, although it may sadly need ablution, but beyond this will require "a show of hands" before it will adjudge damages for an alleged defilement.

The ruling of the judge, in this case, was peremptory and unqualified, that the evidence made out no legal defence, and that the verdict must be for the plaintiff "to the full extent of the damages sustained by the injuries to the plaintiff's person, and for detention."

If, after this ruling, the defendant had consented to a default, and the case had come before a judge to determine the damages, and the same claim for cumulative and exemplary damages had been made and pressed, would any judge have excluded, in the hearing before him, the evidence offered in this case? If he had, how could he determine the degrees of aggravation or extenuation, or come to any satisfactory conclusion on the matter of damages? As before said, the jury in this case were in the same con-

dition, after the ruling, as a judge would have been after default.

When we consider the nature and the grounds of this claim for exemplary or punitive damages, it is difficult to see why the evidence of provocation or mitigation, if allowed at all, should be restricted to the time of the overt act. What happened then may, and generally would, give a very partial and insufficient view of all the circumstances which in truth belong to the matter in question, and serve to aggravate or diminish the injury to the feelings, or the malice of the act. Every one sees this at a glance.

We think it will be found, on a careful examination of the cases, that where this rule, limiting the evidence to what transpired at the moment, has been enforced, the claim was to diminish the damages for the actual corporeal injury and loss of time, and no distinction was made between those and exemplary damages. The reasoning to be found in this class of cases is very similar to that found in the decisions at common law, where the degree of guilt is lessened, and a different and distinct offence, of a less degree, is found by reason of proof of sudden and provoked anger; as where a homicide is reduced from murder to manslaughter. But, in such trials, these matters of provocation and sudden anger are introduced, not to mitigate a crime found or admitted, but are strictly matters in defence, and modify or give character to the act, in determining what crime has been in fact committed, and are used for that purpose. In such case it becomes important to know whether the act was the result of sudden passion, or whether there had been time for the passions to cool. But in a civil action for trespass the liability of the party for actual damages does not depend upon the intent or state of mind of the trespasser. He may be liable, if his act was unlawful, although he did not intend to injure any one, and had no anger or ill-will towards the party whose person or property was affected by his illegal act. It is not the motive, or the feelings under which the legal wrong is committed, which determines the character of the act, or the amount of the actual damages resulting from it. It cannot be excused, if legally unjustified, by proof of sudden passion, or the absence of malice or wrong intent.

The analogy, if any, between civil actions and criminal prosecutions, is to be found in the determination of the extent of punishment in the one, and the amount of exemplary or cumulative damages in the other. Although in the trial of criminal cases the evidence may be limited to the time of the occurrence, yet every judge is aware that, in fixing upon the sentence to be awarded, he does not hesitate to hear evidence or statements as to facts and acts and declarations made or done anterior to such time—in order to ascertain, as well as he can, the mitigating or aggravating circumstances connected with the offence. So, in determining the amount of damages in a civil suit, beyond the tangible, as before explained—when there is no question as to the fact that a trespass has been committed, a limitation of the examination into what transpired at the moment would seem to fall far short of what reason and common sense would prescribe. It seems hardly just to require any tribunal to act and determine such questions, and to award damages in the nature of punishment, and withhold from it all knowledge of the facts which may fairly be said to give the moral character of the act, and the actual guilt of the respondent.

We are aware that great care must be taken to confine the examination to such matters as are clearly and directly connected with the acts, or give color or character to it. Mere evidence of general bad character,—or unpopularity, or of acts or declarations of ancient date, or not clearly and really part and parcel of the matter in question, must be excluded. But time is not of the essence of the principle, but fairly established direct connection, as cause or effect. It is impossible to accurately define the limits, so as to reach every case. But there can be no greater difficulty in the application of this than of many other rules of law.

In the case at bar, the evidence was limited to the transactions of the day on which the assault was committed, and very evidently was of matters connected directly with the acts done. If it had been excluded, after the evidence on the part of the plaintiff had been heard, how could the jury have properly or understandingly determined what punitive damages should be given in vindication of outraged law, or for the indignity and injury to the feelings? They had a right to know, and the defendants had a right to place before them the true relations of the parties, and to show how far the act was wanton, malicious, vindictive, or unprovoked, or how far extenuated by the conduct, declarations, or provocations of the complaining party.

On the whole, after a full consideration of the case, and the cases, we think that the rulings of the judge were not erroneous, but give the rules on this subject which are practical, and in accordance with common sense and the general principles of the law.

Exceptions overruled.

Cutting, Dickerson, Barrows, and Tapley, JJ., concurred.

(Note by Editors American Law Register.)

This is one of that class of cases, where there existed at the time it occurred, and even at the present time, to some extent, there exists, a degree of unfairness, in judgment and opinion, which renders it extremely difficult to say anything which will be kindly received, or candidly weighed. But we feel compelled to say, that the facts of this case, placed beside the verdict of $6.46, certainly do indicate a substantial failure of the suit, if not of justice. The jury must have treated the evidence given in mitigation of damages, as a substantial justification of the assault, battery, and false imprisonment, with all its incidents of humiliation and outrage. The verdict very clearly manifests an opinion in the mind of the court and jury, that the plaintiff was more in fault than the defendants—in short, that the conduct of the plaintiff was reprehensible, and that of the defendants excusable—and that, therefore, it was proper for the court to place its stigma upon the action. This is not said, indeed, in so many words, but it is fairly implied.

This is a result to which courts of justice should never come, except in the most unquestionable cases, where there is no pretence of

anything more than a nominal breach of the law, and where the action is therefore clearly vexatious. And it is especially unbecoming for courts to fall into this view, out of respect for, or sympathy with, or dread of, an intensified partisan public opinion. It is the duty and the business of courts, to hold the scales of justice evenly and firmly between the most embittered partisans of contending factions in the state, when such become suitors before them.

We might better have no courts, than to have them echo the varying surges of an ever-changing and baseless public sentiment. In a case like the present, it would be far better to have the court instruct the jury, in so many words, that the plaintiff's disregard of the common courtesies and decencies of life, justified the defendants in inflicting such punishment upon him, as would teach him not to repeat the offence, and to conduct with more circumspection in the future, than to have left the case to the jury, in such a slipshod way, as to bring about the same result exactly, but without any technical violation of the rules of law. And we must say, it seems to us that the charge of the court below, and the opinion of the full court, although clearly not so intended, must have operated in that direction.

Possibly some may claim, that upon a nice construction, there was no error in law, and all agree that courts cannot be expected always to control the waywardness or the prejudices of juries. But this is generally urged, where courts desire to throw their own responsibility upon the irresponsibility of the jury. And it seems to us the charge to the jury, in this case, afforded the jury an excellent opportunity to punish the plaintiff, and at the same time to compliment the defendants for taking the plaintiff in hand, and applying the rules of Lynch law to him, in the summary mode they did. This was all very well, provided it were the business of courts to administer Lynch law, or to moderate the strictness of the existing law. But as that is not the fact, but the contrary, it seems a peculiarly unfortunate distinction which the court have attempted to make in this case, between compensatory and exemplary damages, and to allow of the mitigation of one and not of the other.

If there be, in fact, any such distinction in the law, it should certainly be differently stated from what it seems to have been in the trial of this case, or it would be very likely to be misapplied by the jury, as it certainly was here.

The error in the charge seems to be in treating "the injury to the plaintiff's feelings, the indignity and the public exposure," as forming no part of the *actual damages* in the action. Nothing could be further from the truth; since these things not only constitute a portion of the actual damages, but the principal portion. It is scarcely possible to conceive any proposition more unjust or unreasonable—not to say absurd—than to suppose that in a transaction like that, through which the plaintiff was dragged by the defendants, that the actual "injury to his person and his detention" embraced all for which he was entitled to compensation under the head of actual damages.

It is not probable, indeed, that the plaintiff was of that delicate organization, that he would be likely to suffer any irreparable damage merely from the insult and indignity, for if so, he could not have said what he did. But there are many persons who, from similar treatment, might have been ruined for life; and the rule of law is the same in all such cases. And there is no case, except the present, so far as we have noticed, which attempts to discriminate between corporeal and external injuries, and those which affect the sensibilities. These latter, are those which form the chief ingredient of damages in this class of actions. If these latter are to be excluded from consideration, or justified by *public sentiment*, there might better come an end of all pretence of the administration of justice. It is the direct and sure mode of encouraging a resort to force for remedy and redress.

We know that some very able writers, and among them the late Professor Greenleaf (2 Evidence, s. 253 and n. *et seq.*), contend for the rule, that in no case are exemplary or punitive damages to be given, but that in all cases they should be confined to making *compensation* to the plaintiff. But no writer, or judge, to our knowledge, has ever before attempted to limit the actual damages to which the plaintiff was in all cases entitled *by way of compensation*, to loss of time and injury to the person, in cases of trespass and false imprisonment. Mr. Sedgwick (Dam. 665, n. 1), says, that "all *rules*, or rather definite principles of damages in civil actions, must be referred either to compensation or punishment." No one, we suppose, would for a moment deny that the plaintiff, in an action of this character, is entitled to recover damages for "the injury to his feelings, the indignity, and the public exposure;" and it would seem to be equally improbable, that any one should hold, that such damages were in the nature of punishment to the defendant, and only recoverable under that head.

The truth unquestionably is, in the present case, that the court have mistaken the application of their own rule, and thus, as it seems to us, have presented the whole case in a most unfortunate aspect—very much in that of an excuse and an apology, if not a full justification of Lynch law, than which nothing could have been further from its intention.

We hope no one will be simple enough to suppose that we feel any other than the most unqualified disgust and contempt for such sentiments as were expressed by the plaintiff, on the occurrence of the most disgraceful, as well as the most unfortunate event, which has ever occurred in our past history. The only possible mode of accounting for such folly, in speech, is that folly on one side naturally leads to counter folly upon the other, and despotic public opinion naturally provokes foolish words. But we trust it is not needful to inform the profession, and especially the courts, in this country, that the high privilege of free speech is not created, or maintained, for the exclusive, or the chief benefit of wise and discreet men. They will do very well without any such protection. But it is intended for the protection of every class of the most ranting fools, and the vilest blackguards, and the most infamous blasphemers, except as they are liable to some restraint by the firm and wise administrators of the criminal and civil law of the land. These are the only men who require protection

at the hands of the administrators of the law; and when we allow ourselves to be cheated with the delusion that the simple and degraded, or the offensive and coarse-grained, do not deserve the highest protection of the law, we approach a point of timeserving, which is but one degree removed from actual corruption, of which we already begin to hear charges, in some quarters, but we trust wholly without foundation.

We regret, in this case, the affirmation of the principles of the charge in the court below by a court of such high character, although done in a mode, and for reasons, which show the high dignity and purity of the tribunal, and do also show, as it appears to us, that an unfortunate misapplication of the very principle upon which the case is decided, must have occurred in the court below. We know the learning and ability of the court from which the decision comes; and we are always proud to welcome its members among our most esteemed friends; but we cannot shut our eyes to the fact, that the substantial damages in this action were blinked out of sight, and disregarded by the jury, upon grounds which are flagrantly in violation of the leading doctrine of the decision, viz., that actual and compensatory damages cannot be denied upon any ground of provocation short of an actual justification of the assault, battery, and false imprisonment, which was not attempted in this action.

The testimony offered and received in mitigation of damages in this action, might well enough have been received, upon the question of punitive or exemplary damages, but it was not of a very satisfactory character even upon that head. The only portion of it which seems to afford any just apology for the flagrant misconduct of the defendants, was the stupid blunder of the provost-marshal in directing the plaintiff to be "detained." This had some fair tendency to vindicate the good faith of the defendants in arresting the plaintiff. But what can be said of their after-conduct in forcibly carrying the plaintiff three miles, and dragging him before a town meeting, and sentencing him to take an oath to support the Constitution of the United States? They might, with the same propriety, have sentenced him to be hanged, or burned to death. And if they had done so and carried the sentence into execution, and been indicted for murder, they should, so far as we can see, upon the principle of this decision, have been permitted to show the plaintiff's provoking bravado talk in mitigation of punishment—or possibly to reduce the verdict from murder to manslaughter.

It does not seem to us that such evidence should have been permitted to go to the jury, upon either the first or second point made in the plaintiff's request to charge, and not upon the third, except so far as it tended to show that the defendants acted under a misapprehension of the law, and in good faith; for punitive or exemplary damages are not given with any reference to the plaintiff's misconduct, within the limits of the law, but solely on account of the malice and wanton misconduct of the defendants, and to admonish them, and others in like case, not to repeat the misconduct. Is there anything in the plaintiff's folly and bravado, naturally calculated to induce the defendants to believe they had any legal right to deal with him in the manner they did? Was not then the charge of the court, and the result of the trial, directly calculated to encourage such abuses of right, such flagrant breaches of the law? Was not the conduct of the defendants malicious, wanton, and intentionally insulting and abusive? Can there be more than one opinion on these subjects? And was not the charge in the court below, the verdict of the jury, and the overruling of the exceptions, all calculated to encourage such conduct, and to discourage such actions? If so, can we fairly expect parties suffering like indignities to appeal to the tribunals for redress? And will not the result of such experiences, in courts of justice, sooner or later, end in a resort to force in all such cases? These are plain questions, but they are fundamental to the very existence of free states and private liberty, both of person and speech. I. F. R.

—*American Law Register.*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR AUGUST, SEPTEMBER AND OCTOBER, 1869.

(Continued from Vol. VI. page 54.)

Action—*See* Money Had and Received.

Administration—*See* Executor and Administrator.

Admiralty.

A vessel with her anchor down, but not actually holden by and under the control of it, is "under way," within the meaning of the Admiralty Regulations, 1858.—*The Esk*, L. R. 2 A. & E. 350.

See Collision.

Agent—*See* Principal and Agent.

Assignees—*See* Costs, 1.

Assignment—*See* Equitable Assignment.

Assumpsit—*See* Money Had and Received.

Bailment—*See* Negligence, 1.

Bank—*See* Bankruptcy, 4; Negligence, 1.

Bankruptcy.

1. In July, A. voluntarily gave to B., his principal creditor, a bill of sale of all his goods, &c, with a power to enter and sell if, &c. In October, B. entered and sold the goods for less than his debt. In November, A. was adjudged a bankrupt on his own petition, and the creditors' assignee sued B. for the conversion of said goods, and also for money had and received. *Held*, that as there could be no relation to an act of bankruptcy previous to the bankrupt's own petition, neither count could be maintained.—*Marks* v. *Feldman*, L. R. 4 Q. B. 481.

2. J. deposited bills of lading for cotton and coffee with G., as collateral security for G.'s acceptances. J. afterwards authorized G. to sell the cotton and coffee and receive the pro-

ceeds. Later, J. became bankrupt. The cotton was sold before J.'s bankruptcy; the coffee did not arrive till afterwards, and after the acceptances had been paid, but was then sold, J. being in G.'s debt. *Held*, a case of mutual credits. (Kelly, C. B., *dissentiente* as to the coffee.) (Judgment of Common Pleas *reversed*. Exch. Ch.)—*Astley* v. *Gurney*, L. R. 4 C. P. 714.

3. A. sued B., C., and D. on a joint debt. The defendants pleaded a set-off. (12 & 13 Vict. c. 106, s. 171.) A. replied that before plea D. had become bankrupt. *Held*, a good replication.—*New Quebrada Co.* v. *Carr*, L. R. 4 C. P. 651.

4. Although a bankrupt's shares in a bank have been declared forfeited by the bank for a debt due to it, the bank may prove for the full amount of its debt; and the forfeiture, if questioned, must be tried in an independent proceeding.—*Ex parte Rippon*, L. R. 4 Ch. 639.

5. After a company was ordered to be wound up, some of its debts were bought by contributories for much less than the sums actually due. *Held*, that the full amount of the debts might be proved for.—*In re Humber Ironworks Co.*, L. R. 8 Eq. 122.

See Costs, 1; Fixture, 1; Interest.

Benefit Society.

Among rules, mostly those of a Friendly Society, was this: "Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council shall be entitled to the sum of 15*s.* per week." An officer of the society testified that members would not be allowed to go where there were strikes, if they could prevent them, and that money would be granted to send them another way. *Held* (*per* Cockburn, C.J., & Mellor, J.; Hannen & Hayes, JJ., *dissentientibus*), that, taking the rules with the evidence, one of the purposes of this society was to support strikes, and was illegal as in restraint of trade—*Farrer* v. *Close*, L. R. 4 Q. B. 602.

Bill of Lading—*See* Sale.

Bills and Notes.

In an action against M., as an indorser of a bill of Exchange, brought by a *bona fide* holder for value, the jury was instructed that "if the defendant's signature was obtained upon a fraudulent representation that it was a guarantee, and the defendant signed it without knowing that it was a bill, and under the belief that it was a guarantee, and if he was not guilty of any negligence in so signing the paper, he was entitled to the verdict."—*Held*, that the direction was right.—*Foster* v. *MacKinnon*, L. R. 4 C. P. 704.

See Cheque.

Cheque.

1. If there are not effects in a bank on which a cheque is drawn sufficient for its payment when presented, and it is presented at the time when the drawer has reason to expect it will be, and he has no ground to expect that it will be paid, he is not entitled to notice of dishonor; although at the time of drawing it, but before the agreed time of presentment, there were sufficient effects.—*Carew* v. *Duckworth*, L. R. 4 Ex. 313.

2. June 4, A. drew a cheque on H. & Co. at Falmouth, in favor of defendant, who transferred it to the plaintiffs, his bankers at Truro, on the 5th. On the same day the plaintiffs sent the cheque to B. & Co., their agents in London, who received and presented it on the 6th to H. & Co.'s agents in London. On the same day H. & Co.'s agents forwarded the cheque to H. & Co., who received it on the 7th. On that day H. & Co.'s agents in London failed. On the 7th B. & Co. wrote to H. & Co. to return the cheque or to pay it. On the 8th H. & Co. wrote, declining to do either, and stopped payment on the 9th. The plaintiffs gave defendant notice of dishonor on the 9th. *Held*, that defendant was liable. The cheque was presented, and notice of dishonor was given, in due time.—*Prideaux* v. *Criddle*, L. R. 4 Q. B. 455.

See Principal and Agent.

Club—*See* Company, 2.

Codicil.

At a testator's death there was found what purported to be a codicil to his last will and testament, which referred only to the dispositions of a deed of gift. Before the deed he had executed several wills, none of which were found. *Held*, that the codicil should be admitted to proof.—*Black* v. *Jobling*, L. R. 1 P. & D. 685.

See Will, 2.

Collision.

Two steamships, the Q. and the R., each under the charge of a compulsory pilot, came into collision in the Thames. The Q. was solely to blame, and after the collision she rendered no assistance to the R., and showed no excuse for having failed to do so. *Held*, that the owners of the Q. were liable, although she had a pilot on board. The master was "the person in charge" of the Q. at the time under 25 & 26 Vic. c. 63, s. 33.—*The Queen*, L. R. 2 A. & E. 364.

Digest of English Law Reports.

Company.

1. A company, incorporated for the working of collieries, contracted with A. for the erection of a pumping engine and machinery for use in the colliery, and paid him part of the price. *Held*, that the company could maintain an action against A. for breach of the contract, though the contract was not under seal. (Exch. Ch.)—*South of Ireland Colliery Co.* v. *Waddle*, L. R. 4 C. P. 617; s. c. L. R. 3 C. P. 463; 3 Am. L. Rev. 268.

2. A mutual insurance association was formed, but not incorporated. By their rules the members were to severally, not jointly or in partnership, each in proportion to the amount of his own insurance, insure the ships of the other members. The affairs of the association were to be managed by a committee; and all moneys of the association were to be kept in their name at a banker's. *Held*, that outside creditors could only look to those who gave the orders, not to the association of the members as such.—*In re London Marine Insurance Association*, L. R. 8 Eq. 176.

See Bankruptcy, 4, 5; Benefit Society; Interest.

Concealment—*See* Insurance, 2.

Condition—*See* Insurance, 3; Landlord and Tenant.

Conflict of Laws—*See* Foreign Government; Domicile; Insurance; Stamp, 2; Will, 2.

Conspiracy—*See* Parliament.

Construction of Instruments—*See* Benefit Society; Deed; Equitable Assignment; Guarantee; Insurance, 2–4; Legacy, 1, 2; Statute; Trust; Will, 5.

Contract.

A party caused an agreement for the purchase of a warehouse to be made out in the name of his nephew, paid part of the purchase-money, and induced his nephew to sign on the faith of his representation that he would give him the warehouse, and pay the balance due. He then died testate, without having provided for such payment. *Held*, that it must be made out of his assets.—*Skidmore* v. *Bradford*, L. R. 8 Eq. 134.

See Company; Foreign Government; Covenant; Guarantee; Insurance; Novation; Pleading; Specific Performance; Stamp, 1.

Contributory—*See* Bankruptcy, 5.

Corporation—*See* Company, 1.

Costs.

1. The court will not require security for costs to be given by a plaintiff who sues as the assignee of a bankrupt for the benefit of the estate, although he is in insolvent circumstances.—*Denston* v. *Ashton*, L. R. 4 Q. B. 590.

2. Nor by two executors, one of whom is out of the jurisdiction, and the other insolvent. *Sykes* v. *Sykes*, L. R. 4 C. P. 645.

Covenant.

1. A., a brewer, sold land to B., who covenanted with him that A. his heirs and assigns should have the exclusive right of supplying beer to any public house to be erected on the land, but A. did not covenant to supply it. C. bought part of the land with notice of the covenant, built a public house, and supplied it with his own beer. A filed a bill to restrain C., alleging that A. had always been ready to supply good beer at a fair price. A demurrer was overruled. The covenant was not void.—*Catt* v. *Tourle*, L. R. 4 Ch. 654.

2. A lessee having covenanted to use the demised premises for the sale of spirits, the lessor covenanted not to build or keep any house for such sale within half a mile of said premises. *Held*, that an assignee of the lease could not sue the lessor on his covenant.—*Thomas* v. *Hayward*, L. R. 4 Ex. 311.

See Landlord and Tenant.

Curtesy.

A husband may have curtesy in an equitable fee given to the separate use of his wife.—*Appleton* v. *Rowley*, L. R. 8 Eq. 139.

Custom—*See* Mortgage, 3.

Damages—*See* Vendor and Purchaser of Real Estate.

Debtor and Creditor—*See* Novation.

Deed.

The grant of a warren of conies in B., "and all that lodge thereupon built, called," &c., which warren extends itself "in and over the wastes of B.," with a reservation of rent "for" the same, does not pass an estate in the soil of said wastes.—*Earl Beauchamp* v. *Winn*, L. R. 4 Ch. 562.

See Trust.

Demand—*See* Cheque, 2.

Desertion.

A wife having reason to believe that her husband had been guilty of adultery, separated from him, and instituted a suit for divorce, in which she failed. The husband never thereafter sought to resume cohabitation, nor did the wife, and it was not resumed. *Held*, that these facts did not constitute desertion by the husband.—*Fitzgerald* v. *Fitzgerald*, L. R. 1 P. & D. 694.

Deviation—*See* Insurance, 2.

Devise—*See* Will, 5.

Discovery.

A defendant, in a suit for infringement of a patent, in order to prove that there was no novelty in the plaintiff's patent, interrogated the plaintiff as to the inventions described in the specifications of previous patents, and asked him to show in what respect they differed from his. The plaintiff declined to answer, on the ground that these were not questions of fact, and that they related to the plaintiff's case. *Held*, that he must answer. A defendant may ask any questions tending to destroy the plaintiff's claim.

An exception bad in part, is not necessarily wholly bad.—*Hoffman* v. *Postill*, L. R. 4 Ch. 673.

Divorce—*See* Desertion.

Domicile.

When a domicile of choice is abandoned, the domicile of origin revives and continues until a second domicile of choice is acquired.—*Udny* v. *Udny*, L. R. 1 H. L. Sc. 441.

Election—*See* Perpetuity, 2.

Equitable Assignment.

A., having wheat ex vessel M., in the hands of a factor for sale, borrowed 500*l.* from B., and gave B. his acceptance at two months, describing the consideration as "value received in wheat ex M.;" and it was orally agreed to renew the bill from time to time until A. should receive from the factor the proceeds of the wheat. *Held*, that this did not amount to an equitable assignment of the fund in the hands of the factor.—*Field* v. *Megaw*, L. R. 4 C. P. 660.

Equitable Conversion—*See* Tenancy in Common.

Equitable Plea—*See* Pleading.

Equity Pleading and Practice—*See* Discovery; Specific Performance, 1.

Evidence—*See* Stamp, 2.

Exception—*See* Discovery.

Executor and Administrator—*See* Costs, 2; Money Had and Received; Stamp, 2; Will, 3.

Fixture.

1. A lessee of rolling mills made an equitable mortgage of the same, and afterwards became bankrupt. On a case stated between the mortgagees and the assignees, *held*, (1) That duplicate iron rods, which had been fitted to the machine and used, were fixtures, and passed to the mortgagees; (2) so were straightening plates embedded in the floor; (3) but rolls which had not yet been fitted to the machine; and (4) weighing machines which were placed in bricked holes, the weighing plate being level with the ground, but which were not fixed to the brickwork, were not fixtures, and passed to the assignees.—*In re Richards*, L. R. 4 Ch. 630.

2. A steam-engine and boiler, annexed to the freehold for the more convenient use of them, and not to improve the inheritance, and capable of being removed without any appreciable damage to the freehold, pass under a mortgage of the freehold (Exch. Ch.)—*Climie* v. *Wood*, L. R. 4 Ex. 328; s. c. L. R. 3 Ex. 257; 3 Am. L. Rev. 271.

Foreign Government.

By a convention between the government of Peru and a Peruvian company, all guano to be shipped from Peru to England and Ireland was to be consigned to the company, which was to sell the same, and hold the net proceeds at the disposal of said government. Said government afterwards negotiated a loan in England, hypothecating for the same all the guano to be shipped as above, and agreeing that out of the proceeds of said guano a certain sum should be applied half-yearly in redemption of the loan bonds. Bondholders sued to enforce the application of the proceeds in England to redemption as agreed. The Peruvian government was made a party, but did not appear. *Held*, that the court had no jurisdiction.

The loan was governed by the law of Peru.

The above redemption was to be made by paying off at par bonds to be drawn by lot when the bonds should be above par, and by purchasing at the market price when the bonds should be at or below par. The government cancelled bonds which had been given up to it in exchange for bonds of a subsequent loan, to the stipulated amount at the price at which the subsequent loan was contracted, being a higher price than that of the bonds of the first loan, as quoted on the London Stock Exchange. *Held*, a compliance with the contract.—*Smith* v. *Weguelin*, L. R. 8 Eq. 199.

Forfeiture—*See* Landlord and Tenant.

Fraud—*See* Bills and Notes; Contract; Fraudulent Conveyance; Wife's Equity.

Fraudulent Conveyance.

A debtor, at a time when he knew that a writ of sequestration would be issued against him, mortgaged all his property to trustees for five of his creditors. By the deed the debtor was to remain in possession of his property for six months, but not so as to let in any execution or sequestration, and in case any such should be enforced, his possession was to cease. A writ of sequestration was

subsequently issued. *Held*, that the deed was not void under 13 Eliz. c. 5, as against the sequestrators.—*Alton* v. *Harrison*, L. R. 4 Ch. 622.

Frauds, Statute of—*See* Specific Performance, 1.

Friendly Society—*See* Benefit Society.

Guarantee.

1. The defendant gave to the plaintiff, a cattle dealer, this guarantee: "50*l.* I, J. M., of, &c., will be answerable for 50*l.* sterling that W. Y., of, &c., butcher, may buy of Mr. J. H., of, &c." It appeared from the circumstances under which the guarantee was given, that the parties contemplated a continuing supply of stock to W. Y. in his trade as a butcher. *Held*, a continuing guarantee to the extent of 50*l.*—*Heffield* v. *Meadows*, L. R. 4 C. P. 595.

2. The following: "In consideration of the Union Bank agreeing to advance and advancing to R. & Co. any sum or sums of money they may require during the next eighteen months, not exceeding in the whole 1000*l.*, we hereby jointly and severally guarantee the payment of any such sum as may be owing to the bank at the expiration of the said period of eighteen months;" is a continuing guarantee.—*Laurie* v. *Scholefield*, L. R. 4 C. P. 622.

Heir and Personal Representative—*See* Tenancy in Common.

Husband and Wife—*See* Curtesy; Desertion; Money Had and Received; Revocation of Will; Wife's Equity.

Illegal Contract—*See* Covenant, 1.

Injunction—*See* Covenant, 1.

Insolvency—*See* Costs; Interest.

Insurance.

1. Trustees under a will agreed to advance to A a sum to which his wife would be entitled at twenty-one, if B. would be surety for repayment of the sum if A.'s wife should die before that age. B. consented, on condition that the wife's life was insured. The sum was advanced, and A. effected an insurance in his wife's name on her own life. *Held*, that as A. was interested in the policy, and his name was not inserted therein, it was void under 14 Geo. III. c. 48, s. 2.—*Evans* v. *Bignold*, L. R. 4 Q. B. 622.

2. Plaintiff obtained insurance from defendant on bone-ash on board his vessel "cleared from A. and port or ports of loading in the province of B.," to port, &c., knowing that the vessel was to load at L., a geographical port in the province of B., but not informing the defendant of the fact. Had the latter known it, he would have charged a higher premium; but underwriters did not then know that L. was a port of loading. Vessels loading at L. had to return to and to clear from A. The vessel and cargo were lost in so returning. *Held*, (1) that L. was a port of loading within the policy; (2) that there was no concealment; (3) that there was no deviation. *Harrower* v. *Hutchinson*, L. R. 4 Q. B. 523.

3. Defendants in London insured the plaintiffs upon gold "in the ship called the *Dutchman*," for a certain voyage, against, *inter alia*, perils of the seas, with the usual suing and laboring clause. The ship was at the time English, but afterwards became a Russian ship, without the knowledge of either plaintiffs or defendants. The ship was wrecked in Turkish waters, and the gold was taken in charge by the Russian consul. By the judgment of his court, which had jurisdiction, the gold was ordered to pay a much larger sum, by way of contribution, than it would have been had the ship remained English. An appeal might have been, but was not, taken, and the sum was paid in order to get back the gold. In an action to recover a part of the sum so paid from the insurers, *held*, (1) that as there was no express warranty that the ship should continue English, none could be implied; (2) that whether the Russian judgment was according to law or not, the compulsory payment was a direct consequence of the wreck, and so was a loss by perils of the seas; (3) that the plaintiffs were not bound to have appealed.—*Dent* v. *Smith*, L. R. 4 Q. B. 414.

4. Insurers agreed that if the plaintiff should be compelled to pay "as damages" for running down any other ship any sum, &c., they would repay him a certain proportion of such sum. The policy also contained the usual suing and laboring clause. Plaintiff successfully defended the action against him for running down another ship. *Held*, that he could not recover the costs of defence from the insurers (Exch. Ch.)—*Xenos* v. *Fox*, L. R. 4 C. P. 665; s. c. L. R. 3 C. P. 630; 3 Am. L. Rev. 701.

See Company, 2; Stamp, 1.

Interest.

In the winding up of an insolvent company, dividends are to be paid on the debts as they stand at the date of the winding up. Subsequent interest is to be allowed only in case of a surplus, when dividends will be applied first to interest then due, and then to principal.—*Warrant Finance Co.'s Case*, L. R. 4 Ch. 643.

See Legacy, 3; Stamp, 2.

Interrogatory—*See* Discovery.

REVIEWS.

Harrison's Common Law Procedure Act, 2nd Ed. Copp, Clark & Co., Toronto.

Part IV. has been issued, containing sections 205 to 280, inclusive, of the Common Law Procedure Act. This brings the author into the heaviest part of his work, but does not we imagine, give us as yet half of the entire work. We anxiously look for its early completion, which will give us the index, that most necessary key to every book, and especially to a work of Practice as compendious and complete as this. We doubt not that the energy and experience of the learned gentleman who has so successfully brought us so far, will as efficiently conclude his most admirable work. Few who have not had experience, can know the delays and difficulties in passing a work of this kind through the press, and the time necessarily taken up is vastly increased by the number of cases referred to, as these have to be carefully verified.

It is wonderful to notice the careless way in which counsel cite cases, giving the person whose duty it is to verify the cases endless annoyance, at a great waste of time to him and delay in publication. In the work before us we can vouch that this verification is being done with the greatest exactitude, regardless of time and trouble.

The American Law Review. January, 1870. Boston: Little, Brown & Co. Subscription price $5 per annun. Quarterly.

The second number of Vol. iv. of this well-conducted quarterly is before us. The articles are, I. Proximate and Remote Cause—rather metaphysical than practical: II. Warranty of Seaworthiness in Time Policies: III. The Law of Insanity: IV. Lord Campbell's Lives of Lyndhurst and Brougham.

The article on the Law of Insanity, which, were it not for our limited space, we should like to reproduce for our readers, is thus introduced:—

"When Lord Hale laid down his famous rule of law that some kinds of insanity furnish no excuse for crime, he unquestionably reflected the most advanced opinions on the subject, both of lawyers and physicians. For more than one hundred years its correctness passed unchallenged; and no person on trial for a criminal act was acquitted on the ground of insanity, whose disease had not entirely deprived him of reason and reduced him to the condition of an idiot or a wild beast. Science could enter no protest against the rule, for the materials necessary to give such a protest any support were not in existence. Medical men may sometimes have had a vague apprehension that all was not right, when a convict proclaimed the grossest delusions from the gibbet; but they were never properly shocked by the barbarity of such scenes. Coincident with the signal reforms in the treatment of the insane and the increased attention to the study of insanity, which marked the close of the last century, the suspicion began to be entertained by lawyers that the rule excluded from its protection many classes of the insane that were justly entitled to it. But they never, to this day, have decided that insanity, in whatever shape it may appear, is necessarily an excuse for crime. The advanced step which they took was to regard certain forms of what is now called partial insanity, as having this legal effect; but precisely which they were, was a point not so easily settled. The exact question was, what mark, quality, or attribute of insanity should make it an adequate excuse for crime, and this led to definition of insanity and tests of responsibility. At one time, the question seemed to be satisfactorily answered by saying that it was a delusion, without which the patient conld not be considered so insane as to be irresponsible for any criminal act. It was not too long, however, before it began to be suspected that this was giving too large a sweep to the excuse, and then its application was restricted by various limitations. From time to time other tests were offered which, though intended to meet a present exigency, were fondly believed to cover every possible requirement. One was that if the patient retained his knowledge of right and wrong, he continued to be accountable for his acts. Another was that if he knew the act to be contrary to the laws of God and man, he could not avail himself of the plea of insanity. Again, it was said that if he showed contrivance and forethought in regard to the criminal act, he was sufficiently sane to be accountable therefor. It would be a waste of time to mention all the rules of law on this subject, which the ingenuity of courts has devised, and which, one after another have been found too narrow for general application. But they will continue to be offered, and new ones no better to be made, so long as false theories of insanity prevail in the community, and the indubitable facts of science are treated as matters of speculation and fancy; and no improvement will be made, so long as it is believed in the high places of justice that the effect of

insanity on the thoughts and feelings, the appetites and impulses, may be thoroughly discerned by a hasty examination and the slightest acquaintance with the mental phenomena."

The writer then proceeds to give the following passage from the charge of a learned American judge (Edmonds), to the jury, in the case of *The People* v. *Kleim*, as illustrative of what he argues is the more enlightened doctrine of the present day:—

"To establish a defence on the ground of insanity, it must be clearly proved that at the time of committing the act, the party accused was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong. If some controlling disease was in truth the acting power within him, which he could not resist, or if he had not sufficient use of his reason to control the passions which prompted the act complained of, he is not responsible. In order then to constitute a crime, a man must have memory and intelligence to know that the act he is about to commit is wrong; to remember and understand that if he commit the act he will be subject to punishment; and reason and will to enable him to compare and choose between the supposed advantage or gratification to be obtained by the criminal act, and the immunity from punishment which he will secure by abstaining from it. If, on the other hand, he has not intelligence and capacity enough to have a criminal intent and purpose, and if his moral or intellectual powers are so deficient that he has not sufficient will, conscience, or controlling mental disease, his intellectual power is for the time obliterated, he is not a responsible moral agent and is not a punishable for criminal acts."

We notice in the *Bench & Bar*, an article on the same subject, which will also repay perusal. The subject has an ephemeral interest, over and above that attaching to it from its intrinsic importance, from a divorce case in the English courts lately brought prominently before the public. Whilst, however, admitting that humanity requires that all care should be exercised for the protection of those suffering under the dispensations of Providence, the public must be guarded against the abuse to which the *humane* doctrine is open.

Of the specimen of petty spite in high places, exhibited by Lord Campbell in his Lives of Lyndhurst and Brougham, we have almost had enough. But, as a final shot at the author, and as an interesting sketch of the salient points of character of the great men now dead, that Lord Campbell unsuccessfully attempted to malign in his own peculiar style, the article in this review is most interesting, and we hope on a future occasion to find room for it.

We have the usual Digest of English and American Cases, Book Notices, A List of Law Books published in England and America since October, 1869, and a summary of events.

We heartily commend this Review to our readers, and advise them to subscribe to it at once; the price is a mere nothing for the interesting and instructive matter always to be found in it.

The Albany Law Journal: Weekly. Weed, Parsons & Co., Publishers, Albany, N. Y. $5 00 per annum.

This is a new weekly Law Publication of much promise. It does not purport to be a collection of miscellaneous reports of cases, of which there are enough and to spare in the United States, but is more of a Magazine of matter interesting to the profession, culled from various sources, and containing leading articles on important topics. We have now received several numbers, and they evince good taste and much literary attainment.

A very interesting sketch of "Law and Lawyers in literature," by Mr. Irving Browne, runs through the numbers that have hitherto come to hand. With many of the incidents and extracts we are of course all more or less familiar, but many are new to the general reader, and may here be found collected and arranged in an accessible shape.

We notice also an address to law students by Hon. J. W. Edmonds, containing some excellent advice; the Administration of Justice, by the same author; on the Study of Forensic eloquence; Law of Arrest without Warrant, &c. We anticipate good success for this publication.

Bench and Bar. Chicago, January, 1870.

This number contains discussions as to whether the Law deals unfairly with Questions of Insanity; the Right of Arrest &c.

The American Law Register. Philadelphia.

The leading article is as to how the Good-will is to be dealt with in Partnerships. The usual selections of cases.