The Legal News.

VOL. I. AUGUST 24, 1878. No. 34.

MIDDLEMISS v. *HOTEL DIEU.*

The judgment of the Court of Queen's Bench at Montreal, in the case of *The Hotel Dieu of Montreal*, Appellant, and *Middlemiss*, Respondent, rendered on the 22nd of December last (LEGAL NEWS, p. 51), has been confirmed by the Judicial Committee of the Privy Council (13 July, 1878). The question was as to the right of the appellants to a commutation fine claimed from the respondent, Middlemiss, on certain property in the fief St. Augustin, by reason of his having obtained this property from the Crown in exchange for other property. The defence was that after the Crown acquired the property, it paid the indemnity due under the law in consideration of the extinction of all seigniorial rights; that these rights were then finally extinguished, and could not be revived by any sale or exchange that the Crown might thereafter make. The plaintiffs (the Hotel Dieu) replied that the indemnity paid represented only that indemnity which was payable by all *mains mortes* when they acquired immoveable property; that the tenure was only suspended, and when the property passed out of the hands of the Government the seigniorial rights revived. The Superior Court sustained the plaintiff's pretensions. In appeal this decision was reversed, Judges Monk and Tessier dissenting, and the judgment of the majority has now been affirmed by the Judicial Committee of the Privy Council. Their lordships hold that under the law of real estate as it was introduced into Canada, and as it existed here at the time of the transactions referred to, the acquisition by the Crown of lands held from a Seignior as part of his fief, extinguished absolutely and for ever all feudal rights in such lands, and gave the Seignior a mere right to an indemnity of one fifth of the price. The law being thus defined, their lordships further decided that the indemnity paid by the Government in 1860 was in fact the indemnity payable on the final extinction of feudal rights, and that the plaintiffs were entitled to nothing more.

The case has been very thoroughly and earnestly discussed, and their lordships compliment counsel on the great learning and ability with which it has been argued on both sides. It may be added that the proceedings before the Judicial Committee have been expeditious, the final decision being rendered within seven months after the judgment in our Court of Appeal.

THE SCOTTISH BAR.

There are many who lament what appears to them to be a great falling off in the learning, dignity, and greatness of the English bar. Goldwin Smith, in an address delivered before Convocation of McGill University, recognizing the fact, ascribed it in some measure to the overshadowing influence of the solicitor branch of the profession, which renders success at the bar next to impossible unless the aspirant is favored with a relative who enjoys a good business as an attorney. An article which we copied in our last issue from the *London Week* took a similar view. A like decay in the bar of Scotland has also been deplored by some of its members, but Professor Lorimer comes to the defence of his associates, and, in a letter addressed to the *Scotsman*, stoutly resists the imputation that the bar is not equal now to what it was in what are regarded as its palmy days. At the same time he wishes the bar not to restrict itself to too narrow a field of activity. The letter is as follows:—

1 BRUNTSFIELD CRESCENT,
JULY 17, 1878.

"SIR:—An addition to the bar of nine members in eight days, which has just taken place, is a social phenomenon too important to pass without notice in your columns. Nor is this all. The whole number for the year, I am told, is expected to be fourteen—the average for many years past having been eight. I do not profess to explain a manifestation of vitality so unequivocal in a body the decay of which was supposed, by many, to be a fact as incontrovertible as that of the Ottoman Empire. There is one explanation, however, which I can foresee will be given of it—not quite unwillingly, I fear, by those to whom, in its palmy days, it was an object of envy—I can at once put aside. The bar, they will say, has become democratic—it can no longer lay claim to the exceptional

advantages either in the culture or social position of its members, which it owed to its exclusiveness, and hence the increase in its members. The gain in quantity has been purchased at the sacrifice of those special qualities to which, in former times, so much value was attached. Now I can state, emphatically, as a matter of personal knowledge, that such an explanation would be wholly at variance with the truth. Whether we adopt intellectual or social tests, whether we take learning or refinement as our measure of value, the bar never received, during the long period I have known it, more valuable accessions to its ranks, than in the young gentlemen who have joined it at present, and during the last few years. So thoroughly, indeed, am I persuaded of this fact, that, with all the respect which I feel for the rapidly thinning ranks of my seniors, and with all the natural clinging which I have to those who are of my own age, or my immediate juniors, I do not hesitate to state it as my opinion that much of the best blood and brains and culture at the bar will be found amongst the men under ten years' standing. But if all this be true, even those of your readers who hear it gladly, may not, unnaturally, shake their heads when a brilliant future is predicted for the bar. The practice of the Court of Session they will say is falling off; the number of judgeships and sheriffships is being diminished; the office of Lord Advocate is in danger of being shorn of its political importance, and that of Lord Clerk Register is threatened with abolition, or, what is pretty much the same, with being transferred to London. What, then, are all those gifted and accomplished young fellows to do? What a prodigious waste of talent and energy must be going on in the Parliament House, and how many of those men whom you now regard as so promising, if no change for the better should occur in their prospects, must run utterly to seed. It is sadly too true; and the fact, I think, points clearly to the necessity of the bar vindicating for itself a wider field of activity than it has hitherto enjoyed, or than can now possibly be furnished to it by the practice of the law. The bar, meaning thereby the highest branch of the legal profession, must develop in this country, as it has done elsewhere, a political and official, as well as a legal side, and our university teaching must be so expanded and adjusted as to prepare a class of specialists for this new sphere. To explain how this is effected in continental countries would involve an unjustifiable encroachment on your space. All that I can do for the present is to call the attention of your readers to a series of papers in the *Journal of Jurisprudence*, in which this is being done very fully, by my friend and colleague, Professor Mackay; and to the first article in the last number of that periodical, which is devoted to the subject. In urging the adoption of the course which I have here indicated, it will be seen from the information contained in Professor Mackay's articles that the writer, far from proposing a novelty, is only suggesting that this country should do what the rest of the civilized world has done already.

I am, etc., J. LORIMER."

INCIDENTS OF ENGLISH BAR PRACTICE.

The practice of the law in England is commonly supposed to be characterized by the most profound respect and decorum on the part of the bar towards the bench, while the members of the latter are presumed to live in an atmosphere too elevated and dignified to be affected by human infirmity or foible. A brace of incidents which we find in a single issue of an English journal (Liverpool *Post*, Aug. 2), are somewhat at variance with such preconceptions. The first is headed "A Scene in Court," and is as follows:

"During the hearing of the Herne Bay Waterworks petition in the Court of Chancery, London, on Wednesday, a scene occurred between Vice-Chancellor Malins and Mr. Glasse, Q.C., the leading counsel of the court. The Vice-Chancellor having stated that the case had better stand over till the November sittings, Mr. Glasse remarked on the inadequacy of the court to deal with the business.—The Vice-Chancellor: That is a very improper remark for you, as the leading counsel of the court, to make.—Mr. Glasse: The public will judge.—The Vice-Chancellor: Your remarks are of an infamous description. I wonder you have the audacity to make them.—Mr. Glasse (who spoke with suppressed excitement): I, standing here, will not condescend to tell your lordship what I think of you."

And the other relates to a gentleman who became famous as counsel during the second Tichborne trial:

"Mr. Justice Hawkins seems to have developed a singular passion for military costumes. At the Derby Assizes, the high sheriff appeared in court in ordinary morning dress, to the great disappointment of Mr. Justice Hawkins, who insisted that this gentleman should attend in uniform or other official attire. The high sheriff ventured to point out to his lordship that as he was not a deputy lieutenant of the county, and held none of those positions which carry with them the perquisite of a uniform, he could not very well conform to the judge's request. His lordship still refused to forego the gratification of seeing the high sheriff in uniform, and threatened that if his commands were not obeyed, he would next day fine that official £500. In vain did the high sheriff protest that in appearing in morning dress he was only following the practice of his predecessors. Mr. Justice Hawkins was inexorable, and the next morning, no doubt to his lordship's very great delight—the high sheriff presented himself in —the uniform of a captain of the Derbyshire Volunteers! Whether his lordship, who appears to be in these matters as punctilious as a Chinese Mandarin, will insist on uniform the next time he presides at the Derby Assizes remains to be seen."

And a third incident, which is depicted in the following little sketch from the London *World*, does not place English court proceedings in a more dignified light;

"Divisional Court.—*Cor.* KELLY, L.C.B., and MELLOR, J.

"Eleven A. M.—At the conclusion of the *ex parte* motions.

"Mr. A.—Might I mention to your Lordship a case of *Snooks* v. *Jones*, which stands fifth on your Lordship's list? [The learned gentleman was here interrupted by another learned counsel, who made some communication to him.] I beg your Lordship's pardon; I find that it is now useless to apply to your Lordship. [Prepares to sit down.] The L.C.B.—What is the name of your case, Mr. A.—My Lord, the case is that of *Snooks* v. *Jones*; but—Mr. J. Mellor. —Snooks against what? Mr. A.—Jones, my Lord. The L.C.B.—How do you spell it? Mr. A.—J-o-n-e-s, my Lord. But as I said before —The L.C.B.—One moment, pray. [Writes down the name.] Now will you have the goodness to tell us what the case is—what question is raised for the decision of this court, and in what form? Mr. A.—My Lord, I was just about to tell your Lordship!—The L.C.B. [with some warmth].—Never mind what you were about to tell me, sir. If learned counsel would not constantly attempt to evade the questions of the court, the business of the court would be transacted in a much more rapid and satisfactory manner, and there would be a great saving of the public time. Mr. A.—My Lord, I was not attempting to evade your Lordship's questions; but with the object of saving public time, I ventured to think—The L.C.B.—I must trouble you not to venture to think anything until you have told us the facts. When the court is in possession of *all* the facts, it will then, and not till then, be in a position to listen to any application which you may wish to make. In the meantime, I must ask you to have the goodness to raise your voice. Mr. A. [in stentorian tones]. —I do not wish to make any applica— The L. C. R.—You have not yet informed us for whom you appear. Mr. A.—For the plaintiff. But if your Lordship will bear with me one— The L. C. B.—Stop, pray; for the plaintiff, you say. Does any one appear for the defendant? Mr. A.—My learned friend, Mr. B. Mr. B.—I appear for the defendant, my Lord. I perhaps may be allowed to tell your Lordship— The L. C. B.—One at a time, please. Mr. A. is at present in possession of the Court; and I desire, in the first instance, to hear from him, if he will have the goodness to tell me, which he seems strangely reluctant to do, the facts, the whole facts, and nothing but the facts. [Mr. J. Mellor here left the court, and the facts, which were of an uninteresting and complicated nature, were gone into. Owing to the defective acoustic properties of the building, frequent repetition was necessary, and an hour and a half were thus consumed. Mr. J. Mellor returned.] The L. C. B.—Very well, you have explained the facts lucidly and clearly, and we shall now be most happy to hear the nature of your application. Mr. A.—My Lord, I have no application to make. (Laughter). The L. C. B.—I must really beg—nay, if necessary, I must insist—that there be no unseemly inter-

ruption to the business of this court. [To Mr. A.] You say you have no application to make. Will you have the goodness to tell me then, why you are taking up the time of the court? Mr. A.—My Lord, I was about to ask your Lordship to allow this case to stand over until to-morrow, with the consent, as I was informed, of my learned friend on the other side. As I was about to apply to your Lordship, I was told by my learned friend, who entered the court at that moment, that he had given no such consent, and I therefore desired to withdraw my application. The L. C. B. [after consultation with the officers of the court.] Of course, without the consent of the other side, we can make no such order. The case will retain its place on the list.

"The court then adjourned for luncheon."

It is fair, however, to suppose that these incidents are but as the spots on the sun, and do not detract from the general splendor and dignity of the English bench.

A GREAT CHANCELLOR.

[Continued from page 393.]

In 1820 occurred the trial of Queen Caroline, which forms one of the most disgraceful pages of English history. For his conduct in lending encouragement to this unfortunate proceeding, Eldon has been often and severely blamed, and, it must be admitted, with sufficient reason. He had in former years been a warm friend of the unhappy queen, dining often at her table, and acting in many things as her confidential adviser and supporter. But after the accession of George IV. to the regency, and his strenuous endeavors to bring about a judicial separation from Caroline, a change was gradually discernible in the attitude of the chancellor toward this unfortunate woman, which has been not unreasonably ascribed to his anxiety to retain the favor of his sovereign by yielding to his wishes in that behalf. Certainly, if, with his strong influence over the regent, and his extraordinary ascendency in the House of Lords, Eldon had put his face resolutely against the persecution of the queen, the disgraceful proceedings which followed might have been spared. Unfortunately for himself he chose to trim his sails to meet the royal favor, and yielded to the wishes of the king. Lord Liverpool accordingly introduced, with the approval of the ministry, his "Bill of Pains and Penalties against her Majesty," charging her with adulterous intercourse with her Italian servant. Even then, when the government was fairly embarked upon this perilous prosecution, the chancellor might well have saved himself the reproaches which were heaped upon him, had he maintained a discreet silence, declining, as he might well have done, to participate in the discussions leading to the hearing. But, with a strange fatuity, he did not scruple to ally himself openly with the supporters of the bill. Erskine having moved that the queen be furnished with a list of the witnesses against her, and having supported his motion with a manly speech, Eldon spoke warmly in opposition to the motion, thus denying to the queen the privilege to which the meanest subject would have been entitled upon an indictment. Erskine afterwards moved that, as the charge contained in the bill extended over several years and over many countries in Europe and Asia, the queen should, for the purpose of preparing her defence, be furnished with a specification of the times and places when and where the offence was charged to have been committed. This motion, also, was opposed by Eldon in a formal speech.

But during the entire course of the trial, in which the fervid eloquence of Denman and Brougham in defence of their client recalled the forensic splendors of the Hastings impeachment, Eldon's conduct as presiding officer of the lords and president of the court was deserving of the highest praise for the judicial dignity and absolute impartiality which it displayed. And it was not until the evidence and arguments were concluded, and the bill stood upon its second reading, that he again left the woolsack, assumed the role of partisan, and delivered a vigorous speech in support of the bill. The second reading was carried by a majority of only twenty-eight. This small majority, with a growing sentiment everywhere apparent in sympathy with the queen, should have warned the government against further proceedings; but, with a strange fatuity, they continued to press the bill to its third reading, Eldon again speaking in its support. The third reading was carried by a majority of only nine votes, and the ministry, conscious at last of the futility of further proceedings, moved that further con-

sideration of the bill be postponed six months; and it was subsequently withdrawn. Lord Eldon's connection with this miserable phase of English history must be dismissed without excuse, since it is utterly inexcusable.

In 1821 he was raised to an earldom by the king, whose cause he had served so well. The royal patent conferring the new honor recited that it was bestowed in consideration of the "distinguished ability and integrity which he had invariably evinced in administering the laws in his office of chancellor during the period of nineteen years." He took his seat in the House of Lords shortly afterwards as an earl, and was warmly greeted by his brother peers of all parties, with whom he was always a universal favorite.

He was much annoyed during this, the second, period of his chancellorship by the frequent complaints of delay in the business of his court, and he seems to have been exceedingly sensitive to criticism upon this point. These complaints seem to have increased as his term went on, and in 1811 they had become so frequent that he was reluctantly compelled to refer the subject to a select committee in the House of Lords, and a motion was made for a similar committee in the Commons. Jeremy Bentham, whose iconoclasm in all matters of law reform could ill brook the conservatism of Eldon, was especially bitter in his abuse of the chancellor because of the delays in his court. And the fifth volume of Bentham's published works contains a most bitter philippic directed against Eldon and his court because of the delays and expenses incident to chancery litigation. Indeed, Bentham seems to have hated him from first to last with the most malignant and unsparing hatred, and omitted no opportunity of giving expression to his spleen.

The press, too, lent itself to the propagation of absurd rumors concerning the chancellor's delays. It was asserted that many who had large sums of money due them, locked up in chancery, owing to the doubts and delays of the chancellor, actually died of poverty and a broken heart; and that their ghosts might be seen between midnight and cock-crow flitting around the accountant general's office. Equally absurd stories were invented of a cargo of ice having melted away, and a cargo of fruit having rotted away, while the chancellor was doubting what his judgment should be upon a motion for an injunction.

One Taylor, a member of the House of Commons, came to be known as especial guardian of litigants in chancery, and at each recurring session of Parliament, year after year, he introduced a resolution calling for an investigation of the delays in the Court of Chancery. How sorely these complaints vexed the chancellor is apparent from a letter of his written in 1812, a committee of the Commons being engaged in one of these investigations. He writes: "I have now sat in my court for about twelve months, an accused culprit, tried by the hostile part of my own bar, upon testimony wrung from my own officers, and without the common civility of even one question put by the committee to myself in such mode of communication as might have been in courtesy adopted. When I say that I know that I am, and that my officers and that my successors will be, degraded by all this, I say what I think I do know."

But while the chancellor was not wholly blameless for the great delay in the dispatch of business, the fault was more the fault of the system than of the judge who administered it. The country had outgrown the Court of Chancery. The court had still but two judges, the lord chancellor and the master of the rolls, just as there had been since the reign of Edward I., while its jurisdiction and its business had increased tenfold.

So great had become the complaints of the existing system that, in 1813, Lord Eldon procured the passage by Parliament of a bill for the appointment of a vice-chancellor, for the double purpose of relieving the Court of Chancery and the House of Lords, where appeals and writs of error had accumulated so that it was many years behind in its appellate judicial business. Campbell, with his accustomed sneer, remarks upon this measure: "I am sorry that the vice-chancellor's bill, which had become indispensable for Lord Eldon's own convenience, is the only instance of his doing anything for the improvement of our institutions."

But however little he may have done for the improvement of English institutions or English laws, he certainly dispatched an immense

amount of judicial business; and except when engaged in the Cabinet, he devoted himself with unremitting zeal to his judicial duties. Much of his business was in the hearing of interlocutory motions, but these practically had the effect in many cases of final decrees. After the Vice-Chancellor's Court was established, counsel were in the habit of bringing forward before Eldon motions in causes pending before the vice-chancellor for the purpose of getting his opinion, and thus saving the expense and delay of further proceedings. And counsel would frequently frame a bill for an injunction or a receiver for the purpose of bringing on a motion before the chancellor, and thus obtain his opinion upon the subject-matter of the dispute. So great was the respect of the bar for his opinions that his decisions upon these interlocutory motions were often taken as final and conclusive between the parties. And there hardly seems sufficient ground for the statement attributed by Brougham to certain wits of the time—that the chancellor's court was the court of *oyer sans terminer*, and the vice-chancellor's that of *terminer sans oyer*.

He continued to hold the great seals until the dissolution of Lord Liverpool's ministry, in 1827, when, owing to the illness of Liverpool, Mr. Canning was called to the head of the government, and all the anti-Catholic members of the Cabinet, including Eldon, tendered their resignations, which were at once accepted. He continued to sit in the Court of Chancery for a period of three weeks, disposing of causes that had been argued before him, and on May 1, 1827, he surrendered the seals to the king at Carlton House. He had held the office longer than any of his predecessors, the total duration of his chancellorship, including both terms, lacking but a few weeks of twenty-five years.

Lord Eldon passed from the court which he had so long adorned into private life with the good wishes and esteem of the entire bar. Indeed, from his first entry into the law he had been a favorite with both branches of the profession. And this continued during his occupancy of the woolsack, notwithstanding his somewhat miserly distribution of professional honors. One of the especial prerogatives of the English chancellors is that of rewarding merit at the bar by nominating deserving barristers to the honor of King's Counsel, a rank entitling the recipient to don the silk gown and sit within the bar. Eldon had himself obtained his promotion after only seven years' practice, while Campbell complains of his withholding from him the coveted silk after he had been twenty years at the bar, and for several years the leader of his circuit; and mentions other instances of still greater injustice. He was, too, severely blamed for withholding their well-earned professional advancement from Denman and Brougham, who had given mortal offence to George IV. by their spirited defence of Queen Caroline.

He was also much criticised for his inattention to the social duties of his station, and his neglect of the hospitalities usually extended to the profession by the chancellors. And, to one familiar with the rigid etiquette of the English bar in matters of this nature, it is not surprising that these charges assumed more serious importance than their cause would seem to demand. But despite his faults of omission in these minor details, he had so endeared himself to the entire profession that his surrender of the seals was universally regretted.

The limits of this paper will neither permit an extended review of his judicial career nor admit of an exhaustive analysis of his character as a judge. It is only proposed, therefore, to sketch in brief some of the leading characteristics of his judicial record. Nearly fifty closely-printed octavo volumes of reports contain the record of his decisions as an equity judge. Next to the profound knowledge amounting to a complete mastery of the science of equity, as well as of its practice and procedure, which is apparent upon every page of these reports, their most noticeable feature is the proneness of doubt which Eldon everywhere displays. In this respect he has become proverbial. Again and again he sums up a case in the most masterly and comprehensive review of the principles and precedents applicable to the questions involved, only to conclude with an expression of his doubts as to the correctness of his own views, and a desire for further and more mature consideration. In an opinion fairly luminous with its profound insight into the equitable principles which should govern the case, he would challenge the admiration of the entire bar who were listening, only to end with an expression of his doubts and a *curia*

advisari vult. And the remarkable feature of all was that he himself was the only person who doubted. Lyndhurst, who succeeded him, stated the case epigrammatically in a speech in Parliament in 1829, when, alluding to Eldon, he used these words: "It has been often said in the profession that no one ever doubted his decrees except the noble and learned lord himself." And the words were no unmeaning compliment, since it is said by Campbell that only two of his decisions were ever reversed by the House of Lords.

He himself was not insensible to his weakness, and in his "Anecdote Book," a sort of fragmentary autobiography in manuscript, which he wrote in his later years for the entertainment of his grandson, he thus excuses his faults of hesitation—and very satisfactorily, it must be confessed: "I always thought it better to allow myself to doubt before I had decided, than to expose myself to the misery, after I had decided, of doubting whether I had decided rightly and justly." And he seems to have guided himself by the advice of the celebrated French chancellor, D'Aguesseau, to his son: "My son," said the chancellor, "when you shall have read what I have read, seen what I have seen, and heard what I have heard, you will feel that if on any subject you know much, there may be also much that you do not know; and that something even of what you know may not, at the moment, be in your recollection; you will then, too, be sensible of the mischievous and often ruinous consequences of even a small error in a decision; and conscience, I trust, will then make you as doubtful, as timid, and consequently as dilatory, as I am accused of being."

He was, moreover, proverbially slow in the hearing of causes, encouraging rather than restricting argument, and willingly hearing all the counsel on either side, juniors as well as seniors, without restriction or hindrance. Upon this point, he says, in the case of *Ex parte* Pease, 1 Rose, 237: "I know a great deal of time is consumed in hearing arguments, but a great deal of justice is the result."

Three objects he seems to keep prominently in view in all his judicial decisions. These he states in his opinion in Attorney General v. Skinner's Company, 2 Russ. 437, as follows: "Looking back to my judicial conduct—I hope with no undue partiality or self-indulgence—I can never be deprived of the comfort I receive when I recollect that in great and important cases I have endeavored to sift all the principles and rules of law to the bottom, for the purpose of laying down in each new and important case as it arises something, in the first place, which may satisfy the parties that I have taken pains to do my duty; something, in the second place, which may inform those who, as counsel, are to take care of the interests of their clients, what the reasons are upon which I have proceeded, and may enable them to examine whether justice has been done; and, further, something which may contribute towards laying down a rule, so as to save those who may succeed to me in this great situation much of that labor which I have had to undergo by reason of cases having been not so determined, and by reason of a due exposition of the grounds of judgment not having been so stated."

Again, he says in his "Anecdote Book:" "I thought it my indispensable duty as a judge in equity to look into the whole record, and all the exhibits and proofs in cases, and not to consider myself as sufficiently informed by counsel. This I am sure was right." And he once narrated, with much satisfaction, that Lord Abergavenny had told him that he had compromised a suit because his attorney had told him there was a weak point in his case, which, though the opposing parties had not discovered it, "that old fellow" would be sure to find out if the case came before him.

His judicial style has been severely criticised, and his opinions are by no means models of rhetoric. His sentences are generally long, frequently involved, and his choice of terms is not always elegant when tested by literary standards. But it is to be remembered that his opinions, like those of most English judges, were always delivered extemporaneously, and that he rarely made use of the aid of notes. Unless in one or two cases which he decided by consent of the parties after he resigned the great seal, he never put pen to paper in preparing his opinions. It is to be remembered, too, that from the time when he began to fit himself for the bar he utterly relinquished literature, and while he did not, like Blackstone, bid farewell to his muse in atrocious verse, the

parting was none the less final and complete But it may well be doubted whether his complete abandonment of literature, even as a recreation, detracted in any degree from his transcendent ability as a judge. The span of life is too short, and the law is too jealous a mistress to permit one to attain the highest rank as a jurist, and acquire even a smattering of literary culture.

[To be continued.]

SOME HUMORS OF THE LAW.

We are not so young as we were when we commenced the publication of the *Albany Law Journal*, and ought to, and perhaps have, grown graver with our added years. And yet we think that a little intellectual disporting, especially in the dog days, is good for us and for our readers. If we keep ourselves and our patrons on the incessant mental strain necessary to the ordinary and habitual perusal of our columns, there would be no answering for the consequences. Therefore, we have been casting about for some legitimate legal object for the exercise of that graceful humor, for which, we think we may say without undue, or at least unusual, vanity, we are noted. But we must say that the law has been rather dull of late, somewhat destitute, in fact, of those funny cases which alleviated our youthful career. To be sure, there was the recent case in North Carolina (*State* v. *Neely*, 74 N. C. 425; 16 Alb. L. J. 382), where the jury found the negro guilty of an attempt to commit a rape, because he shouted to and ran after a white lady, although he did not say a word on the subject of rape, and the court sustained the verdict upon general theories of the tendency of the African beast to do what the jury thought he was going to do in this case. But, on reflection, we deemed that case rather too serious to be treated lightly, and we hope we have not said a word on the subject that can be construed otherwise than seriously. The last volume of the American Reports gives us a little timely relief. There we find several cases that will bear a little humorous treatment.

For instance, *Popham* v. *Cole*, 66 N. Y. 69; 23 Am. Rep. 22. The first paragraph of the syllabus is to the effect that, to entitle one to relief for alleged infringement of a trade-mark, the resemblance of the two marks must be so close as to amount to a false representation of the manufacture or proprietorship of the article. This is all well and serious. But in the next paragraph the reporter grows ambiguous. He continues: "The plaintiff put upon packages of lard the figure of a fat hog, with his name" —(the plaintiff's, probably, not the hog's)— "and the words 'prime leaf lard.' Defendant put upon packages of lard a globe with a small lean boar on top, above which was his name," —(it *must* have been the defendant's, not the boar's)—"and beneath it the words 'prime leaf lard.'" Otherwise the packages were quite dissimilar. This was held no infringement. Judge Allen, in whose amiable disposition was always a sly sense of fun, remarked: "The shape and general appearance of the pictured animals upon the two brands, and their position, the one upon a globe and the other without such a support; the one representing a small lank, and lean wild boar, and the other a large, fat and well-conditioned domestic animal, are so entirely dissimilar that the one can hardly be said to be an imitation of the other, and clearly not a fraudulent or deceptive imitation." Here was certainly a *world* of difference. But is it quite clear that, even with that distinguishing mark, the average buyer would note the difference in sex, amount of flesh and tameness? Right here, let us suggest to Mr. Cole that he would do much better to put his boar under rather than above the globe, for thus he might make a graceful reference to the ancient theories of the support of the world, and a symbolical allusion to the importance of the hog in commerce, which would be appreciated in Cincinnati, if nowhere else. But Mr. Cole was a lucky man compared to Mr. Crump, defendant in *Colman* v. *Crump*, the case of the "Bull's Head Mustard," in which Mr. Crump was restrained by the Supreme Court from putting a bull's head upon his packages of mustard, because the plaintiff had previously adopted it as his trade-mark, and although Mr. Crump's bulls were quite distinguishable from Mr. Colman's by a careful observer. Mr. Crump should have used a cow, and stood her on a hay-stack, and he would have been protected. But we must not say anything further on the latter case, for it is on appeal, and we would not wittingly influence

the opinion of the Court of Appeals. Our own impression is, however, in regard to *Popham* v. *Cole*, that the matter of sex would be as little observed in the commercial world as the sex of the swimmers who were observed by Charles Lamb. A lady called his attention complainingly to some boys bathing in some distant water. "Are those b-b-boys? said Lamb; "I thought they were g-g-girls."

We now pass to a case of gigantic importance—*Gott* v. *Pulsifer*, 122 Mass. 235; 23 Am. Rep. 322. This was an action to recover damages for a disrespectful article in a newspaper on the "Cardiff Giant." The plaintiff alleged that the giant was a great scientific curiosity and had been a source of profit to him as an exhibition;—we know that is true, for half Albany, including ourselves, paid to see it;—but that a sale of it had been defeated by the article in question, which called the giant a humbug, a sell and a fraud, and, worse than all a "monolith," stating that "the man who brought the colossal monolith to light confessed that it was a fraud." A verdict for the defendant was sustained. We have little doubt that this arose from the fact that the editor swore, as the report shows, that he designed the article as humorous. We don't believe in hurting an editor for writing anything that he can conscientiously swear he supposed was funny. Speaking of "colossal monoliths" reminds us of another recent case, singular, if not exactly humorous, and that is, the action in an English court for salvage of Cleopatra's Needle, abandoned at sea. The plaintiff in that case acquired a large fortune by the adjudication of the court, and all because his mother had taught him when a boy to pick up every pin and needle that came in his way. We would not make invidious distinctions, but really it seems to us that the Cardiff Giant, if not so ancient, is fully as curious and interesting a proof of the skill and ingenuity of man as Cleopatra's Needle. Besides, there is but one Cardiff Giant, and never will be another, it is safe to say; while of Cleopatra's Needles the world possesses, so to speak, a whole paper. But let us emphasize the point we wish to make—that the editor's humor was what saved him. How could a verdict ever be obtained against *Punch*, for instance?

Again, the case of *Sterling* v. *Drake*, 29 Ohio, 457; 23 Am. Rep. 762, deserves chronicling in this connection. A statute of Ohio provides that a reprieve granted to any person under sentence of death, on any condition whatever, shall be accepted in writing by the prisoner. *Held*, that a postponement of execution to a specified day was not conditional, and need not be accepted, but the execution might then be carried into effect. The court very gravely remark: "The object sought to be accomplished by this section would, in my opinion, constitute a *pardon* instead of a reprieve upon conditions;" the section "evidently contemplates a punishment other than the execution of the person under sentence of death, and he is required to accept the modification on the theory that a punishment different from that imposed by the sentence of the court cannot be thrust upon him by the governor without his consent." This is the most extraordinary case of caution we ever heard of. It would seem quite unnecessary to provide for the imaginary case of a person who should insist on being hanged. This is a match—which we did not suppose could ever be found—for the act of our Legislature (Laws of 1863, ch. 415), providing that prisoners, by good behaviour, should be entitled to certain deductions from the terms of imprisonment, but that this should not apply to the case of a person sentenced for life! Verily, legislatures are more cautious than wise. Perhaps, however, the Ohio Legislature had heard of the case of the Frenchman, not very conversant with our language, who fell into the water, and was left to drown, because he cried: "I *will* be drowned, nobody *shall* help me!"

The first two cases would be useful to Mr. Ivins (see 18 Alb. L. J. 25), if he were disposed to continue his researches into the law reports as aids to a history of the times. The rivalries of commerce and the trickeries of showmen are not new, but they are more ingenious now, perhaps, than they were of old time. Human nature is just about the same the world over, in all times, but civilization enables men to overreach their fellow-men more adroitly than a mere barbarian could do. As for the men who draft laws, we doubt whether any thing could make them any wiser—or any more stupid—than they generally are.

We have before this written on "law for the dog-days," and we now find some recent cases under this head. In *Heisrodt* v. *Hackett*, 34 Mich. 283; 22 Am. Rep. 529, it was decided for all time that a dog is not a "person." This was held in an action for the killing of the plaintiff's dog by the defendant's dog, in which the defendant tried to justify himself (or his dog) under a statute authorizing "any person" to kill a dog at large, and without a collar. This, we should say, is the inevitable grammatical construction, but the court try to give a reason, and say that the Legislature "contemplated that some judgment would be exercised by the person before killing the dog," but "no such judgment or discretion could have been exercised in this case." From our knowledge of men and dogs, we are inclined to believe that these are both rather violent presumptions.

In Massachusetts they are very particular about dogs and the Lord's day. We don't know what they would do to dogs that should be caught fighting on Sunday. In the last volume of the Massachusetts reports we find two dog cases. One is *Searles* v. *Ladd*, 123 Mass. 580, an action for damages for a dog bite. The plaintiff was a lady, who had been purchasing some meat at a provision dealer's shop and had placed it in a satchel under her arm. As she was going out of the door, a dog, with a strap-muzzle on, lay there, and she remarked to him, "Doggie, ain't you going to let me out?" In spite of this endearing diminutive the dog made no reply, but rose up and bit the wrong meat. The lady got a verdict, of course, in spite of the muzzle and of her undue familiarity in addressing a dog to whom she had never been formally presented. *Commonwealth* v. *Brahany*, 123 Mass. 245, was a complaint for keeping an unlicensed dog. The license was for a yellow and white dog called "Dime." The proof showed the keeping of a black male dog called "Nigg." This was held to be a clear case of an unlicensed dog. The mistake came about from the miscarriage of the defendant's agent, who was evidently color-blind, and would seem to have been a silver partisan rather than an abolitionist. What they did with the guilty man does not appear. We only hope they did not hang him, but they are such a virtuous people over there that there is no telling what they might not do to such a gross offender.

But to see how much more consideration is given to a dog in our State than to a "nigger" in North Carolina! We have seen what the presumption and punishment are where a colored man runs after and calls to a white woman in the latter State. Now, in our State, in *Smith* v. *Waldorf*, 13 Hun. 127, an action to recover the value of a cow, which the plaintiff, having found trespassing upon his lands, had set his dog upon, and which had jumped over a fence in trying to escape the dog, and hurt itself, it was decided that, as there was no proof that the dog did any thing more than run after and bark at the cow, and no pretense that he bit her, and as it appeared that he was always at a considerable distance from her, and that her injuries were sustained on account of her fright, and were accidental, the action could not be sustained. So the darkey did not come anywhere near the woman, and did not hurt her, but only ran after and "barked" at her, but it was all of no use;—he meant rape, the court said, and must be punished for the intention. On similar principles the owner of the dog ought to have been held liable for the injury to the cow. But our courts make a great deal of allowance for natural propensities, and we hardly think they would have punished the colored brother for his act toward the timorous lady, but they would have assumed that he merely meant to "pass the time of day," or inquire his road.

RECENT UNITED STATES DECISIONS.

[Selections have been made from 58 Georgia; 28 Grattan (Virginia); 74 Illinois; 56 Indiana; 45 Iowa; 28 and 29 Louisiana Annual; 122 Massachusetts; 12 Nevada; 67 New York; 11 Rhode Island; 47 Texas; (Civil Cases); 2 Texas Court of Appeals (Cr. cases), and 42 Wisconsin; also from 95 United States.]

Action.—1. Plaintiff, being injured by reason of the accumulation of snow on a sidewalk, sued S., the owner of the adjoining estate, who was bound by city ordinance to remove the snow. *Held*, that he could not recover.—*Heeney* v. *Sprague*, 11 R. I. 456.

2. In an action against a city, the declaration averred that the defendants licensed one J. S.

to exhibit in the streets wild animals to wit, two large cinnamon-colored bears, whereby the street was obstructed, and plaintiff's horse frightened and rendered unmanageable, and plaintiff's wife injured. *Held*, good on demurrer.—*Little* v. *Madison*, 42 Wis. 643.

3. Plaintiffs insured the life of J. S., who was wilfully killed by defendant, and plaintiffs paid the insurance. *Held*, that they could not recover over against defendant.—[*Mobile Life*] *Ins. Co.* v. *Brame*, 95 U. S. 754.

Admiralty.—A contract for wharfage is a maritime contract, and within the admiralty jurisdiction.—*Ex parte Easton*, 95 U. S. 68.

Alteration of Instruments. A promissory note was indorsed by defendant before it was negotiated; afterwards, the maker, without defendant's assent, and at the request of the payees, to whom he gave the note for his own debt, added the word "agent" to his signature. In absence of evidence that his principal was accustomed to pay notes drawn in this form, *held*, that the alteration was immaterial, and, therefore, that defendant was not discharged.—*Manufacturers' Bank* v. *Follett*, 11 R. I. 92.

Amendment.—A surviving partner and the administrator of his deceased partner brought an action, declaring for goods sold and money lent by them, and made an attachment, which was dissolved by giving bond with sureties; afterwards, the surviving partner amended by striking out the administrator as a party, and declaring anew for goods sold and money lent by the partnership, and by himself as surviving partner, in winding up the business. *Held*, that the sureties on the bond were discharged.—*Quillen* v. *Arnold*, 12 Nev. 234.

Assault.—Indictment for assault and battery. Defence, that the prisoner, as master of a public school, *moderate castigavit* the prosecutor, as an unruly pupil in the same. *Held*, a good defence, though the prosecutor, was not entitled by law to attend the school; for if he attended it, though wrongfully, he was subject to its discipline.—*State* v. *Mizner*, 45 Iowa, 248.

Bankruptcy.—An executor improperly sold assets of the estate at an undervalue. A bill was afterwards filed against the purchaser to compel him to make up the deficiency, to which he pleaded a discharge in bankruptcy. There being no evidence of actual fraud by the purchaser, *held*, that the claim was not a debt created by his fraud, within the meaning of the Bankrupt Act, and, therefore, that the discharge was a good bar to the bill.—*Neal* v. *Clark*, 95 U. S. 794; reversing s. c. 25 Gratt. 642.

Bills and Notes.—1. On the day when a promissory note fell due, the indorsers wrote on it, "We hereby waive protest on this note, and hold ourselves responsible for the payment of the same, which is hereby extended thirty days." *Held*, that neither protest nor notice, at the expiration of the thirty days, was required to charge the indorsers.—*Blanc* v. *Mutual Bank*, 28 La. Ann. 921.

2. Two promissory notes being due and unpaid at several times, and the indorser of both having deceased testate, notice was given to the person named as executor in his will, who had, at the time the first note fell due, presented the will for probate, but, before the second note was due, had renounced the executorship, and a special administrator had been appointed; but no public notice had been given of the latter's appointment. *Held*, that the notice was sufficient as to the first note, but not as to the second—*Goodnow* v. *Warren*, 122 Mass. 79.

3. A bill of exchange, indorsed "Pay A. or order on account of B.," was sent by A. to his correspondent C., and paid to C. by the drawees. A. failed about an hour before this payment, in debt to C., and his failure was known about an hour after the payment. C. applied the payment to reducing his claim against A. In an action against him by B. to recover the amount of the payment, *held*, that the indorsement was notice that B. was the real owner of the bill; that C., not having paid the money to A. before notice of his failure, could not apply it afterwards to his claim against A.; and that B. was entitled to recover.—*Blaine* v. *Bourne*, 11 R. I. 119.

Carrier.—1. A bill of lading which stipulated that the carrier would transport the goods without transfer, in cars owned or controlled by him, contained also a clause exempting him from liability for loss by fire. The goods while in *transitu* were unloaded, and while awaiting reshipment were destroyed by fire. *Held*, that the carrier was liable.—*Robinson* v. *Merchants' Despatch Transp. Co.*, 45 Iowa, 470.

2. The owner of a patent car-coupling, who was negotiating for its use by a railway company, went, at the request of the company, and in their cars, to see one of their officers about

the matter, the company giving him a free pass, on the back of which were printed conditions exempting the company from any liability for injury by negligence of their servants or otherwise; and on the passage was injured through the company's negligence. *Held*, that the pass was given for a consideration; that he was therefore a passenger for hire, and not barred, by the conditions of the pass, of his remedy against the company.—[*Grand Trunk*] *Ry. Co.* v. *Stevens*, 95 U. S. 655.

Check.—1 The holder of a check procured it to be certified by the bank on which it was drawn, and then indorsed it to another person. *Held*, that the latter might still hold his indorser, as well as the bank.—*Mutual Bank* v. *Rotgé*, 28 La. Ann. 933.

2. The holder of a check brought it to the bank on which it was drawn, and asked to have it certified, expressing doubt whether it was genuine in all respects. The teller certified it as correct in every particular. In fact the signature was genuine, but the body of the check had been altered. *Held*, that the legal effect of certification was only to warrant the signature; that evidence that it was understood, by the custom of merchants, to warrant anything more was inadmissible; that the teller had no authority to warrant anything more; and that his act in doing so did not bind the bank.—*Security Bank* v. *Nat. Bank of the Republic*, 67 N. Y. 658. But see *Louisiana Bank* v. *Citizens' Bank*, 28 La. Ann. 189, *contra*.

Citizen.—A citizen of the United States, while residing in Canada, served in the militia, in the war of 1812, but on compulsion, and not voluntarily, and received pay for his service. *Held*, that he did not lose his citizenship.—*State* v. *Adams*, 45 Iowa, 99.

Constitutional Law (*State*).—By the Constitution of Virginia, no one who takes part in a duel shall be allowed to hold any office. *Held*, that any person committing the offence might be removed from office by *quo warranto*, without a previous conviction of the offence in a criminal court.—*Royall* v. *Thomas*, 28 Gratt. 130.

Corporation.—1. A stockholder was refused permission to examine the books of the corporation. *Held*, that the corporation was compellable by *mandamus* to allow an inspection by the stockholder's agent, as well as by himself —*State* v. *Bienville Oil Works Co.*, 28 La. Ann. 204.

2. A corporation entered into a partnership with an individual, to be determined at will by the corporation. Nothing in the name or charter of the corporation indicated the business to be done by it, and all its stock was held by one person. *Held*, that the contract of partnership was not *ultra vires*.—*Allen* v. *Woonsocket Co.*, 11 R. I. 288.

Damages.—1. Where an act was punishable as a criminal offence, *held*, that, in a civil action to recover damages for the same act, exemplary damages were not recoverable, by reason of the constitutional principle that no one shall be twice punished for the same offence.—*Keorner* v. *Oberly*, 56 Ind. 284.

2. A traveller, injured by reason of an obstruction in a highway, brought an action against the town in which the way was situate; and the town notified the person who had made the obstruction, and requested him to defend the action, which he failed to do, and judgment was recovered against the town. *Held*, that the town might recover over against the person so notified, not only the amount of the judgment, but the reasonable expense of defending the action, including counsel fees.—*Westfield* v. *Mayo*, 122 Mass. 100.

3. A passenger on a railroad being unable to find a seat, except in the smoking car, or in a car reserved for ladies, entered the latter peaceably, not being forbidden by any one; and a brakeman afterwards, while the train was moving, and without requesting the passenger to depart, ejected him from the car, using no more force than was necessary for that purpose. The conductor of the train was informed of the facts; and the passenger afterwards sued the railroad company, who, after service of process in the action, retained and promoted the brakeman in their service. *Held*, that they were liable in exemplary damages if they ratified their servant's act, and that the evidence warranted a finding that they did ratify it.—*Bass* v. *Chicago & N. W. Ry. Co.*, 42 Wis. 654.

The first application by a woman for admission to the California bar was made at the opening of the July term of the Supreme Court of that State, by Mrs. Mary Young, of Sacramento. She failed to pass a satisfactory examination, and was rejected.