THE

MANITOBA LAW JOURNAL.

VOL. I. NOVEMBER, 1884. No. 11.

THE SALE OF MORTGAGED PREMISES.

THE distinction between realty and personalty, wholly artificial in its foundation, appears most marked when considered in relation to their respective incidents of pledge and sale. It certainly seems curious that the sale of hundreds of thousands of dollars' worth of wheat, railway stocks, and merchandize can be effectually made by delivery or by a mere memorandum, while the transfer of a trifling amount of land is always surrounded with considerable difficulties and technicalities. Similarly, property in stocks and bonds, or other things of a chattel nature, when hypothecated for advances, can, on default in repayment, be readily transferred to the purchaser, while the sale of mortgaged lands, under the like circumstances, can only be effected through prolonged and technical proceedings. To ask for the abolition of the legal distinction between realty and personalty, would be premature. But it would be in the interests of all parties if the remedies of the mortgagee of lands were rendered more expeditious.

The ordinary decree for foreclosure or sale allows six months for payment of the debt and redemption of the estate. This practically gives the mortgagor upwards of a year to redeem. This privilege, which arose out of the overflowing benevolence of courts of equity towards the

oppressed mortgagor, is one of which the parties entitled to redeem practically never avail themselves. Its sole effect is to obstruct the mortgagee, and thereby impair his security. The mode of proceeding under the power of sale or pursuant to Lord Cranworth's Act (23 and 24 Vict., c. 145) is far more expeditious, though not devoid of objections. The statute does not necessarily exonerate the purchaser's title from being impeached (Fisher on Mortgages, p, 501.) A title derived from a mortgagee exercising the power is seldom considered absolutely safe, notwithstanding the Act or any special conditions contained in the mortgage. Every conveyancer prefers to see the title brought down through a decree of the Court. Any reform, therefore, ought apparently to aim at consolidating the indefeasibility acquired through a decree with the more expeditious procedure under the power. The protection of the purchaser should be absolute, and such cases of hardship as *Latch* v *Furlong*, 12 Gr., 303, would be avoided. The time for redemption on suits for foreclosure or sale might be advantageously shortened from six months to one—ample time, when added to that allowed prior to decree, to enable the mortgagor to redeem if he wish. But the cumbrous practice in dealing with subsequent incumbrancers and execution creditors would still remain as a source of delay. The exercise of the power of sale, with a collateral action of ejectment when necessary, affords the prime requisites of a prompt and inexpensive procedure. The sole disadvantage is the unsatisfactory title acquired by the purchaser. To remedy this, legislative action would be necessary. I would suggest that power be given to the mortgagee vendor or to the purchaser, on application before the Referee of Titles, proper notice being given to all parties interested, to have the sale confirmed. The Referee, on being satisfied that the terms of the statute or the power in the mortgage had been sufficiently complied with, could order the confirmation of the sale and render the title indefeasible. This power might be properly given by way of amendment to the Quieting Titles Act.

The present state of the law impairs the security of the mortgagee, and the elements of risk and unwieldiness in the security must be compensated by a higher rate of interest. The slight amendment indicated above would thus be advantageous to both parties to the mortgage as well as to the purchaser.

J. D. C.

CODIFICATION.

The venue for the trial of this great issue is at present the State of New York. The combatants are mainly David Dudley Field with a few assistants on the one side and the majority of the bar with James G. Carter as their principal exponent on the other.

Mr. Field has devoted a large portion of his life to the work of codification and his labors have been of much service in the advancement of the administration of law not only in New York, where he resides, but in many other States of the Union and we believe also in England and Ontario. The Judicature Act of 1873 abolished for ever, in England, the absurd opposition and conflict between the courts of law and equity, but twenty-five years before that date, namely on the first of July, 1848, the New York Code of Civil Procedure, the handiwork of Mr. Field, had become law, a code whose principal characteristic was the assimilation of law and equity, not only in regard to practice, but also with respect to the principles, upon which the law was administered. Simultaneously with the preparation of the Code of Civil Procedure Mr. Field produced a Civil Code and a Political Code. The

former of these has become law in the States of Dakota and California and the question now being debated is whether it s also to be adopted by New York.

Fresh from a perusal of the numerous and lengthy pamphlets that have recently issued from the New York press our opinion is that the combatants are not nearly so wide apart in their views upon the main question as they seem to think they are. Mr. Carter delivers himself in 116 pages which Mr. Field says " is divisible into five parts, corresponding to the five acts of a play; beginning with a vilification of codification in theory, followed by a vilification of all codes in practice; then a vilification of the civil code now proposed in particular; next a vilification of the courts and the legislature; and lastily a vilification of me". This is provoked by Mr. Carter's assertion that Mr. Field is actuated by improper motives, that his " cherished passion for the enactment of civil code bearing his image and superscription has, it may be feared, survived his concern for the merits of the performance or its effect upon the public welfare." When writers leave their subject and discuss the personal peculiarities or eccentricities of their opponents, all hope of agreement vanishes. Let an outsider indicate wherein they disagree.

Mr. Carter (33) says: " The *law*, therefore, in respect to *future and unknown* cases is, and must be, *unknown*; and if it be not, and cannot be, known, it cannot be codified. Codication, however, consists in enacting rules, and such rules must, as we have seen, from their very nature, cover future and unknown cases; and so far as it covers future and unknown cases it is no law that deserves the name." Mr. Carter feels that this is, apparently, an argument against all statute law and proceeds to distinguish the cases. He says :—" In statute law, when limited to its proper subjects, and kept within its appropriate boundaries, there is no attempt to make rules for *unknown* conditions of fact. These conditions are, indeed, to arise in the future, but they are, nevertheless *known*, or which is the same thing, *contem-*

plated as known, for they are, as it were, created by the statute, and particularly specified in it. If a case arise presenting those conditions, it is disposed of by a statute which was passed in full contemplation of such a state of things. If any case arise which does not present the specified conditions, it does not fall within the operation of the statute, and is not decided by the statute." This distinction, if it exists at all, is without its proper complement—a difference. If there is a statute which says that the assignee of a mortgage may plead that he is a purchaser for value without notice, will the provision be useful if in a statute, but bad if in a code? Is there any objection to a clause, either in a statute or a code, declaring that a married woman has power to convey her real estate without her husband's concurrence? But why distinguish between a code and a statute at all? A code *is* a statute, or it has no force. Mr. Carter truly says—if a case happens not contemplated by the statute, the statute will not apply to it, and a code being a statute the rule applies to a code. There is, therefore, no force whatever in this objection.

There is a sense, however, in which Mr. Carter is right. His pamphlet is based upon the idea that all law is to be found in the new code; that certain rules are to be promulgated, and that there is thenceforward to be no more judge-made law; that answers are to be provided for all unthought-of conumdrums. Mr. Carter is right in his opposition only because his idea of a code is entirely erroneous. He is right in closing the door against a ravening wolf but he may have slammed it in the face of an angel. He has never stopped to inspect the object.

Mr. Fowler states the issue in this way: "The party opposed to codification simply adhere to the old position that truth is too many sided to be shackled; the party of codification to the old position, that certain fundamental propositions of law may be so formulated as to afford great aid to the arrangement and discussion of the propositions not formulated" (39). The question then seems to be, can

a very large number of legal propositions be so formulated as to afford great aid to the arrangement and discussion of the propositions not formulated? In other words, are there a sufficient number of points, definitely settled or ripe for settlement, to make it worth while to gather them together out of the mass of unsettled law, and to print them by themselves? If there are but a few points let them alone and let them accumulate; but if there are many, let us by all means have them scheduled. The answer urged to this seemingly sensible proposition is that such a schedule would be of no use, that it would merely exhibit a lot of A, B, C, two-and-two-make-four propositions that no one would ever look at. This argument only goes to the expense of preparing the schedule—the work when finished would be unobjectionable, but not worth the money it would cost. Now Mr. Carter may be thoroughly familiar with all settled points in all departments of law, maritime, mercantile and criminal, the law of real property, promises and torts, but we humbly confess our ignorance of some hundreds, if not thousands of them. We will go further and admit that our most cherished convictions upon settled points, have frequently been entirely disregarded by the latest case upon the point. For example we were brought up to believe that payment was not a sufficient part performance, of a contract respecting real estate, to take it out of the Statute of Frauds, and yet we find learned judges in England telling us that this may require reconsideration.

If we were the only practitioners who have not all the settled principles at their finger ends it would make very little difference to the community, but we find that, when in argument we assume the unimpeachability of certain propositions, the foundations are once more attacked and we are obliged to prove again their solidity. The text books say that under the statute of 27 Eliz. a voluntary deed is void against a subsequent purchaser, for value, even with notice of the prior deed, but this was recently strenuously, and with much ingenuity, combatted by one of our leading counsel. In truth without a code every principle of law is open to

attack and although the attacks fail the labor of defence must be undergone. Now the advocates of codification desire that an examination should be made of our books and that, as far as possible, the threshed should be separated from the unthreshed grain, that the former should be placed by itself and the latter left for the threshers to thresh over again. We do not think that any lawyer should object to this. It would save him no end of labor.

We would not advocate, however, the immediate adoption of a complete code. One branch of the law might be taken up and then another. In this way each would secure greater attention and all would be better done. The criminal law will no doubt be very largely codified at the next session of Parliament. The law of bills and notes has been practically codified in England and the statute should be made the basis of a code for Canada. The law of evidence is peculiarly well adapted for the work of the codifier, as shewn by Stephen's Digest of Evidence. The law of partnership and other subjects have been reduced to system by various recent writers and would follow in due course.

It is often objected that, if the development of the law passes from the judges to the legislators, it will constantly be the subject of crude and ill-digested amendment. To obviate this we would suggest that it should be duty of the judges in appeal to make suggestions from time to time, as cases come before them, upon the advisability of, or necessity for, amendments. In this way the code would be from time to time improved and would run no risk of being impaired.

HOW TO ARGUE A BAD CASE.

BY GEO. M. DAVIS, ESQ., OF LOUISVILLE.

IN arguing a bad case before the judge, the first thing for the sagacious practitioner to do, is to get as far away from the merits of the case as possible. With this idea you must make your real case of secondary importance, or further off even than that, if possible. Plant yourself at once, therefore, upon some broad principle, and endeavor to allure the other side into grappling with you upon it. Rise above the mere case of your Mr. Jones, and make the country at large stand as your imperiled client. In other words, the first thing to do, if possible, is, with a look of profundity, and voice of rotundity, to raise a "constitutional point."

Now there is nothing so pleasing to the ordinary *nisi prius* judge as to have raised, in his court, deep problems of constitutional law. When you rise, with a copy of Coolley, Story and other constitutional authorities before you, and, for purposes of greater impression, the fifty pound volume of the United States Revised Statutes, containing the Federal Constitution (for the bigger the book the better, in constitutional arguments), you will perceive the judge at once undergo a marked change. If he has, from Democratic tendencies, or from the heat of summer, taken off his coat or drawn his boots, you will see him carefully put them on, and, bracing himself back as an "upright judge," sit with a thoughtful air, conscious that there now hangs upon him the destiny of the country and of the future unborn. You may perhaps perceive during the argument none of the usual signs of weariness, but rather that expression of fortitude and death which one might imagine Chief Justice Marshall's countenance to have exhibited during the argument of the Dartmouth College case by Daniel Webster.

There is nothing better in a bad case than to announce with emotional intensity that the effort of the opposing counsel would, if permitted to be successful, result in a decomposition of "vested rights;" or that they would ruthlessly impair the "solemn obligation of contracts;" or that they are permeated with "*ex post facto*" malignity.

Magistrates' courts, I have observed, are peculiarly susceptible to the seductive influence of constitutional law.

Nor, in these fundamental ramifications, should you confine yourself alone to the constitution of your particular State. You should "broaden yourself out" and take in the constitution of the Union; including the recent amendments, which, under a "broad-minded" construction, you may contend, with a fair hope of being allowed to proceed, to mean almost anything that your necessities require. Nay, your genius, if capable of still greater daring, may soar back to "*Magna Charta*" itself, and disport awhile amid reminiscences of "Runnymede," "King John," and the "Powerful Barons," who so often serve for padding in the powerful efforts of our locally great.

When, however, you feel that you can no longer sustain flight in the rarefied atmosphere of the lofty altitudes of constitutional law, be sure, in your downward descent, that you alight upon the "Statutes."

Now, in the great body of statutory law, it will be marvelous indeed if you cannot find something that will give you hope and comfort. Remember, in the first place, that all the statutes of England prior to the "fourth year of James I." are good as new here in Kentucky. Remember, too, that all the statutes of Virginia "prior to 1792" are also legal tender. Remember further, that all the statutes that fill the tremendous volumes of the "United States at Large," are of potency and that the great body of our own laws, as amended and improved by the constantly augmenting wisdom of succeeding legislative intelligences, has created a mass of profound statutory law, some of which will strength-

en almost any bad case that may be imagined. There are many sections of our code that can, by a little ingenious construction, be converted into bulwarks behind which a bad case may rest in apparent safety. I remember, a few days ago, when an injunction was sued out to prevent a Kentucky corporation (the Knights of Honor) from emigrating from the state of Kentucky to Missouri, an ingenious friend suggested to me, as counsel for the proposed emigrant, a statutory argument, my failure to use which possibly led to the perpetuation of the injunction. He called attention to sec. 688 of the code, which "abolishes the writ of *ne exeat*," and be said: "How can this corporation be prevented from going out of the State, when the writ of '*ne exeat*' has been abolished by solemn statute?"

If, however, you cannot, by ingenious and subtle transfiguration of the statutes, manage to anchor your canoe in the rapids, the next best thing is to fall back upon your reserve learning, and to make disclosure of what my Lord Coke calls "The Amiable and Admirable Secrets of the Common Law."

The current scientific theory of this day is that of "evolution," and one of the leading tenets of evolution is, that mankind, in its progress from barbarism to civilization, passes through many degrees of morals; so that, at one time in its career a thing will be considered right, which at later time, will be declared wrong; very much as the clothes of a child are ridiculed as unfit when he comes to be a man.

Whatever case you may have, therefore, and however bad it may seem now, it is pretty certain that it would have fitted the ideas of right in some one stage of the progress of the evolution of England from its barbaric state to its present condition. The fact is, that a bad case is somewhat like Lord Palmerston's famous definition of "dirt." He said that dirt was simply "matter out of place." So a bad case is simply a case out of time. In old times, we know that murder was rather approved as a fine art in England; and we know that batteries and trespasses were by no means as

reprehensible as now. Embezzlements are still cherished by the common law as no crimes. You have, therefore, only to search back through the various strata of the English common law to that one to which your case properly belongs; and you will generally have little difficulty in finding precedents somewhere in the line that fit and justify it entirely. For example, the case, bad at this time, was probably a good case in the time of Coke; and, therefore, Coke is your authority. If your case be very bad you may have to go as far back as Bracton, or even to the Year Books. But the further back you go the more learned it sounds.

And it is to be said in favor of this common law mode of presenting a bad case, that nothing is more pleasing to the judge than to hear arguments, and to rest his opinions upon old common law points. An opinion of a modern judge, so full of the old common law authorities that you can almost blow the dust off it, is looked upon by its author with peculiar pride; for he knows that it is sure to be complimented as "able and exhaustive" by succeeding lawyers who may have occasion to cite it as an authority in their favor.

Let us assume, however, that you have searched, the heights of the constitution and the depths of the statutes and the varying strata of the common law, and found no comfort there. Under such circumstances, it may pay you, like many yersons who have committed dubious acts in England, to take a little trip abroad. In other words, you should stray over into the domain of the "civil law." You may, thereupon, descant learnedly upon the "Code of Justinian" or the "Code Napoleon," and exhibit traces of a mind too broad for this hemisphere. You will find that a little dab of civil law, especially in Latin, will sometimes cause the judge to come down without further debate.

A large amount of this peculiar Latin may be found ready in Judge Story's book on Bailments.

If, however, all of these successive resources that I have named, prove fruitless, you will be driven to another resort,

viz.: the Kentucky Reports. And here let me warn you not to be downcast or disheartened at this stage; nor should you yield to the gloomy apprehension, that because you have found the law against you everywhere else you will find it against you there. By beating the "Bushes" you may expect to scare up much unexpected law.

Of course, if a case is found in your favor there, it generally ends your troubles; for it will be followed by all the courts in the State, except sometimes by the one that rendered it.

There is also a very valuable magazine of unknown learning in those manuscript opinions marked "not to be reported." I have known some desperate cases to be won by the citation, from memory, by our older lawyers, of manuscript opinions, which, however, they always assure us younger members, were "burned up in the appellate clerk's office fire in 1865."

An ingenious member of the bar, it is said, has with great advantage invented the idea of saying to the judge below, that he has, besides reading the opinion, had a more or less confidential talk with the judge who wrote it, in which the judge told him that the opinion was meant to go much further than on its face it seems to go; and our friend sometimes accompanies this with an intimation, that if the judge below, does not regard the additional light thrown upon the opinion by the confidential communication, the chances are he will have occasion to meet the most dreadful of all things to a *nisi prius* judge, a reversal of his opinion on an intimated appeal.

If you find, after a careful exploration of Barbour's Digest, that the Kentucky law also is silent when you invoke it, the next thing left you is to attack that myriad-minded monster, the "United States Digest." Sit yourself down therefore to this work of digestion, in that hopeful spirit in which the sick and hungry Sancho Panza contemplated an "Olla podrida."

"Quoth Sancho, that great dish which I see smoking yonder I take to be an olla-podrida; and amidst the diversity of things therein contained, I may surely light upon something both wholesome and toothsome."

It is the boast of our American people that, owing to our very great diversity of soil and climate, we are able to show well-nigh every product of nature, from the tropical fruits of Florida, Texas and the Pacific Coast, to the hardy pines of frigid Maine. But while America may be proud of her diversity of products in other directions, her greatest praise for variety of production is certainly in the line of law. If a vote were put upon any conceivable point, to the reports of the thirty-eight States, rarely indeed would it be "unanimously carried." It has been poetically said that when Nero died "one" hand strewed flowers upon his tomb; and no matter how bad your case may be, you may rest assured that you can lay upon its tomb the tribute of some precedent in its favor, from the United States Digest.

Let us suppose, however, that you have gone through all these processes of enlightenment, and have bombarded the court with the various legal artilleries I have named. Let us suppose your case so bad that you can develop nothing in the constitution or the statutes, or the decisions to support you. Still do not succumb. Your case is a hard one. But all is not yet lost. There is one last resort for the despairing attorney. There is one faint light which his dying eyes may see. It may not amount to much. It may prove illusive. But it is the duty of the lawyer to try all legal means. As a last resort therefore, my friends, and only in that dreadful extremity, fall back upon what is known as the "argument of the principle" and the "merits of the case."

In that emergency, you may proceed to give, possibly from your own personal knowledge, a vivid biographical sketch of the moral perfections of your client; and perhaps likewise a converse picture of the mental and moral obliquities of his opponent. Pay that compliment to the credibility of your witnesses which they have always deserved, but

have perhaps never before received. Denounce the "technicalities" of the opposing law. Appeal to that higher plane of the profession, in which the judge, overlooking mere technical precedents, rises into abstract ethics, and considers the case upon "high points and general principles." Indulge the sensibilities of the race. Bring the calm light of the emotions into play, to assist the logic of the court. Paint the beneficent effects of the decision in your favor. Depict the fearful consequences of a decision against you. And wind up with an inspiring burst of professional fervor, or by a pathetic appeal, in a minor key.

If, however, in spite of all these laudable legal efforts, the judge below is obdurate, and the decision is against your unhappy client, still, my brother, do not yield wholly to despair. As in the death of a good man comes his brightest hope, so in the loss of a bad case comes its best opportunity. Remember there is organized, in the jurisprudence of every State, a series of superior tribunals, "created for the express purpose," as Judge Emmons once said, "of reversing the lower courts." Remember, as you lie rolling over in the dust of the lower arena, that there still stands a higher tribunal, whose doors are open to the defeated and the beaten, and to cases adjudged "bad," and to which the successful can never appeal.

At the threshold of the Appellate Courts the history of a "bad case" naturally ends; for, there under the requirement of even-handed justice, all cases must stand alike.

WINNIPEG LEGAL CLUB.

WE are glad to notice that this club has again commenced operations. We regard the exercises engaged in by the club as the very best training for success at the bar. They are well calculated not only to dispel the timidity which, if allowed to take deep root, will mar the usefulness of the finest intellect, and form a considerable subtraction from success, but also to cultivate and develop the ready wit, and to supply a fund for quick retort, without which many a case will inevitably be lost. We have no fear that the members of such clubs will, as is so frequently asserted, become captious and hypercritical in their arguments or bumptious and offensive in their manner. We believe that the refining influence of such clubs extends both to the intellect and the manner; that the tone and standard insensibly adopted is almost always that of the most cultivated member and sometimes reaches even a higher plane. All that young men, as a rule, require for their education in polite demeanour is the presence of a proper ideal during action—extended, of course, over a period sufficiently long to closely associate the one with the other, in other words to form a habit. We believe that the meetings of the Winnipeg Legal Club will do much to tone up the minds and, if necessary, tone down the manners, of the aspirants for legal honors, and we strongly recommend all those who are bent upon making a determined effort to succeed at the bar to avail themselves of the advantages of the club. The officers for the present season are:—President, W. E. Perdue; Vice-President, A. E. McPhillips; Secretary-Treasurer, R. W. Bradshaw; Executive Committee, Messrs. Wade, Davis, Haney, Whiteman, Wemyss and Wilson.

FLOGGING AT THE GAOL.

WAIVING the constitutional question, no one doubts that in order to justify the corporal castigation of a recaptured prisoner, there must be some written law somewhere. Granting that the Legislative Assembly has power to impose the lash as a part of prison discipline, and that it has power to delegate to the sheriff, or the Lieutenant-Governor-in-Council the right to frame rules under which it is to be applied, there does not appear to be either statute, order-in-council, or rule which assumes to permit whipping of prisoners. Under Con. Stat. Man. c. 7, ss. 53-57, rules may be made for the maintenance of order, the duties of the gaoler and turnkeys, and with regard to all matters necessary for the proper security and the due ordering of the gaol. Under this statute rules have been made and approved of by the Lieutenant-Governor-in-Council. Those of them which relate to the penalty for attempted escapes or to the infliction of punishment for any offence, are as follows :—

18. The punishments allowed in the gaol for breaches of discipline shall be :—

(No. 1.) The hard bed, with sufficient covering for the season of the year, for an indefinite period.

(No. 2.) Bread and water diet for a period of not more than five consecutive days.

(No. 3.) Dark cell, and ball and chain.

(No. 4.) Chained to the floor.

21. Prisoners attempting to escape and thereby endangering their lives will be subject, *under the statutes*, to a further term of imprisonment.

It will be seen that flogging has not been sanctioned as a punishment for any offence, and that the penalty for an attempted escape is a further term of imprisonment. This further term of imprisonment must be awarded after trial, and the law has provided the tribunal. An attempted escape is a misdemeanor; and one accused must be tried and condemned, for this, as for all other crimes. No power is given to the gaoler, or even the attorney-general, to convict without information, evidence, or the presence of the prisoner.