DIARY FOR JUNE.

1. Mon..P. D., Q. B. N. T. D., C. P. Hon. Joseph Howe died, 1873. Hon. J. S. Macdonald died, 1872.
2. Tues..N. T. D., Q.B. P. D., C.P. Last d. for not. of trial, Co. Ct. Fenian skirmish at Limeridge, 1866.
3. Wed..Open Day, Q.B. New Trial Day, C.P.
4. Thurs.Open Day, Q.B. Open Day, C.P.
5. Fri....New Trial Day, Q.B. Open Day, C.P.
6. Sat....Open Day, Q.B. and C.P. Last day to give notice for Call.

7. SUN..*1st Sunday after Trinity.*
9. Tues..Charles Dickens died, 1870. Gen. Sess. and Co. Ct. sit. in each Co. beg. Last day for J. P.'s to ret. convictions to Clerk of Peace (32 V. Ont. c. 6,s. 9 (4); 32-33 V. c. 31, s. 76; 33 V. c. 27, s. 3.)
13. Sat....Last d. for Ct. of Rev. finally to rev. assess. rolls (32 V. c. 36, s. 59).

14. SUN..*2nd Sunday after Trinity.*
15. Mon..Magna Charta signed, 1215.
18. Thurs.Battle of Waterloo, 1815.
20. Sat....Accession of Queen Victoria, 1837. 38 Vict. begins.

21. SUN..*3rd Sunday after Trinity.* Longest day.
23. Tues..H. B. Co.'s territory transferred to Canada, 1870.
24. Wed...*St. John the Baptist.*
25. Thurs.Lord Dufferin landed at Quebec, 1872.

28. SUN..*4th Sunday after Trinity.*

CONTENTS.

THE

Canada Law Journal.

Toronto, June, 1874.

The Hon. A. A. Dorion, Minister of Justice, has been appointed Chief Justice of the Queen's Bench in the Province of Quebec, in the room of Chief Justice Duval, resigned.

We are delighted at last to see a specimen sheet of the new Law and Equity Digest, by Mr. Christopher Robinson, Q.C., assisted by Mr. F. Joseph, which has just been issued by the publishers, Messrs. Rowsell & Hutchison. It is intended to issue it in monthly parts, containing from 100 to 120 pages each. The first to be issued this month. We trust the publishers will be able to fulfil their promise in this respect, though, considering the arrears of law reports to be got out by the same firm, it may be doubted. The new Digest will embrace all reports of the Superior Courts from the commencement, together with Practice, Chambers, and *Canada Law Journal* Reports.

We understand that the University of Trinity College has resolved to grant the degree of LL.B. to any Barrister of Ontario, who under the regulations of the Law School has had twelve months struck off his time, upon his producing a certificate to that effect. This may be looked upon as a high compliment to the efficiency of the Law School and the estimation in which it is held. We believe that graduates of other universities, which require a regular course of a more extended and complete nature before granting the degree, do not look upon this step with much favour. And although the Law School may very properly be looked upon as the place

where the best legal education can be obtained, and where the examiners are from their skill and experience best fitted to test the knowledge of the student and to frame proper questions (a more difficult matter than the uninitiated suppose), there is much force in this, that the course of study at Osgoode Hall is purely of a practical character, whilst that of the universities is more wide-spread, embracing the civil law, international law, and a varied reading of a theoretical character.

THE NEW JUDGES.

Under the Act of the last session of the Ontario Legislature "to make further provision for the due administration of justice," the Court of Appeal is remodelled, and it will be necessary to appoint three additional Judges. We do not intend, at present, to discuss at any length the nature of the change that will be made by this Act, nor its uncertain wording and some omissions, but rather to speak of current rumours as to the appointments about to be made.

We regret exceedingly to hear that it is the intention to appoint as the three new Justices of the Court of Appeal, men other than the present Chiefs of the three Superior Courts of Law and Equity. We do not say that their claims have been overlooked, but it is manifestly absurd to suppose that they would give up their present position and take one which, though higher in some respects, would deprive them of a large percentage of the small pittance that has hitherto been thought sufficient for those on whom so much of the welfare of the people at large depends. The question of their precedence, also, under section 5 of the Act, is not very clear. It is impossible to say with certainty that they rank with the Chiefs of the Superior Courts, though it is thought that such was the intention.

We think that such arrangements as to salary and otherwise should have been made that the three gentlemen we have referred to might have been the new Justices of Appeal. They have a large judicial experience and largely enjoy the confidence of the profession and the public, and their decisions would carry great weight. If it is a matter of promotion, they are undoubtedly entitled to it. It is not seemly, nor is it to the benefit of the "due administration of justice," that men, admitting them to be equally able and learned, should be taken from the Bar, or even from the present Bench, and placed in appeal from the judgments of those who have been for years their seniors, and rumour has it that both ranks will be drawn upon to fill the appellate chairs.

If the Chief Justice of Ontario were not, as he is, not only a sound and able lawyer, but also a man of superlatively strong practical common sense, intimately acquainted with the habits of the people and the nature and necessities of their business relations: if the Chief Justice of the Common Pleas were not, as he is, not merely a man of a high order of attainments and sparkling wit, but also a brilliant, well read and excellent lawyer: if the Chancellor had not, as he has proved he has, a remarkably sound judicial mind, combined with great industry and experience: and if they would not collectively, including of course the Chief of the Court of Appeal, form a very strong and satisfactory appellate court—we could understand some benefit to be gained by a course being taken which has the practical effect of passing them over; but we fail to see the wisdom of placing younger men, more fitted, from their natural vigour, for the toils of circuit work, in a position which, however well they may fill it, is more suitable for men at least equally capable and of ripened experience, and who, from their long and faithful service, are entitled to some relief from the more arduous portion of their

duties. But whilst we take exception to the scheme which has brought about the result, we should show very little knowledge of the learning and ability of the Vice-Chancellor, who has just been gazetted as one of the Justices of Appeal, ("Senior Justice" it is said, whatever that may mean), if we deprecated his appointment, for we venture to assert, that high as he stood as a Judge of first instance, his reputation will be greater when his duties will be chiefly with matters of pure law. And if we are correctly informed as to the other gentleman who is to be taken from the present Bench, his appointment will be equally unexceptionable, and alike honourable to himself as to the appointing power. But notwithstanding this, we have no hesitation in saying that the profession and public would be best satisfied if a higher salary had been attached to the position of the Justices of Appeal, and if the three Chiefs had been placed in the appellate court.*

THE CONSOLIDATION OF THE STATUTES.

We are glad to hear that the work of consolidating the Statutes applicable to Ontario is under way. The consolidation of 1858-9 was entrusted to men of great experience, having amongst their number some of the highest legal talent of the country. The result was on the whole very satisfactory. A different plan is to be adopted on this occasion, and though doubts have been expressed as to the advisability of the course proposed by the Attorney General, we do not intend, as the plan has been settled, even if we desired to express any strong opinion against it, to say anything which could in any way create an unfavourable impression of that which should and will be judged solely upon its merits, when the important work has been completed.

The preliminary work will be done by three junior Barristers, under the immediate and direct supervision of the Attorney-General, and we understand it is intended that all doubtful questions which may arise as to jurisdiction, construction, implied repeal, &c., will be referred to the judges, either from time to time during the progress of the work, or in bulk as soon as the consolidators have brought the new volume as near perfection as they can. Of course the obvious difficulty that presents itself is, whether the Attorney-General and the judges can find the time to devote to such an arduous and engrossing business, for to be of any use, they must not only be all agreed upon the scheme of consolidation, but must also be thoroughly familiar with the details of the preliminary work, in fact it would be desirable that they should follow it from the beginning to the end; this, however, would be manifestly impossible.

All this would seem to show, if there is any force in our objection, that the whole work should have been entrusted to persons of the same experience and calibre as those who had charge of the consolidation of 1858-9; but, on the supposition that the Attorney-General and the judges can give the necessary time to it, we see many advantages in the proposed plan.

It will be necessary in the first place, to lay down some general plan on which

* Since the above was written, and as we go to press, we hear that Mr. Justice Gwynne has declined to go into the Court of Appeal, on the terms of the *Gazette*, appointing Mr. V. C. Strong as "Senior Justice." We presume on the very intelligible ground that when the position was offered to him it was on the implied understanding that the order of precedence between himself and any other person who might be appointed should not be interfered with, and that the inversion of precedence was in fact a breach of faith on the part of the government, and contrary to established usage. The gentlemen from the Bar will probably be Mr. Burton, Q. C.; Mr. Proudfoot, Q. C.; and Mr. C. S. Patterson, Q. C.

the Statutes are to be consolidated, and it is perhaps right that the duty and responsibility of determining this should be assumed by the Attorney-General. There is a good deal of difference of opinion amongst the profession upon several points. One prominent one we may mention: whether the present language, with all its repetitions and redundancies, is to be adhered to, or an attempt made to simplify and improve the language of the Statutes. Even the bolder course of a codification is not without advocates. It will be a long work, and a work of great drudgery to "rough hew" the great body of the Statute Law of Ontario into anything like a symmetrical form; and it is well that men who can give their whole time to the work should be engaged in this operation. But the final work of preparing the body of consolidated laws to be submitted to the Legislature must be undertaken by the very best and ablest jurists in the country. This will be a practical necessity; for it is quite obvious that the consolidation, as finally prepared, must be accepted on *faith*. It would be absolutely impossible, without common consent, to pass any such measure in the ordinary way. There would be material for a discussion for years in such a work. If, then, the present is merely intended as preparing the ground, and it is intended finally to appoint two or three men of long experience, high standing and familiarity with the subject matter finally to prepare it for the Legislature, it is well, otherwise the work will be abortive.

The gentlemen who have been selected to do the preliminary work are said to be Messrs. F. Joseph, Langton, Biggar and Kingsford. The three latter are University honour men. Of Messrs. Langton and Biggar, having been on the staff of this journal, we can speak with confidence of, and with much pleasure testify to, their ability and industry. Mr. Joseph has had some experience in the sort of work which he will have to do, and he is a careful and painstaking compiler; and if young men are to be chosen (and such is the fashion now-a-days, though some might like to see professional plums given to older men who have "borne the burden and heat of the day," and who also have time on their hands), we think the selection is a good one. The consolidation of 1858-9 will be a model for the new volume, and the learning and skill there displayed will be of the greatest value.

We wish the consolidators every success in their labours and shall be glad to congratulate all parties concerned upon a successful result. On a future occasion we shall refer more particularly to the nature of the work to be done.

LAW SOCIETY.

Easter Term—1874.

We are glad to see that the Hon. Mr. Justice Gwynne has returned from his recent trip to Europe, looking extremely well. He is taking Chambers and Practice Court this term, relieving Mr. Dalton for a time from his too arduous duties.

Business in both courts is unusually brisk, there being no less than sixty-five cases on the trial paper of the Queen's Bench, and thirty-three on that of the Common Pleas.

Thirteen gentlemen presented themselves for call to the Bar. Of these Mr. E. G. Patterson was the only one who succeeded in passing without an oral on the merits. He distanced all competitors, passing a most satisfactory examination. Messrs. C. E. Ryerson, G. E. Frazer, P. M. Barker, H. M. Deroche, J. E. Terhune, A. S. Ball, and F. D. Moore, were also admitted without an oral, having previously passed as attorneys. Four gentle-

men were rejected. Mr. Gormully, being an English Barrister, was admitted to an *ad eundem* degree. Of those who competed in the examination for attorneys, Messrs. Gormully, G. E. Patterson, C. E. Ryerson, and T. H. McGuire passed without an oral on the merits, having obtained 75 per cent. Sixteen gentlemen presented themselves for this examination, of whom twelve passed. Amongst the candidates for admission to the Law Society, Messers. Fitzgerald, Riordan, Fletcher, Campbell and Holmes, passed an exceedingly good examination, each obtaining more than four-fifths of the entire number of marks. Thirty-seven gentlemen presented themselves for admission, of whom five were rejected.

In the Law School examinations Messrs. Lawson, Evans, Bruce, and Ferguson, passed an examination entitling them to reduce their time of service under articles by eighteen months. Messrs. Hall, Cooke, O'Brien and Pearson had their time shortened by twelve months. Messrs. Wilson, Clendennan and Pearson, passed the Junior class examination.

TRIBUNALS OF COMMERCE.

The third report of the Judicature Commission has been presented to the House of Parliament of Great Britain. It deals with the question "whether it would be for the public advantage to establish tribunals of commerce for the cognizance of disputes relating to commercial transactions, or to any and what classes of such transactions, and if so, in what manner and with what jurisdiction such tribunals ought to be constituted; and in what relations, if any, they ought to stand to the courts of ordinary jurisdiction?" To obtain the necessary information whereon to base a report, a series of questions were addressed to consuls, merchants, and members of the legal profession in foreign countries, as well as to mercantile men in England; and evidence was also taken before a Committee of the House of Commons, and the answers received and the evidence are given in an appendix to the report.

It is more as a matter of interesting legal news, than from a conviction of any pressing necessity to ventilate the subject in this country, that we now refer to this matter. The establishment of such tribunals has, however, been discussed here, and the example of some continental countries not enjoying a larger commerce than ourselves adduced, but the matter can, we think, without any great detriment to the public interests, lie over until other matters of more practical importance are settled.

The conclusions arrived at by the Commissioners, or rather by the large majority of them (for Lord Penzance and Sir Sydney Waterlow give their reasons for not signing the report), we give in the words of the report:—

"We find that those by whom legislation on this subject has been promoted (although generally desiring that some provision should be made for more summary proceedings in many commercial cases), are not agreed as to the character of the Tribunals which they wish to establish, or the class of cases that should come within their cognizance. Indeed there is no unanimity of opinion as to whether the Judges should be wholly commercial, or partly commercial and partly legal; whether the commercial members of the Tribunals should be Judges having an equal voice in the decision, or assessors or advisers only to a legal Judge, who would in that case be the President of the Court; whether the commercial members should be paid or not paid for their services; whether the Tribunals should observe the ordinary rules of evidence, or be at liberty to admit anything as evidence which they may consider material to the point in issue; whether they should be guided by the principles laid down by the Superior Courts of Law, or decide irrespectively of precedent and according to their own views of what is just or proper in each particular case; whether the parties should be allowed to be represented by counsel or solicitors; whether there should be any appeal, and in what cases, and to what Courts. Upon all these points

there appears to be the greatest diversity of opinion.

We find moreover that, even in the countries in which Tribunals of Commerce are established, great diversity exists with regard to the constitution of these Courts. Thus, in France, in Belgium, and in some other countries, all the members of the Court are merchants, except the greffier or registrar, and he has technically no voice in the decision. On the other hand, in many of the German States, the Court is presided over by a lawyer. In Dantzic the Tribunal consists of a legal President, four other legal Judges, and four merchants, but the merchant Judges do not attend unless required. In Königsberg the commercial members have no vote, only a deliberative voice, the decision resting entirely with the legal members of the Court. In Prussia, generally, it is in contemplation to substitute a paid lawyer for an unpaid merchant as President. There is in fact no uniformity in the constitution of these Tribunals; in some countries the mercantile, in others the legal element prevails, sometimes in the latter case to the exclusion of the commercial altogether.

We also find that, where the Tribunal is composed entirely of mercantile Judges, assisted by a greffier who is a lawyer, the latter, although he has no vote, becomes of necessity the most important member of the Court; and thence arises this anomaly, that the person who virtually decides the case is not clothed with the responsibilities of a Judge.

Now, we think that it is of the utmost importance to the commercial community that the decisions of the Courts of Law should on all questions of principle be, as far as possible, uniform, thus affording precedents for the conduct of those engaged in the ordinary transactions of trade. With this view it is essential that the Judges by whom commercial cases are determined, should be guided by the recognized rules of law, and by the decisions of the Superior Courts in analogous cases; and only Judges who have been trained in the principles and practice of law can be expected to be so guided. We fear that merchants would be too apt to decide questions that might come before them (as some of the witnesses we examined have suggested that they should do) according to their own views of what was just and proper in the particular case, a course which, from the uncertainty attending their decisions, would inevitably multiply litigation, and with the vast and intricate commercial business of this country, would sooner or later lead to great confusion. Commercial questions, we think, ought not to be determined without law, or by men without special legal training. For these reasons, we are of opinion that it is not expedient to establish in this country Tribunals of Commerce, in which commercial men are to be the Judges.

But while we are quite agreed that a Court presided over by mercantile men, or in which mercantile men have a deciding vote, would lead to confusion and uncertainty in the administration of the law, we are fully alive to the inconveniences that do undoubtedly arise from the want of adequate technical knowledge in the Court which has to adjudicate upon cases of a commercial character. We think there is ground for the complaint that cases are sometimes tried at Nisi Prius before a Judge and jury who have not the practical knowledge of the trade or business which is necessary for their proper determination. We are of opinion that many cases involving for their comprehension a technical or special knowledge, cannot be satisfactorily disposed of by the ordinary tribunal of a Judge and jury, and that the proper tribunal for such cases would be a Court presided over by a legal Judge, assisted by two skilled assessors, who could advise the Judge as to any technical or practical matters arising in the course of the inquiry, and who by their mere presence would frequently deter skilled witnesses from giving such professional evidence as is often a scandal to the administration of justice. This is the kind of assistance which we, in our first report to Your Majesty, contemplated should be given to the superior Judges on the trial of cases of a scientific or technical character; and which has been provided for by the Supreme Court of Judicature Act. If the recommendation for the enlargement of the jurisdiction of the County Courts, contained in our second Report, should be adopted by the Legislature, we think it would be expedient that similar assistance should be afforded in mercantile cases to the Judges of those Courts; and in this manner the principal advantages anticipated by the advocates of Tribunals of Commerce might, we think, be attained.

We are of opinion that there would be no practical difficulty in carrying such an arrangement into effect. We think that there might be for every place of sufficient importance a rota or a panel, to be formed from time to time, composed of merchants, shipowners, or others conversant with the trade and business of the district, or other competent persons, from which rota the Judge might, at the request of the

parties, or, if he thought the circumstances of the case required it, at his discretion, select two persons who should sit with him, and advise him during the progress of the case on any point upon which their special knowledge would be of use. In special cases it might also be competent for the Judge to call in the assistance of assessors who are not upon the local rota. But we are strongly of opinion that these mercantile or scientific assessors should not have any voice in the decision, and that the whole responsibility of the decision should rest with the Judge.

We think that in cases in which an appeal is allowed there should be power for the Judge or Court to call in the assistance of like assessors.

Our opinion is that the assessors should be paid for their services in Court, but not receiving any other remuneration. We think that for moderate fees the services of gentlemen possessing sufficient knowledge and independence to afford the requisite assistance to the Judge could be obtained. Their fees should be costs in the cause.

These provisions, we venture to think, would supply the Judge with the requisite practical or technical knowledge to enable him to do justice between the parties. We hope that the Legislature will always provide sufficient judicial strength to obviate the great complaint as to delay, and that under the new judicial system, of which the Judicature Act is the first fruit, effectual rules will be established to meet the other great grievance of expense.

We hope soon to be in a position to lay before Your Majesty our further Report upon other matters included in our Commission, which have not been already disposed of."

Here follow the signatures of the Commissioners, commencing with Lord Selborne, followed by Lord Cairns, Lord Hatherley, Chief Justice Cockburn, &c.

Mr. Acton S. Ayrton expresses his individual views on some points as follows:

"In signing this Report, I am unable to concur in the reasons assigned for deeming it inexpedient to place the mercantile members on a footing of equality with the legal Judges of the Tribunals proposed to be invested with power to decide commercial cases. The argument that the uniform administration of the law would be impaired has, I believe, been usually urged against proposals for withdrawing causes from the Courts at Westminster, and remitting them to inferior Tribunals. It was suggested that this evil would arise from the establishment of County Courts, and from the extension of their jurisdiction, but it is proved by experience that no such evil has arisen, nor does it arise from the exercise of the judicial functions of the Courts of Quarter Sessions or Petty Sessions, or the stipendiary or unpaid magistrates, although their decisions in criminal cases, and in certain civil cases, affect the rights and liabilities of the public in as great a degree as the decisions of Tribunals of Commerce would affect the commercial community.

It appears to me that when a dispute arises in the course of a commercial dealing, the compulsory settlement of it by a Tribunal may be regarded as only a continuance or a conclusion of the transaction, and that it is unreasonable to insist that the parties interested shall, as a condition of having their dispute determined, be required, at an enormous cost and inconvenience to themselves, to create a precedent for the benefit of society, and to add a rule of law to a commercial code.

I venture to think that it is not necessary to regard the decisions of particular cases as such precedents, but where parties desire, as now sometimes happens, that a rule of law should be established, regardless of the trouble and expense of litigation, there would be no difficulty in carrying the case from a Tribunal of Commerce to the Supreme Court of Justice for that purpose.

I consider that the advantages which would result from placing the legal and commercial elements of the Tribunal on an equality, outweigh the objections. The legal Judge could exercise sufficient influence over his commercial colleagues to prevent them from acting contrary to settled law, but the sagacity and experience of the commercial men would in general be of more service to the suitors in the decision of their disputes than the legal knowledge of the Judge.

The advantage of a Tribunal of Commerce does not, however, consist merely in the constitution of the Court, but it is in the mode of procedure. It seems desirable to have a guarded formal and somewhat tardy procedure through legal agents, where the judicial power is entrusted to a single State Judge, not only for the protection of the suitors against each other, but against any abuse of power on the part of the Judge. Nor does the ordinary litigation in these Courts require a more summary mode of procedure. But commercial disputes frequently demand a very speedy decision, as well as special treatment whilst under adjudication, such as those arising out of dealings relating to the

loading and despatch of vessels, the sale and resale, the warehousing, transfer, and stoppage of goods, the transactions of agents, and of others involving several liabilities. Tribunals of Commerce, with the safeguard of mercantile members, are authorised to proceed in the most summary manner, to adapt their procedure to the exigencies of each particular case, and to require the personal attendance of the parties who have been engaged in the dealing to afford such explanations as may be requisite, instead of being obliged to wait in order to have every representation to the Court, it may be said, filtered, and perhaps mystified, through a single or even double legal agency.

It seems to me to be no sufficient answer to the request of the mercantile community, that Tribunals which have for so many years shown their usefulness abroad should be introduced into this country, to assert that individuals are not agreed upon the best mode of constituting such Tribunals, or of regulating their procedure. The Committee of the House of Commons, after considering a variety of opinions, arrived at conclusions indicating how Tribunals of Commerce might be established, and the Commission has in very material points concurred in those conclusions. It may, therefore, be hoped that a measure may be framed which will meet with general acquiescence."

The reasons of Lord Penzance and of Sir Sydney H. Waterlow for not signing the Report are given below in their own words:—

I have been unable to concur in this Report, because I am not satisfied that Tribunals might not be established consisting of commercial men with adequate legal assistance, capable of settling commercial disputes in a satisfactory manner, at greater speed, and at much less cost than at present. And I think the well-known fact that in the large majority of commercial disputes the parties avoid the Courts of Law and resort to private arbitration, is strong to show the need of some such Tribunals, and a cogent reason for making the experiment.—Penzance.

I am unable to agree in all the recommendations of this Report, and therefore do not sign it. I feel very strongly that in a great commercial country like England, Tribunals can and ought to be established where suitors might obtain a decision on their differences more promptly, and much less expensively than in the Superior Courts, as at present constituted and regulated.

Those who support the present system of trying mercantile disputes seem to regard them all as hostile litigation, and lose sight of the fact that in the majority of cases when differences arise between merchants or traders, both parties would rejoice to obtain a prompt settlement, by a legal tribunal duly constituted, and to continue their friendly commercial relations. The present system too frequently works a denial of justice, or inflicts on the suitor a long-pending worrying law-suit, the solicitors on either side pleading in their clients' interests every technical point, and thus engendering a bitterness which destroys all future confidence, and puts an end to further mercantile dealings.

It is essential that the procedure of our Mercantile Courts (whether called Tribunals of Commerce or by any other name) should be of the simplest and most summary character, similar to that of the Tribunals of Commerce in Hamburg or in France, or before Justices of the Peace in this country, as recommended by the Select Committee of the House of Commons in 1871.

The liberty of the subject is, perhaps, more jealously guarded in this country than property. If the summary jurisdiction conferred on Justices of the Peace in criminal cases, when exercised by gentlemen who are not lawyers, gives satisfaction, it can scarcely be doubted that a similar jurisdiction in civil cases would be equally acceptable.

Sydney H. Waterlow.

LAW COURTS IN OHIO.

[communicated.]

It happened that the writer of this article and a legal friend found themselves lately in one of the largest and wealthiest cities in Ohio. We were strolling about the streets with that aimlessness of purpose, which belongs to sight-seers in a strange place; when we came upon a gloomy building, about which many other idlers were hanging, and which bore other unmistakeable signs of being a Court House. To a lawyer a law-court in a strange country has peculiar attractions. Most lawyers would be as eager to see Westminster Hall as Westminster Abbey, and an enforced stay in a western city might

be made tolerable if a law-court were sitting. Moved, therefore, by true professional instincts, we entered the temple of justice, and made our way into a room where the Court of Common Pleas for the county was in session.

This Court of Common Pleas, as far as we could learn, corresponds to a County Court in this country, though it appeared to have somewhat higher jurisdiction. The Court Room was very much like any Court Room of our own, with one notable distinction. There were no seats for the public, whereas, in a land which is supposed to be "groaning under the yoke of an aristocratic tyranny," the people are encouraged to attend the courts, and watch the course of the law, and for that purpose provision is made for their comfort; these democrats, however, railed off the public in a narrow corner, which was guiltless of anything like a seat.

But if the comfort of the public was neglected, the jury were treated with great consideration. They were accommodated with chairs of most luxurious make, and were placed at a respectable distance from one another, so as to allow full opportunity for stretching the limbs. In this matter we are far behind our cousins. The hard and narrow boxes in which our jurymen undergo the torture of their office, would not be tolerated for an hour in the United States. There was a negro amongst the jury in question, but, to our regret, no ladies. The jurors appeared respectable and intelligent, and listened with praiseworthy attention to the laboured and learned argument which a tedious counsel was slowly unfolding to them. We were somewhat surprised at the nature of the address under which the jury were suffering. We knew that in some States the jury have deprived the judge of some of his functions, for instance the sentencing power, and it seemed possible that here they had gone further still, and were judges of the law as well as the fact. The counsel did not seem to appeal to the jury for a simple decision on the facts. He cited for their benefit from various thick volumes in support of legal propositions, and very elementary ones too, and talked a good deal about the "factum probandi," "experimentum crucis," "animus furandi," and other matters which are not supposed to suggest the clearest ideas to the mind of the average juryman. It occurred to us that if the jury were to form their own opinion as to the law, this learning would tend to their bewilderment. If they were to take the law from the judge, it was not complimentary to him to cite a cloud of authorities in support of the simplest principles. But the jury assumed a look which was intended to express the interest with which they followed the argument of the learned counsel, and indeed their serious and patient attention was beyond all praise. Our admiration was enhanced when we learned that the case (it was the trial of a citizen for burglary) had been going on all the day before: that counsel had already "made argument" three different times: that the prisoner's counsel was just winding up an address, the magnitude of which was obvious from the pile of manuscript in which it was transcribed and to which constant reference was made, and that the State prosecutor and judge would follow at proportionate length. Great must be the endurance of the law-loving American! The long-suffering of the jurors was, however, made intelligible when we were told they were professionals. In other words, that they made a business of serving on juries, and thereby earned a competent livelihood. It was also darkly hinted that a suitor had facilities for retaining a jury, as well as a counsel—and a judge.

There was a judicial bench in the

Court of Common Pleas, but at present it was unoccupied. An elderly gentleman was sitting on a cane-bottomed chair, facing the wrong way, and warming his back at the open fire. His chin was resting on the chair-back, and he was meditating profoundly. He occasionally rose, traversed the room, his hands in his pockets, and expectorated thoughtfully. This was the judge. To those accustomed to the English or Colonial judge, presiding in robes and white cravat, in frigid reserve upon the bench, distant and dignified, the unconstrained manners and graceful ease of this Republican magistrate would seem refreshing in the extreme.

The prisoner sat by his counsel at a small table, in front of the jury. We looked in vain for a dock. We are very harsh to accused persons in this respect. We have absolutely no respect for their feelings, and cruelly exhibit them to the gaze of their fellow-citizens, between two minions of the law, in durance vile, unmindful of the theory that every man is presumed to be innocent until he is proved guilty. They have more delicacy about these matters in the States.

There was another gentleman at this counsel's table who attracted observation. His chair was tilted back against a pillar; his feet rested on the back of another chair before him. He was so placed that the judge was seated directly opposite him, and was forced to contemplate the soles of his boots. This gentleman was dressed in the seediest apparel: he picked his teeth with a pen-knife: he expectorated continuously: he was lean and sallow: he looked like a clock-peddler: he was in outward appearance one of Dickens' typical Yankees. We thought he might be a crier of the court or a personal friend of the burglar. What was our surprise when, on the defendant's counsel drawing his tedious oration to a close, he lowered his feet from their elevation, brought his chair to the horizontal, and rose with the obvious intention of haranguing the jury. He was, in truth, the State Prosecutor.

He first took from the table a dirk, which, with other murderous and damning articles, had been found upon the prisoner. He examined it deliberately, felt its edge, held it up for the jury to observe, and commenced his address with the calmness and self-possession of the practised speaker.

The opening of his speech was almost word for word as follows: "You have heard tell, gentlemen of the jury, of the Gordian knot. Alexander, gentlemen, Alexander the Great, wanted to untie that Gordian knot, but he could not do it, nohow. So what did he do? He just whipped out his sword and cut that knot right square through. Now, gentlemen, we have a Gordian knot to untie, and a tough one too. But I won't trouble you to untie it. I'll just slither it, right clean through, with this dagger. You have likely seen instruments of this sort before. They are only found on two classes of men—Texan Rangers and Italians; and when you find one of these on a man, you know he's a *rascal and a scoundrel, like this fellow here.* I'll tell you what this dirk reminds me of. It reminds me of a cheese-taster. They just let it into a man, you know, and draw it out again, and see what sort of stuff he's made of. And I tell you, these fellows just whip out one of these articles and let it into a man as much quicker than they could draw a pistol and fire into him, as a streak of lightning is quicker 'n the growth of a tree. Now it does just make me sick to see a man toil and labour in defence of a scoundrel like this burglar here, the way my friend Wilson has laboured for his client. His effort was splendid: it was desperate: it was noble: and while his labours, his moral courage, and his fearlessness challenge

my admiration and command my eulogy, I say it does make me sick to see such noble efforts thrown away on such a rascal as this."

Here a certain irreverence in our manner and a disposition to laugh attracted the notice of an official of the Court, who was eating an apple with a pocket-knife, which had evidently cut a good deal of tobacco. We thought it well to retire before we had compromised our character by laughing in the face of justice, and make it necessary for her myrmidon to expel us from her presence. We left highly gratified with our entertainment, and reproduce the incident for the information of an admiring profession in this benighted Northern clime, vouching for its strict accuracy in every particular. *

SELECTIONS.

IMPRISONMENT FOR DEBT IN COUNTY COURTS.

Mr. Bass' Bill for abolishing imprisonment for debt in the County Courts has been defeated by an overwhelming majority, but there is sufficient strength of opinion in support of its principle to justify the expectation that imprisonment as a punishment for not paying debts will be abolished altogether at no distant date. When we find converts such as Sir Henry James, who was on a committee which took evidence on the subject, there must be some very strong and cogent objections to the present system. If we fail to appreciate them the fault must be ours. But whatever they are, and whatever their force, we consider that a mistake is made in mixing up with the simple issue "grave social and economical questions," which, according to Sir Henry James, are involved. We look through his speech to discover such questions, and what do we find? First, that the power to enforce payment by imprisonment fosters an unhealthy system of credit. Secondly, that the opportunity of obtaining credit for necessaries induces the working man to get in debt to the draper and grocer whilst he spends his cash at the publican's, who cannot now recover for beer scores. Again, he says that men sent to prison are brought into contact with the worst characters. These, we suppose, are the grave social and economical questions, and we are free to admit that opinions may differ as to their gravity. We have heard them urged before, and they are supported by the testimony of one or two of the most eminent of our County Court Judges. Perhaps the difference of opinion prevailing among County Court Judges is the most remarkable circumstance in the history of the agitation. Mr. George Russell and Mr. J. A. Russell are gentlemen held in high esteem, and would not be likely to give opinions of a vague or ill-founded character. Forming their opinions upon their experience, they conclude that many of the small debts for which commitment orders are now made would never have been incurred if the power to enforce payment by imprisonment had not existed. That is to say, that if imprisonment for debt were abolished, the credit system as available to the working classes would collapse. And this they consider expedient. Many Judges, on the other hand, take a diametrically opposite view; they see no objection to the credit system properly regulated, or to the commitment of debtors with whose knowledge debts have been contracted, and who have the means to pay. Perhaps Mr. Commissioner Kerr has had as large experience of the credit system as any Judge, and the operation of imprisonment for debt has been constantly before him for many years. It is only necessary to sit in his court for a few hours to hear his opinion of the expediency of abolishing the power of imprisonment for non-payment of debts. The view which he takes is probably

We think our correspondent must have fallen on a bad specimen of the courts in Ohio. However that may be, the courts in Pennsylvania, Maryland and the Northern Atlantic States are certainly not conducted in the way our correspondent describes. We have at various times been in the courts in most of these States and found the business conducted not only with ability, but with dignity and decorum.

In some of the States in the Union the judges still retain the gown—and in the highest court in the land, the Supreme Court, the judges never appear in court without it.—Eds. L. J.

stronger than that of many County Court Judges, as he looks upon a man who has voluntarily got into debt, and refuses to pay, as *primâ facie* dishonest. This is, we conceive, the correct view, and if imprisonment for non-payment of debts, or, more correctly, for disobeying an order of the Court for payment, were abolished, Mr. Cross' suggestion that the principle of the legislation against fraudulent debtors should be extended, would have to be adopted.

It is a favourite argument against imprisonment for debt, that it is punishing criminally the incapacity or refusal to perform a civil contract. For the purpose of promoting healthy trade, we question whether this is the right way of looking at the matter. To procure on credit goods for which we have not the means to pay is virtually obtaining them by false pretences, and a false pretence is punishable by imprisonment. We freely admit, on the other hand, that where the debtor is not the author of his own liability—where, for example, the goods have been ordered without his knowledge, and the first demand for payment comes in the form of a County Court summons, the hardship of imprisonment may be very great. We also admit that every precaution should be taken that a debtor should be informed personally of the intended proceedings before matters are put in train for commitment. Here, indeed, we arrive at the true grievance, and Mr. Cross deserves the greatest credit for being the only participator in the debate with sufficient sagacity or insight to perceive that it is in the administration of the law, and not in the law itself, that the evil is to be found. "If," he said, County Court Judges would confer together and frame rules by which to act in a more uniform manner, much of the alleged evil would be removed." It is certainly extraordinary that there has not been more concerted action amongst those gentlemen with a view to settling the practice. Strict proof should always be required that the original summons has reached the debtor before a judgment summons is granted, and particular care should be taken to ascertain that the goods were supplied with the knowledge or consent of the debtor. Some Judges have acted up to the extreme limit of *Jolly* v. *Rees* in relieving a husband from liability for goods supplied contrary to his orders. The liability being gone there is an end of all difficulty, but if the liability cannot be got rid of it is in the next place important that the debtor who has to bear a burden innocently contracted, so far as he is concerned should not be sent to prison for non-payment, as the element of fraudulent intent or conduct is altogether wanting.

The whole subject has now at any rate been thoroughly thought out. It is very improbable that we shall obtain any better evidence than that which was extracted by the select committee. We know the opinion of County Court Judges, and we think it is the fact that a considerable majority are of opinion that the restricted power of imprisonment which now exists is most salutary, and should be preserved. We know that many Judges regret that abolition of imprisonment for debt has gone the length it has, and would gladly see it restored, whilst the commercial community must feel that it has considerably altered their relations with the public. This doubtless raises the question whether legislation should impose difficulties on trade by rendering debts impossible of recovery. We are decidedly of opinion that it should not, and we think that Sir Henry James' grave social and economical questions should not be taken into consideration in deliberating upon the operation of our legal machinery. There is ample evidence that impending imprisonment forces the settlement of claims which otherwise would be absolutely ignored in a very large number of cases. The few cases of hardship of which we hear are hardly a satisfactory set-off against such a result, and we conceive that debtor and creditor should be left to the difficulties and perils which each at present incurs; and even on a balance of disadvantages, we believe it would be more detrimental to a working man to be deprived of credit than to suffer occasional imprisonment. — *Law Times.*

HUMOROUS PHASES OF THE LAW.

Trade-marks.

One of the most fertile subjects of conversation in the commercial world is the rascality of lawyers. To hear the unanimous opinion of tradesmen, one would infer that, among the latter, at least, there was no such thing as cheating one another; that such is the purity of the atmosphere of trade, that no merchant ever contrives to filch away another's customers, and that one's ownership of his own is universally respected. In spite of the bad odour in which we are held by the mercantile world, we do not remember of ever hearing ourselves accused of stealing one another's signs, or forging one another's handwriting, or resorting to any other mean device to get business that does not belong to us. We fear that so much cannot be said of our critics. Here is an entire branch of the law devoted to the subject of the protection of merchants against the piracy of their fellows. One merchant imitates the peculiar commodity or invention of another; the law says he must not do this, and gives the latter the privilege of affixing a peculiar mark upon it to denote his proprietorship; the other then steals the mark, too, and the law then punishes the latter infraction. All this not only furnishes inevitable employment to those unprincipled lawyers, of whom we started out to speak, but gives rise to a vast amount of metaphysical and abstruse law learning. Out of this we propose to extract any alleviating phases of humour that may not be altogether patent, although the subject of investigation may be.

The poets have differed in their estimates of the importance of a name. One asks, "What's in a name? that which we call a rose by any other name would smell as sweet;" and another talks about "the magic of a name." But the experience of practical men has demonstrated that Campbell is right. The success of a book, a play, a commodity, is very dependent upon its name, and the success of men themselves is frequently hindered by a ridiculous or common-place name. The only man with a common name who achieved fame, according to our recollection, was John Brown, and even he would not, had it not been for the fortunate circumstances of his failing in his enterprise and being hanged. The modern novelists have recognized "the magic of a name," and have named their offspring in a way to excite curiosity and surmise. Frequently their productions are named without any regard to appropriateness. Thus, "Cometh up as a Flower," so suggestive of the frailty of human existence, and which has accordingly been bought by all the pious persons in the land, turns out to be a very nasty tale of attempted seduction. "Ruskin on Types," it is said, was once inquired for by a printer, and John Hill Burton tells a story of a sheep-breeder who went to a hardware store to buy a "hydraulic ram" for the improvement of his flock. But we are straying from our subject.

It was formerly said that a trade-mark, to be entitled to judicial protection, must in itself indicate the origin or ownership of the article to which it belongs. This idea has been very materially modified by modern decisions. The rule is well stated by Lord Langdale in *Perry* v. *Truefitt*, 6 Beav. 56: "A man may mark his own manufacture, either by his name or by using for the purpose any symbol or emblem, however unmeaning in itself; and if such symbol or emblem comes by use to be recognized in trade as the mark of the goods of a peculiar person, no other trader has a right to stamp it upon his goods of a similar description." As an illustration, the words "Congress water" do not indicate either origin or ownership, for the water is a natural product, and no one would, for a moment, conceive our members of Congress as having any interest in such a subject; and yet the phrase has been held a valid trade-mark. So much the law concedes to a natural beverage described by a "fancy name." But artificial beverages are viewed with less complacency, and "Schiedam Schnapps" may be made and sold by any one. So it was held in *Wolfe* v. *Burke*, 7 Lans. 151, and although Mr. Wolfe was the first to introduce this delicate article of alcoholic stimulant to the American palate, yet any one may keep the wolf from his door by manufacturing and vending it.

It is a well-settled principle that a *colourable* imitation of one's trade-mark or designation will be restrained by a court of equity. This received exempli-

fication in the case of *Christy* v. *Murphy*, 12 How. 77. The plaintiff organized and established, in 1842, a band of performers of negro minstrelsy, and named it after himself, "Christy's Minstrels." He was the first who established this species of entertainment. When he commenced it he incurred some expenditure of time, labour, and money, and continued it successfully until 1854, when he suspended it and went to California. In his absence the defendants, most of whom had been employed by him in his band as performers for hire, assumed the style and name of "Christy's Minstrels." The plaintiff, desiring to re-instate his own band under that name, prayed an injunction against this conduct of the defendants, and it was granted. Judge Clerke, who gave the opinion of the court, and who seems a wise and merry Clerke, such as would have rejoiced the heart of Chaucer, utters some very sensible legal, hygienic and ethical observations. He says: "'Man does not live by bread alone;' the complete enjoyment, even of his physical existence, does not depend upon mere food or raiment or other material substances, but upon the exercise of the various and numerous moral and mental faculties with which God has endowed us. It may be as necessary to laugh as to eat; and I am persuaded, if people *would eat less and laugh more*, that their moral as well as physical well-being would be materially improved. The gravest of poets sings:

> 'The love of pleasure is man's eldest born;
> Wisdom, her younger sister, though more grave,
> Was meant to minister, and not to mar
> Imperial pleasure, queen of human hearts.'"

And the judge concludes that the entertainment afforded by Mr. Christy deserves the protection of the court against fraudulent imitations, and that, in the use of his name, the defendants must "keep dark."

Can a picture become a trade-mark? It was doubted by the Supreme Court of California, in *Falkinburgh* v. *Lucy*, 35 Cal. 52. Judge Sanderson, in that case, shows a keen sense of the humorous in his description of the picture in question. He says: "The plaintiff's label has a highly-coloured picture, representing a washing-room, with tubs, baskets, clothes-lines, &c. There are two tubs painted yellow, at each of which stands a female of remarkably muscular development, with arms uncovered, and clad in a red dress, which is tucked up at the sides, exposing to view a red petticoat with three black stripes running around it near the lower extremity. Each is apparently actively engaged in washing, and clouds of steam are gracefully rolling up from the tubs, and dispersing along the ceiling. In the back-ground is extended across the room a clothes-line, upon which are suspended stockings and other under-garments, which have evidently just been put to use in testing the cleansing properties of the plaintiff's washing powder. To the left of the washerwoman stands a lady in a yellow bonnet, red dress, green congress gaiters, and hoops of ample circumference; upon her left arm is suspended a yellow basket, and in her left hand is held a red parasol; while the other hand, which is encased in a green glove, is gracefully extended toward the nearest washerwoman in an attitude of earnest entreaty. In the immediate foreground is a yellow and green clothes-basket, full of dirty linen, and a yellow and green soap packing-box, upon which are printed, in small capitals, the words, 'Standard Co.'s Soap.' Each wash-tub is supported by a four-legged stool—some of the legs being yellow, some red, some green, and some all three. The floor of the room, as to colour, is in part of a yellowish green, and in part of a greenish red, while the walls are of a grayish blue. This is but an imperfect description of the picture with which the plaintiff's label is adorned. The design is good, for it is eminently suggestive of the plaintiff's goods." The judge has a good eye for colour, it seems, and might make himself very useful in writing descriptions for the religious newspapers, of the "chromos" which they are so much in the habit of offering as inducements to subscribers. But we have never seen why a picture may not be made as good a trade-mark as anything else under Lord Langdale's rule.

However this may be, it would doubtless be conceded that an artist's or engraver's device placed upon a picture by way of trade-mark, would be protected against imitation. Thus, the letters A. D., in the form of a monogram, the well-known device of Albert Durer, could not lawfully be adopted by another engraver of a different name, although he should place after the letters the year of grace in

which the work was produced, thus giving to the letters, when accurately viewed, the force simply of "*Anno Domini.*" And this is the extent to which a man can make a trade-mark of his own name. Those of a different name may be restrained from assuming his name and mark, and others of the same name from imitating his peculiar device.

One accurate observer has seemed to think that trade-marks on pictures to denote their subjects are very useful. Mark Twain, in "Innocents Abroad," after explaining how he is able to recognize pictures of St. Mark, St. Matthew, and St. Sebastian, by the presence of the lion, the book and the pen, and the arrows, respectively, goes on to remark: "When we see other monks, looking tranquilly up to heaven, but having no trade-mark, we always ask who those parties are."

It is also a familiar principle that equity will not lend its aid to restrain imitations of articles which are themselves deceptive and false in their appellations. Thus, in *Fetridge* v. *Wells*, 13 How. 385, where the plaintiff made a liquid soap, composed of palm oil, potash, alcohol and sugar, and called it "Balm of Thousand Flowers," he was denied an injunction to restrain the defendant from doing the same thing. In other words, although the plaintiff came into court with so much soap, he did not come with "clean hands." We have seldom seen a case exhibiting a judge in such a prosaic and unimaginative light as this. Judge Duer actually denied an injunction, on the ground that the title of the plaintiff's soap was false and fraudulent, and induced the public to believe that it was concocted of many flowers! He satirically calls the article a "precious compound," and spends several pages in the severest judicial denunciation of its inventor. He quotes Webster and Johnson to show that "balm" means "an aromatic vegetable juice, whether extracted from trees, shrubs or flowers." What he would do to one who should call a soap "Balm of Gilead," does not appear. But, however matter-of-fact the judge was as to the title, he was sound when he came to criticise the paper of directions, which promised that the preparation would cure nearly every ill that flesh is heir to; and not even the "ingenious pleasantry" of "the able counsel for the plaintiff, to whom he always listened with pleasure, and not unfrequently with instruction;" nor his own concession that "it would be difficult for a judge of the most approved and habitual gravity to read this paper of directions without a smile;" nor his own pleasantry, that "it would seem that so long as the 'Balm of Thousand Flowers' may be procured, it will be a folly to grow old and mistake to die," could cause him to forget his duty to refuse to aid the plaintiff in obtaining a monopoly to deceive the public. To show how doctors will disagree, we may cite the opinion of another judge of the same court upon a similar application, in respect to the very same article. Judge Hoffman could see no great harm in the title of the article, and said, "If a man should compound tallow with some high scent and beautiful colouring matter, and term it the 'Ointment of Immortality,' he has a right to appropriate so much of public credulity as he can by this designation." He also remarked that, the further removed an appelation is from an accurate description of the article, the more decided and exclusive becomes the right to it. He cited the cases of the "Medicated Mexican Balm," which had nothing in its composition peculiar to the land of Montezuma, and the "Chinese Liniment," which was an utter stranger to the celestial empire. (See *Fetridge* v. *Merchant*, 4 Abb. 156). Mr. Brown, in his original and ingenious treatise on trade-marks, takes similar ground. He says: "We are not deceived into thinking that there is any 'gold dust' in the whiskey that bears that name; or that an illuminating oil is verily 'mineral sperm oil;' or that pills are really 'Everlasting.'" We are quite inclined to agree with the latter authorities, and to believe that the public are not quite so credulous as Judge Duer seems to think. At all events, we think that Judge Sutherland lays down the true doctrine in *Comstock* v. *White*, 18 How. Pr. 421. "As to the public," he says, "if these pills are an innocent humbug, by which the parties are trying to make money, I doubt whether it is my duty, on these questions of property, of right and wrong between the parties, to step outside of the case, and to abridge the innocent individual liberty which all persons must be presumed to have in common, of suffering

themselves to be humbugged." A doctrine previously enunciated in substance by Butler:

> "Doubtless the pleasure is as great
> Of being cheated, as to cheat."

And by *The Spectator*: "There is hardly a man in the world, one would think, so ignorant, as not to know that the ordinary quack doctors, who publish their great abilities in little brown billets, distributed to all who pass by, are, to a man, impostors and murderers; yet such is the credulity of the vulgar, and the impudence of those professors, that the affair still goes on, and new promises of what was never done before are made every day."

The principle of *Fetridge* v. *Wells* was less dubiously illustrated in *Hobbs* v. *Francais*, 19 How. 567. The plaintiff manufactured a cosmetic powder called "Meen Fun," and represented on his labels that it was "patronized by Her Majesty the Queen," and that the plaintiff's place of business was in London. It appearing that the article was really manufactured in New York, a motion for an injuction against the defendant's manufacture of a similar article, by the same name, was refused, the court remarking: "Her Majesty the Queen is probably ignorant of its virtues or even of its existence." And again, in *Fowle* v. *Spear*, 7 Penn. L. J. 176, the complainant applied for an injunction to restrain the defendant from using wrappers, labels and bottles resembling those used by him in his business of selling "Wistar's Balsam of Wild Cherry." It was claimed, by the complainant's wrappers, that his preparation was a specific for nearly every imaginable disease. This was too much for the court, who observed: "It is not the office of chancery to intervene, by its summary process, in controversies like this; '*non nostrum tantas componere*,'" which, being translated, we suppose must mean "it is not ours to decide about a nostrum."

Curtis v. *Bryan*, 36 How. 33, is an entertaining case in several particulars. Previous to 1844, Mrs. Charlotte N. Winslow prepared a composition for children teething, which she used with success. In that year she gave the receipt to her son-in-law, the plaintiff, who commenced its manufacture and sale under the name of "Mrs. Winslow's Soothing Syrup," and, with the approval of Mrs. W., he made that his trade-mark, and the article has achieved an extensive and valuable reputation under that appelation. In 1867, the defendant commenced the manufacture and sale of a preparation of similar appearance, put up in similar form, and denominated "Mrs. H. M. Winslow's Soothing Syrup for children teething." On the petition of the plaintiff, the defendant's conduct was enjoined, it appearing that his claim to any use of the name of "Winslow" was false and fraudulent. Long before the defendant commenced his manufacture, the original mother Winslow had passed to the silent tomb, but whether her passage thither had been, or might have been, in any way soothed by the administration of her own charmed mixture, the report does not show. The case is worthy of remark in several particulars. To begin, it shows the tender interest that the law takes in infants. The chancellor and courts of equity are the guardians of infants, and the jealous protectors of their rights. In this case, the court declared that its wards should not be imposed on by pseudo-Mrs. Winslows; that their slumbers should not be broken by any such fraudulent devices, and that the court having cut its own eye-teeth, would not allow the normal development of the infantile teeth to be interfered with by Mr. Bryan and his pretended Mrs. Winslow. Again, the case discloses the unexampled spectacle of a mother-in-law doing something handsome for her son-in-law, and finally we should note that, although Mother Winslow had gone, as is confidently hoped, where there is no "wailing or gnashing of teeth," yet the plaintiff continued to advertise that "Mrs. Winslow, an experienced nurse and female physician, presents to the attention of mothers her soothing syrup;" that the defendant claimed that this was a false representation, and that the court would not protect the plaintiff in a fradulent monopoly of the name of the departed nurse; but that the court held that the objection was technical, that they would not look too intensely into tenses, and, the defendant being guilty of fraud, it did not lie in his mouth to make the objection. So Mother Winslow can rest in peace; her son-in-law can go on selling the mixture undisturbed, and thousands of young mothers, when they

feel, like Hamlet, that the "heir bites shrewdly," will bless good Mother Winslow and good Judge Van Vorst. As for this wretched designing Bryan, he ought to be sentenced to read Judge Van Vorst's opinion of him. We would not like to be in his place for a considerable consideration. If he has any conscience at all, the feelings of the ruffians who smothered the babes in the tower, and of Macbeth, who "murdered sleep," must have been as nothing to his. The poet sweetly sings:

"Heaven lies about us in our infancy;"

but, when we read this report, we must conclude that it is Bryan who *lies* about us in our infancy. Let the wretched man go. Not even the original and genuine Mother Winslow can purchase slumber for his guilty eyelids.

"Not poppy, nor mandragora,
Nor all the drowsy syrups of the world
Shall ever medicine thee to that sweet sleep
Which thou owd'st yesterday."

So much as to the action of courts in assisting poor human nature to get its teeth *in* without pain. Now, let us see how it will aid us in getting our teeth *out* without pain. *Colton* v. *Thomas*, 2 Brewster, 308, tells us how. The plaintiff alleged that he had purchased from Dr. G. Q. Colton the right to use the name "Colton Dental Association" in connection with the use of nitrous-oxide gas to alleviate pain in the extraction of teeth, and that he used the same in advertisements, and prominently displayed it on signs; that the defendant, who had been in his employment, left him, opened dental rooms in the same street, issued cards, announcing that he was "formerly operator at the Colton Dental Rooms," and extracted teeth without pain by the use of nitrous-oxide gas, and put a sign to the same purport over his door, but that the words "formerly operator at the," upon cards and sign, were in small and almost illegible letters, while the words "Colton Dental Rooms" were very conspicuous; the signs were very similar in shape, size, etc., and were hung on the same side of the street, in the same manner, and might readily be mistaken the one for the other, "especially by suffering patients impatient for relief." An injunction against the defendant's cards and signs was granted.

As we have seen, the imitation need not be literal to sustain an injunction. Thus, in *Burnett* v. *Phalon*, 9 Bosw. 192, the plaintiff's "Cocoaine" was held to be infringed by the defendant's "Cocoine;" and, in a French case, "Eau de la Floride" was held to be infringed by "Eau de la Fluoride." Here was a difference of only a single letter, but the court thought "the letter killeth."

But it is time to draw the moral from our subject. In the first place, we see that man is an imitative animal. Doubtless Mr. Darwin would derive comfort from the perusal of this paper, as affording evidence that we are all descended from Mr. Darwin's avowed ancestry. Be that as it may, the fact remains, man apes his fellow. Secondly: in the matter of trade-marks, in nine cases out of ten, the protection of the mark is sought for something not worth protecting or not needing protection. Nostrums form a large class, and things without which mankind would be as well off as with, or the thing infringed is no better than the spurious article; or the genuine is so much superior to the spurious article, that nobody will be deceived. So it is apparent that the protection extended is not for the public, but simply for individual benefit. Third: it is quite possible that if trade-marks were abolished all commodities would be improved, and less liable to adulteration or depreciation in manufacture. Mr. Wedgwood never patented his exquisite wares; he knew they could not be successfully imitated. Ulysses felt no uneasiness lest any one else should bend his bow. Wordsworth said to Lamb that Shakespeare was greatly overrated; "why," said he, "I could write just like him if I had a mind to." "Yes," replied Lamb, "if you only had the mind." There is quite a tempest in the literary tea-pot, about the authorship of "Beautiful Snow" and "Betsy and I are out," but "Paradise Lost" and "Hamlet" have had no imitators and need no trade-mark.—*Albany Law Journal.*

CANADA REPORTS.

Approved R. v. Riley, 12 P.R. 98.

ONTARIO.

ELECTION CASES.

Considered North Duffrin Election, Re 4 Man. L.R. 233

Re Hamilton Election Petition.

(*Reported by* Mr. H. J. Scott, B.A., *Student-at-Law.*)

Recognizance—Petition against two members—Jurisdiction of Magistrate—Attorney as Surety.

Held, 1. That upon a petition against two members, only the same security in amount need be given as upon a petition against one.

2. That the place where it was taken need not be shown on the face of the recognizance.

3. That a practising attorney may be a surety.

4. That a county magistrate can take the recognizance in a city which has a police magistrate, if within his county.

[March 25, 1874.—Mr. Dalton].

In this case a summons was taken out to set aside the recognizance, petition and other proceedings, on the grounds that the recognizance was invalid, having been given for only $1,000, whereas, as the petition was against two members, it should have been for $2,000; that it was not duly acknowledged, not stating where it had been taken; that the magistrate who took it had no authority to do so, and that one of the sureties was a practising attorney, and thus incapacitated from being a surety.

Davidson shewed cause. This is a double application, being to set aside the petition, and also the recognizance; but they can not be both entertained at the same time, as 36 Vict., cap. 28, sec. 14, gives five days, after objections to the security are disposed of, to object to the petition. The recognizance is taken in the words of the form laid down by the Judges, and it is not necessary that the place where it was taken should appear on its face, if it was really taken where the magistrate had jurisdiction, and that this is the case is shown by an affidavit filed by the opposite party. If the objection is a valid one, being merely formal, leave ought to be given to amend, under the Administration of Justice Act. The question as to the jurisdiction of a magistrate, under sec. 308 of the Municipal Act of 1873, in towns or cities where a police magistrate has been appointed, is the same as that raised in the *West Northumberland Case*, and has been decided in favor of his jurisdiction. One of the sureties is a practising attorney, but the only authority for his not becoming a surety is a Rule of Court, which can only apply to that particular court, and the Act is quite silent as to this point. Under the English Act, which contains the same sections as ours, it has been decided that on a petition against two members only one deposit need be made: *Pease* v. *Norwood* L. R., 4 C. P. 235. Should any of the objections be considered valid, a new recognizance has been since filed, and should be allowed to be substituted for the original one.

J. K. Kerr, contra.—Under 36 Vict. cap. 28, sec. 11, the bond must be given at the same time as the petition, and it is with that bond only that we have to do, no second one being allowed to be put in. *Pease* v. *Norwood*, by which it has been decided in England that, upon a petition against more than one member, only a single deposit need be made, is distinguishable from this. Although the sections of the Acts are the same, the judgment in that case is stated to be given in regard to the practice which had prevailed previous to the passing of the Act, which practice was different from that prevailing in Canada, prior to our Act, and the case cannot therefore be looked upon as an authority. In addition to the arguments used in the *West Northumberland Case*, as to the jurisdiction of magistrates, the course of legislation shews that the intention of Parliament was to do away wholly with their jurisdiction in places where police magistrates are appointed. Section 373 of the Municipal Act of 1866 only used the words "shall adjudicate in any case." Then came the Law Reform Act of 1868, which repealed this section, and employed much wider words in section 11, shewing an intention to still further restrict the magistrate's jurisdiction, which intention is kept alive by section 308, Municipal Act, 1873. As to one of the sureties being a practising attorney, the same reason which prohibits his being a surety in a case in the ordinary courts, operates and should have the same effect now.

Mr. Dalton.—With regard to the point which affects one of the sureties in this case—that he cannot be bail because he is a practising attorney—I do not find any authority for disqualification on that ground. It is true that under the Rules of Court, and by long established practice under them, an attorney cannot be bail in an action in the Common Law Courts. But the sole foundation of this is a Rule of Court, which does, of course, prescribe the practice in the courts to which it applies. But it is mere practice; it never was intended to impose, nor could it impose, a general rule of law. It cannot, therefore, be applied without express enactment to the election court. An attorney also is good bail in criminal proceedings: Petersdorf on Bail, 511. As to the point which regards the amount of the security, that on a petition

against two members the security should be for $2,000 and not for $1,000, I think shortly that *Pease* v. *Norwood* L. R. 4 C. P. 235, is conclusive against the objection.

The difficult and important question in the case is, whether a magistrate for the county of Wentworth can take the recognizance, under the Rules of the Election Court, in the city of Hamilton—there being a police magistrate in Hamilton?

The words of sec. 308 of the Municipal Act of 1873 are as follows:—"No other justice of the peace shall admit to bail, or discharge a prisoner, or adjudicate upon or otherwise act, in any case for any town or city where there is a police magistrate, except in the case of the illness, absence, or at the request, of the police magistrate."

This seems to be the only section now which takes away the power of the county justice to act in a town or city, within the boundaries of his county; and it is manifest from the terms of the section itself that the county justice continues to be a justice of the peace for the town or city which is within the county for all purposes, and to exercise all jurisdiction given by his commission, except in those matters forbidden by the words of the section. The commission in the city does not cease, and there is no prohibition of the exercise of authority under it in case of the illness or absence of the police magistrate, or when the police magistrate requests its exercise; and therefore the magistrate of the county of Wentworth here was commissioned as a justice of the peace for the city of Hamilton, in all matters within his commission, in which his authority is not expressly taken away by the 308th section.

It is important to observe this, because the authorities show that in such cases a very strict construction must be put upon words which restrain the powers of the commission.

It is said, in Paley on Convictions, pp. 30, 31, "The words of the commission, however, as well within liberties as without, are held to give the justices of the county jurisdiction in such boroughs and towns as are not counties of themselves, though they have a magistracy of their own, unless the charter by which they are constituted imports an express exclusion of the county magistrates, by a clause of *ne intromittant*." And again, "But the exclusion of the county magistrates has always been jealously regarded, and nothing but express words are deemed capable of having that effect. Therefore, where a borough had possessed an exclusive jurisdiction under two successive charters containing *non intromittant* clauses, and a third charter vested the authority of justices of the peace in the mayor, bailiffs and burgesses *in tam amplis modis et consimilibus modo et forma pro ut praeantea in eodem burgo insitatum et consuetum fuit*, it was held, that notwithstanding such reference to the former charters, the county magistrates could not be excluded, inasmuch as their jurisdiction was not taken away by express terms." This is very distinct as to the manner in which the statute now in question must be looked at.

The exclusion, therefore, by the 308th section, can only be by the express words of the section, and cannot be carried further by intendment. The words are not general, but are applied to particular acts—they are not that no other justice than the police magistrate shall act in his capacity as justice for the town or city, unless in the excepted cases of illness, etc. This, had it been desired, it would have been easy to enact—It is not so said; but certain specified exercises of jurisdiction are forbidden, viz: admitting to bail, or discharging a prisoner, or adjudicating upon, or otherwise acting in any case, for any town or city, etc. What these words mean, and whether or not they extend to taking a recognizance under the Election Rules, may perhaps be made plainer by a history of this section.

In the Consolidated Municipal Act there are two clauses, which were the forerunners of the present. By section 365, it was enacted that justices for the county in which a city lies, should have no jurisdiction *over offences committed in the city*, and the warrants of county justices were required to be indorsed before being executed in a city, in the same manner as required by law, when to be executed in a separate county. Observe "*over offences committed in the city*," are the words, and by section 366, the power of the government was preserved to appoint any number of justices of the peace for a town, and to continue the jurisdiction of the justices of the county in which a town was situated, over offences committed in the town, except as to offences against the by-laws of the town, and penalties for refusing to accept office, or to make the declarations of office in the town, as to which jurisdiction should be exercised exclusively by the police magistrate, or mayor, or justice of the peace for the town.

These are the only clauses of this nature that are in the Consolidated Act, and it will be seen that so far, the exclusion was entirely of a local

character. It was in this state of the law that *The Queen* v. *Row*, 14 U. C. C. P. 307, and *Hunt* v. *McArthur*, 24 U. C. Q. B. 254, were decided. This must be remembered, because the law on which they were founded has been altered.

The next Act is the 29 & 30 Vict. (1866). Section 360 is in the same language as section 365 of the Consolidated Act, with the addition that it authorizes any justice of the peace for the county to issue his warrant to try or investigate any case in a city, where the offence had been committed in the county, or union of counties, in which the city lay, or which it adjoined. This addition was no doubt occasioned by the decision in *The Queen* v. *Row*. Then section 373 enacted, that the recorder and police magistrate should be *ex officio* justices of the peace as well for the town or city as for the county in which they were situated, but that no other justice of the peace should adjudicate in any case, for any town or city where there was a police magistrate, except in the case of illness, etc.

By the Ontario Act 32 Vict., cap. 6, the above section 360 is altogether repealed. The office of recorder is abolished, and for the above section 373 is substituted a section in the words of the present section 308 of the Act of 1873.

I have gone into this somewhat tedious detail, to make manifest two results—at least as the effect appears to me. First, that there is now no distinction as respects the jurisdiction of county magistrates between a town and a city—all now depends upon section 308 of the Act of 1873, and the law upon which the *Queen* v. *Row* was decided is therefore changed. The question is now, not whether the locality is a town or city, but whether or not there is a police magistrate; and, secondly, that these sections, although in the later Acts more precise and cogent language is used than in the old ones, are still meant to enforce the same original idea—that the exclusion is altogether *local* in its character, and is meant to distinguish the jurisdiction of the county and city, or town magistrates as among themselves in respect of matters arising in the county, town or city. There is judicial decision to this effect In *Regina* v. *Morton*, 19 U. C. C. P. 9. Hagarty, C. J., takes this view of the then existing clause; and Gwynne, J., says (p. 27): "But it is further contended that the provisions of sections 356, 360 and 367 to 373 inclusive, of 29 & 30 Vict. cap. 51, have the effect of prohibiting and restraining Mr. McMicken—although acting under 28 Vict. cap. 20, from acting as a police magistrate in this matter within the city of Toronto, which has a police magistrate of its own. This contention rests upon no solid foundation, and it involves, in my judgment, a misconception of the object and intention of the sections referred to, the plain import of which, as their language unequivocally conveys, is to establish certain local courts having limited criminal jurisdiction, and to define the respective jurisdictions of the police magistrate of a city situated within a county, and of the justices of the peace of that county, in respect of offences committed within the city and county respectively. This is the sole object of the sections referred to. They have no application whatever to proceedings under the Extradition Treaty (which the matter then before the court concerned), which relates to offences committed in a foreign country."

This is to the very point. The taking of a recognizance in an election petition has no reference to any locality. It may be done in any county of the Province, and, therefore, there is no reason to suppose the act by a county magistrate, in a police town, forbidden by section 308.

There is very old and well-established law defining those acts which a justice may do out of his own county. It is to be found in "Bacon's Abridgment, Justices of the Peace," E. 5. It is there said, "As justices of the peace have no coercive power out of their county, they cannot make an order of bastardy or such like orders out of their county. But a justice of the peace, as we have already seen, may do a ministerial act out of the county, such as examine a party robbed, whether he knows the felons, according to the statute or not. Also by the better opinion, recognizances and informations voluntarily taken before them in any place are good, for those, says my Lord Chief Justice Hale, are acts of voluntary jurisdiction, and may be done out of the county, as a bishop may grant administration, institution or orders out of his diocese. But a Justice cannot imprison a person for not giving a recognizance, or commit a person for a crime, for these are acts of compulsory jurisdiction which he cannot exercise out of his proper county." 2 Hale, 51, 2 Hawkins, 47, are the authorities for this, and the distinction as to voluntary and coercive jurisdiction, is noticed in Paley on Convictions, p. 18, without any hint that it is not well founded. In Petersdorf on Bail, 511, it is said that recognizances voluntarily taken before justices out of their own county are valid.

After all, is the taking of an election recognizance a judicial act? Admitting to bail is. But here there is no judgment to be exercised, everything is prescribed by the rules of the election court. At any rate, the last mentioned cases show that it is an act of that nature which cannot be within the prohibitions of section 308.

There is another point—that the place where the recognizance was taken is not shown on the face of it. This seems to be unnecessary, if in fact the taking of it was authorized. See the form in Petersdorf, and in Burns' Justice, and *Queen* v. *Sydserff* 2 D. & L. 564. The fact that it was taken in Hamilton is supplied by the respondent himself. See *French* v. *Bellew* 1 M. & S. 302.

I refer further on the question of jurisdiction, to *Kerr* v. *Marquis of Ailsa*, 1 McQ. H. L.C. 736.

I discharge the summons, but, from the nature of the principal question, without costs.

Order accordingly.

CHANCERY CHAMBERS.

NOTES OF CASES.

PETERSON v. PETERSON.

Interim alimony—Con. order 488.

[April 20, 1874—Strong, V. C., affirming the order of the Referee, April 4, 1874.]

An omission to make the endorsement directed by Con. Order 488, to be made upon the office copy of the Bill served, does not disentitle a plaintiff to apply on motion for interim alimony, but is a question merely affecting the costs of the motion.

Where a plaintiff had neglected to proceed to a hearing at the first hearing term after issue joined, it was held that this was no bar to her obtaining interim alimony, it appearing that the neglect was owing to a mere slip on the part of her solicitor, that she had a *bona fide* intention to go to a hearing, and had made offers to change the venue with a view to enable the cause to be speedily heard.

WEISS v. CRAFTS.

Vendor and purchaser—Execution of conveyance.

[April 20, 1874.—The Referee.]

Under the fifth clause of the standing conditions of sale the purchaser makes a sufficient tender of the conveyance for execution by delivering it to the vendor's solicitor; and it is the duty of the vendor's solicitor to procure its execution by all necessary parties.

The purchaser is not bound to pay the expenses of procuring the execution of the conveyance, unless there be an express condition to that effect.

Until the conveyance is completed and delivered to the purchaser, he may properly resist payment out of Court of any part of his purchase money.

WILSON v. WILSON.

Security for costs—Order on præcipe.

[April 27—Strong, V. C., on appeal from the Referee.]

An order for security for costs can only be obtained on *præcipe* when the plaintiff admits on the face of the bill that he is resident abroad, and there is nothing in the bill qualifying such admission. Where a bill describes the plaintiff as of the City of Toronto, but stated that, "by "the advice of a physician the plaintiff had "sought change of air, and is now temporarily "resident at Rochester," it was held that an order for security for costs could not properly be granted on *præcipe*.

DUNN v. McLEAN.

Restoring dismissed bill.

[May 18—Strong, V. C., on appeal from the Referee.]

A bill dismissed for default of prosecution will not be restored unless it can be shewn that the plaintiff's cause of suit will be lost by the dismissal.

ENGLISH REPORTS.

COURT OF PROBATE.

BOUGHTON AND MARSTON v. KNIGHT AND OTHERS.

Will—Testamentary capacity.

Mental capacity is a question of degree, but the highes degree of capacity is required to make a testamentary disposition, inasmuch as it involves a larger and wider survey of facts than is needed to enter into the ordinary contracts of life. A sound mind in contemplation of law does not necessarily mean a perfectly balanced mind: *Banks* v. *Goodfellow*, [illegible] T. Rep. N. S. 813; 5. L. Rep. Q. B. 549, considered.

[28 L. T. N. S. 502, June 21, 1873.]

John Knight, deceased, late of Henley Hall, in the county of Salop, died 7th Sept., 1872 aged sixty-nine, leaving a will, bearing date Jan 27th, 1869. This was propounded by the plaintiffs, Sir Charles Henry Rouse Boughton and Mr. Edward Marston, the executors, and it was opposed by the defendants, the three sons of the deceased, and the children of a deceased daughter, on the ground that the deceased, at the time of the execution of the will, was not of sound mind.

The testator was married in 1827, and shortly after his marriage removed to Brussels, where he resided until 1848. His wife died in 1842, and in 1853, on the death of his father, he

came into possession of considerable landed property in Shropshire. At his death his personal estate was of the value of 62,000*l.* ; his realty was of the value of 1500*l.* a year. The will was prepared by Mr. Marston, who was a solicitor at Ludlow, and who was recommended to him at his desire by Sir Charles Boughton. By the will the testator gave legacies of 8000*l.* to his son James, 7000*l.* to his son Charles, and a life interest in 10,000*l.* to his son John, 10,000*l.* to his brother Humphrey, 10,000*l.* to be divided between the daughters of his deceased brother Thomas, 1500*l.* to his sister, Mrs. Mansfield ; 1000*l.* to each of his executors, and then smaller legacies, amounting together to 1300*l.* He appointed Sir Charles Boughton residuary legatee and devisee, and he also named him joint executor with Mr. Marston.

In support of the will the plaintiffs relied on the fact that the testator, who was admittedly of eccentric habits, and led a retired and secluded life, had always managed his own affairs, and had been treated by those with whom he had business transactions as of sound mind. For the defence it was alleged, that besides labouring under mental perversion in some other particulars, the deceased had conceived an insane aversion to his children, and that he was actuated by it to dispose of his property in the manner in which it was purported to be conveyed by the will.

Sir C. Boughton was a neighbour of the testator, and was on friendly, but not on intimate terms with him.

The case was tried before Sir J. Hannen and a special jury, and the trial extended over thirteen days in the month of March.

Serjt. *Parry* (with him *Day*, Q.C., and *Inderwick*), for the plaintiffs.

Sir *J. B. Karslake* (with him *Lloyd*, Q.C., Dr. *Swabey*, and *C. A. Middleton*), for the defendants.

In the course of his summing up to the jury, Sir JAMES HANNEN made the following observations :—The sole question in this case which you have to determine is, in the language of the record, whether Mr. John Knight, when he made his will, on the 27th Jan., 1869, was of sound mind, memory and understanding. In one sense, the first phrase, "sound mind," covers the whole subject ; but emphasis is laid upon two particular functions of the mind which must be sound in order to create a capacity for the making of a will, for there must be memory to recall the several persons who may be supposed to be in such a position as to become the fitting objects of the testator's bounty. Above all, there must be understanding, to comprehend their relations to himself, and their claims upon him. But, as I say, for convenience, the phrase "sound mind," may be adopted, and it is the one which I shall make use of throughout the rest of my observations. Now you will naturally expect from me, if not a definition, at least an explanation of what is the legal meaning of those words, "a sound mind ;" and it will be my duty to give you such assistance as I am able, either from my own reflections upon the subject, or by the aid of what has been said by learned judges whose duty it has been to consider this important question before me. But I am afraid that, even with their aid, I can give you but little help, because, though their opinions may guide you a certain distance on the road you have to travel, yet where the real difficulty begins—if difficulty there be in this case—there you will have to find or make a way for yourselves. But I must commence, I think, by telling you what a "sound mind" does not mean. It does not mean a perfectly balanced mind. If it did, which of us would be competent to make a will ? Such a mind would be free from the influence of prejudice, passion, and pride. But the law does not say a man is incapacitated from making a will because he proposes to make a disposition of his property which may be the result of capricious, of frivolous, of mean, or even bad motives. We do not sit here to correct injustice in that respect. Our duty is limited to this—to take care that that, and that only, which is the true expression of a man's real mind shall have effect given to it as his will. In fact, this question of justice and fairness in the making of wills, in a vast majority of cases, depends upon such nice and fine considerations that we cannot form, or even fancy that we can form, a just estimate of them. Accordingly, by the law of England, every man is left free to make choice of the persons upon whom he will bestow his property after death, entirely unfettered as to the selection which he may think fit to make. He may wholly or partially disinherit his children, and leave his property to strangers, to gratify his spite, or to charities to gratify his pride ; and we must respect, or rather I should say we must give effect to, his will, however much we may condemn the course which he has pursued. In this respect the law of England differs from the law of other countries. It is thought better to risk the chance of an abuse of the power arising, than altogether to deprive men of the power of making such selection as their knowledge of the characters, of the past his-

tory and future prospects of their children or other relatives may demand; and we must remember that we are here to administer the English law, and we must not attempt to correct its application in a particular case by knowingly deviating from it. I have said that we have to take care that effect is given to the expression of the true mind of the testator, and that, of course, involves a consideration of what is the amount and quality of intellect which is requisite to constitute testamentary capacity. I desire particularly, now and throughout the consideration which you will have to give to this case, to impress upon your minds that, in my opinion, this is eminently a practical question—one in which the good sense of men of the world is called into action, and that it does not depend either upon scientific or legal definitions. It is a question of degree, which is to be solved in each particular case by those gentlemen who fulfil the office which you now have imposed upon you; and I should like, for accuracy's sake, to quote the very words of Lord Cranworth, to which I referred in the observations which I had to make on a former occasion, and from which Sir John Karslake, in his opening speech, quoted a passage. In the case of *Boyse* v. *Rossborough* (6 H. of L. Cas. 4), in the House of Lords, Lord Cranworth made use of these words: "On the first head the difficulty to be grappled with arises from the circumstance that the question is almost always one of degree. There is no difficulty in the case of a raving madman or a drivelling idot, in saying that he is not a person capable of disposing of property; but between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect—every degree of mental capacity. There is no possibility of mistaking midnight for noon, but at what precise moment twilight becomes darkness is hard to determine." In considering the question, therefore, of degree, large allowance must be made for the difference of individual character. Eccentricities, as they are commonly called, of manner, of habits of life, of amusements, of dress and so on, must be disregarded. If a man has not contracted the ties of domestic life, or if, unhappily, they have been severed, a wide deviation from the ordinary type may be expected; and if a man's tastes induce him to withdraw himself from intercourse with friends and neighbours, a still wider departure from the ordinary type must be expected; we must not easily assume that because a man indulges his humours in unaccustomed ways, that he is therefore of unsound mind. We must apply some other test than this, of whether or not the man is very different fom other men. Now the test which is usually applied, and which in almost every case is found sufficient, is this—was the man laboring under delusions? If he laboured under delusions, then to some extent his mind must be unsound. But though we have thus narrowed the ground, we have not got free altogether from difficulty, because the question still arises, what is a delusion? On this subject an eminent judge, who formerly sat in the court, the jurisdiction of which is now exercised here, has quoted with approbation a definition of delusion, which I will read to you. Sir John Nicoll, in the famous case of *Dew* v. *Clark* (1 Hagg. 11), as to which I shall have to say a word to you by-and-by, says:—"One of the counsel"—that counsel was Dr. Lushington, who afterwards had to consider similar questions—"accurately expressed it; it is only the belief of facts which no rational person would have believed, that is insane delusion." Gentlemen, in one sense that is arguing in a circle; for, in fact, it is only to say that that man is not rational who believes what no rational man would believe; but for practical purposes it is a sufficient definition of a delusion, for this reason, that you must remember that the tribunal that is to determine the question, whether judge or juryman, must of necessity take his own mind as the standard whereby to measure the degree of intellect possessed by another man. You must not arbitrarily take your own mind as the measure, in this sense that you should say, I do not believe such and such a thing; therefore the man who believes it is insane. Nay, more; you must not say, I should not have believed such and such a thing; therefore, the man who did believe it is insane. But you must of necessity put to yourself this question, and answer it: Can I understand how any man in possession of his senses could have believed such and such a thing? And if the answer you would have to give is, I cannot understand it; then it is of the necessity of the case that you should say that that man is not sane. Sir John Nicoll, in a previous passage, has given what appears to me to be a more logical and precise definition of what a delusion is. He says:—"The true criterion is, where there is a delusion of mind there is insanity; that is, when persons believe things to exist which exist only, or at least in a degree exist only, in their own imagination, and of the non-existence of which neither argument nor proof can convince them, they are of unsound mind." I believe you will find that

that test applied will solve most, if not all, the difficulties which arise in investigations of this kind. Now, of course, there is no difficulty in dealing with cases of delusion of the grosser kind of which we have experiences in this court. Take the case, which has been referred to, of Mrs. Thwaites. If a woman believes that she is one person of the Trinity, and that the gentleman to whom she leaves the bulk of her property is another person of the Trinity, what more need be said? But a very different question, no doubt, arises where the nature of the delusion which is said to exist is this, when it is alleged that a totally false, unfounded, unreasonable—because unreasoning—estimate of another person's character is formed. That is necessarily a more difficult question. It is unfortunately not a thing unknown, that parents—and I should say in justice to women, it is particularly the case rather with fathers than with mothers—that they may take unduly harsh views of the characters of their children, sons especially. That is not unknown. But there is a limit beyond which you can feel that it ceases to be a question of harsh, unreasonable judgment of character, and that the repulsion which a father exhibits towards one or more of his children must proceed from some mental defect in himself. It is so contrary to the whole current of human nature that a man should not only form a harsh judgment of his children, but that he should put that into practice so as to do them mischief or to deprive them of advantages which most men desire, above all things, to confer upon their children—I say there is a point at which, taken by itself, such repulsion and aversion becomes evidence of unsoundness of mind. Fortunately it is rare. It is almost unexampled that such a delusion, consisting solely of aversion to children, is manifested without other signs which may be relied on to assist you in forming an opinion on that particular point. There are usually other aberrations of the mind which afford an index as to the character of the treatment of the children. Perhaps the nearest approach to a case in which there was nothing but dislike on the part of a parent to his child on which to proceed was the case of *Dew* v. *Clark* (*sup*). There were indeed some minor things which were adverted to by the judge in giving his judgment, but he passes over these, as it was natural he should do, lightly; as for instance, there was in that case the fact that the gentleman who had practised medical electricity attached extraordinary importance to that means of cure in medical practice. He conceived that it might be applied to every purpose, among the rest even to assisting of women in child-birth. But those were passed over, not indeed cast aside altogether, but passed over by the judge as not being the basis of his judgment. What he did rely on was, a long, persistent course of dislike of his only child, an only daughter, who, upon the testimony of everybody else who knew her, was worthy of all love and admiration, for whom indeed the father no doubt entertained, so far as his nature would allow him, the warmest affection; but it broke out into these extraordinary forms, namely, he desired that that child's mind should be subject entirely to his own; that she shonld make her nature known to him, and confess her faults as, of course, a human being can only do to his Maker; and because his child did not fulfil his desires and hopes in that respect, he treated her as a reprobate, as an outcast. In her youth he treated her with great cruelty. He beat her; he used unaccustomed forms of punishment, and he continued throughout her life to treat her as though she were the worst, instead of, apparently, one of the best of women. In the end he left her indeed a sum of money sufficient to save her from actual want, if she had needed it, for she did not need it. She was well married to a person perfectly able to support her; and therefore, the argument might have been used in that case, that he was content to leave her to the fortune which she had secured by a happy marriage. He was not content to leave her so. He did leave her, as I say, a sum of money which would have been sufficient, in case of her husband falling into poverty, to save her from actual want; and, moreover, he left his property not to strangers — not to charities — but he left his property to two of his nephews. He was a man who throughout his life had presented to those who met him only in the ordinary way of business, or in the ordinary intercourse of life, the appearance of a rational man. He had worked his way up from a low beginning. He had educated himself as a medical man, going to the hospitals and learning all that could be learnt there, and he amassed a very large fortune—at least, a large fortune, considering what his commencement was—a fortune of some £25,000 or £30,000, by the practice of his profession. Yet, upon the ground which I have mentioned, that the dislike which he had conceived for this child reached such a point, that it could only be ascribed to mental unsoundness, that will so made in favour of the nephews was set aside, and the

law was left to distribute his property without reference to his will. Now, I say usually you have the assistance of other things, besides the bare fact of a father conceiving a dislike for his child, by which to estimate whether that dislike was rational or irrational; and in this case, of course it has been contended that you have other criteria by which to judge of Mr. Knight's treatment of his children in his lifetime, and his treatment of them by his will after his death. You are entitled, indeed you are bound not to consider this case with reference to any particular act, or rather you are not to confine your attention to a particular act, namely, that of making the will. You are not to confine your attention to the particular time of making the will, but you are to consider Mr. Knight's life as a whole with the view of determining whether, in Jan. 1869, when he made that will, he was of sound mind. I shall take this opportunity of correcting an error, which you indeed would not be misled by, because you heard my words; but I observe that in the short-hand report of what I said in answer to an observation made by one of you gentlemen in the course of the cause, a mistake has been made, which it is right I should correct; because, of course, everything that falls from me has its weight, and I am responsible for my words to another court which can control me if I am wrong in the directions I give you. Therefore I beg to correct the words that have been put into my mouth, when I said that if a man be mad admittedly in 1870, and his conduct is the same in 1868 as it was in 1870, when he was, as we will assume, admittedly mad, you have the materials from which you may infer the condition of his mind in the interval. I have been reported to say, "from which you *must* infer the condition of his mind." That is of course what I did not say. Now, gentlemen, I think I can give you assistance by referring to what has been said on this subject in another department of the law. Some years ago the question of what amount of mental soundness was necessary in order to give rise to responsibility for crime was considered in the case of *MacNaghten*, who shot Mr. Drummond, under the impression that he was Sir Robert Peel, and the opinion of all the judges was taken upon the subject; and though the question is admittedly a somewhat different one in a criminal case to what it is here, yet I shall explain to you, presently, in what that difference consists; and there is, as you may easily see, an analogy which may be of use to us in considering the point now before us. There, Tindal, C. J., in expressing the opinion of all the judges (one of them was a very eminent judge, who delivered an opinion of his own, but it did not in any way differ from the other judges), says:—"It must be proved that at the time of committing the act, the party accused was labouring 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." Now that, in my opinion, affords as nearly as it is possible a general *formula* that is applicable to all cases in which this question arises, not exactly in those terms, but in the manner in which I am about to explain to you. It is essential to constitute responsibility for crime, that a man shall understand the nature and quality of the thing he is doing, or that he shall be able to distinguish in the act he is doing right from wrong. Now a very little degree of intelligence is sufficient to enable a man to judge of the quality and nature of the act he is doing when he kills another; a very little degree of intelligence is sufficient to enable a man to know whether he is doing right or wrong when he puts an end to the life of another; and accordingly he is responsible for crime committed if he possesses that amount of intelligence. Take the other cases that have been suggested. Serjt. Parry, with the skill which characterises all that he does as an advocate, endeavored to alarm your mind, as it were, against taking a view hostile to him, by representing that if you come to the conclusion that Mr. Knight was of unsound mind in Jan. 1869, you undo all the important transactions of his life. In the first place, it is obvious that the same question which is now put to you on behalf of the plaintiff in this case would be put to any jury who had to determine the question with reference to any other act of his life, namely, whether at the time of the act done he was of sufficient capacity to understand the nature of the act he was doing. But in addition to that, take, for instance, the question of marriage. The question of marriage is always left in precisely the same terms as I have said to you it seems to me it should be left in almost every case. When the validity of the marriage is disputed on the ground that one or other of the parties was of unsound mind, the question is, was he or she capable of understanding the nature of the contract which he or she was entering into? So it would be with regard to contracts of buying or selling; and, to make use of an illustration—a very interesting one given us by the learned serjeant—take the case of the unhappy man who, being confined in a lunatic asylum, and with delusions in his

mind, was called to give evidence. First of all the judge had to consider, was he capable of understanding the nature and character of the act that he was called upon to do when he swore to tell the truth? Was he capable of understanding the nature of the obligation imposed upon him by that oath? If he was, then he was of sufficient capacity to give evidence as a witness. But, gentlemen, whatever degree of mental soundness is required for any one of these things, responsibility for crime, capacity to marry, capacity to contract, capacity to give evidence as a witness, I tell you, without fear of contradiction, that the highest degree of all, if degrees there be, is required in order to constitute capacity to make a testamentary disposition. Because you will easily see it involves a larger and a wider survey of facts and things than any one of these matters to which I have called your attention. Every man, I suppose, must be conscious that in an inmost chamber of his mind there resides a power which makes use of the senses as its instruments, which makes use of all the other faculties. The senses minister to it in this manner: they bring, by their separate entrances, a knowledge of things and persons in the external world. The faculty of memory calls up pictures of things that are past; the imagination composes pictures and the fancy creates them, and all pass in review before this power, I care not what you call it, that criticises them and judges them, and it has moreover this quality which distinguishes it from every other faculty of the mind, the possession of which indeed distinguishes man from every other living thing, and makes it true in a certain sense that he is made in the image of God. It is this faculty, the faculty of judging himself; and, when that faculty is disordered, it may safely be said that his mind is unsound. Now I wish to call your attention to a case which has been frequently adverted to in the course of this cause. It is the case of *Banks* v. *Goodfellow*, a judgment of the Court of Queen's Bench, at a time when I had the honor of being a member of it. I was, therefore, a party to the judgment; but everybody, or rather I should say, all the members of the legal profession who hear me, will, of course, recognize the eloquent language of the great judge who presides over that court, the present Lord Chief Justice. But I was a party to the judgment, and, of course, while bound by it, I am bound by it only in the sense in which I understand its words. I think there can be no room for misconception as to their meaning, but I must explain to you the scope and bearing of it. That was a case in which a man who had, indeed, been subject to delusions before and after he made his will, was not shown to be either under the influence of those delusions at the time, nor, on the other hand, was he shown to be so free from them that if he had been asked questions upon the subject he would not have manifested that they existed in his mind. But he made a will, by which he left his property to his niece, who had lived with him for years and years, and to whom he had always expressed his intention of leaving his property, and to whom, in the ordinary sense of the word, it was his duty to leave the property, or it was his duty to take care of her after his death. It was left to the jury to say whether he made that will free from the influence of any of the delusions he was shown to have had before and after, and the jury found that the will which I have described to you was made free from the influence of the delusions under which he suffered, and it was held that, under those circumstances, the jury finding the fact in that way, that finding could not be set aside. I will not, of course, trouble you with reading the whole of the judgment, which, however, I may say, would well reward the trouble of reading it by laymen as well as by professional men, but I shall pick out passages to show you how carefully-guarded against misapprehension this decision is. I shall have occasion by-and-by to call your attention to instances in it which I think it has been sought to apply it incorrectly in the argument which has been addressed to you. Now, at one passage of the judgment, the Lord Chief Justice says this:—"No doubt, when the fact that the testator has been subject to any insane delusion is established, a will should be regarded with great distrust, and every presumption should in the first instance be made against it. When insane delusion has once been shown to have existed, it may be difficult to say whether the mental disorder may not possibly have extended beyond the particular form or instance in which it has manifested itself. It may be equally difficult to say how far the delusion may not have influenced the testator in the particular disposal of his property. And the presumption against a will made under such circumstances becomes sufficiently strong when the will is, to use the term of the civilians, an inofficious one—that is to say, one in which natural affection and the claims of near relationship have been disregarded." But, in an earlier passage in the judgment, the Lord Chief Justice lays down with, I think I may say, singular accuracy, as well as beauty of language, what is essential to

the constitution of testamentary capacity. Sir John Karslake anticipated me in many of the passages I should have read to you. I shall not read all he read, but I shall select this passage, as containing the very kernel and essence of the judgment:—"It is essential to the exercise of such a power" (that is the power of making a will), "that a testator shall understand the nature of the act and its effects; shall understand the extent of the property of which he is disposing; shall be able to comprehend and appreciate the claims to which he ought to give effect; and, with a view to the latter object, that no disorder of the mind shall poison his affections, pervert his sense of right, or prevent the exercise of the natural faculties, that no insane delusion shall influence his will in disposing of his property, and bring about a disposal of it, which, if the mind had been sound, would not have been made. Here, then, we have the measure of the degrees of mental power which should be insisted on. If the human instincts or affections, or the moral sense become perverted by mental disease; if insane suspicion or aversion take the place of natural affection; if reason and judgment are lost, and the mind becomes a prey to insane delusions calculated to interfere with and disturb its functions, and to lead to a testamentary disposition due only to their baneful influence, in such a case it is obvious that the condition of the testamentary power fails, and that a will made under such circumstances ought not to stand." I have no fear, when rightly understood, of that case being misapplied. [His Lordship then proceeded to consider the evidence in the case. Having done so at considerable length, he pointed out that while the witnesses called on behalf of the plaintiffs had few opportunities of meeting the deceased, and could only say that they had never seen anything odd or strange in his behaviour, the witnesses for the defence, who deposed to his insanity, were in constant association with him, and had therefore ample means of observing his true and inner life. The learned judge continued:]—It is for you to say whether the accumulation of this evidence for the defendants has not this effect on your mind, that it leads you to the conclusion that whatever fluctuations there may have been in the condition of Mr. Knight's mind, for some years before he made that will he had been subject to delusions, and especially he had been subject to delusions with reference to the character, the intention, the motives of his sons' acts; and if you come to the conclusion that he was subject to these delusions, I beg to particularly impress on your minds that it is the duty of the plaintiffs to satisfy you that at the time when the testator made that will he was free from those delusions, or free from their influence. The burden of proof, as it is called, is upon those who assert that the testator was of sound and disposing mind. In considering that question you cannot, I am sure, put aside the contents and the surrounding circumstances of that will. Then, on considering whether or not he was free from delusions as to the characters of his several sons whom he passed over in the disposition of his estate, though he left them sums of money out of his personalty, you cannot disregard the fact that he selected one having no natural claims upon him, of whom he knew little, and to whom he was under no obligations, which are usually recognised as the foundation on which to make a gift of this kind. That must be taken into your consideration in determining whether at the time he did this those prevailing delusions which I have referred to had passed away, or were utterly inoperative.

The jury found that at the time the will was executed the testator was not of sound mind.

UNITED STATES REPORTS.

DISTRICT COURT FOR DISTRICT OF CALIFORNIA.

IN RE JULIA LYONS.

Bankruptcy—Married Women.

In a state whose statute law makes a married woman living apart from her husband liable to be sued in all actions as if *sole*, she may be proceeded against under the bankrupt law.

[Jan. 29, 1874.]

HOFFMAN, J.—The question raised by the demurrer in this case, is whether the respondent, being a married woman, is liable on a contract to pay rent, and, if she has committed an act of bankruptcy, can be adjudged bankrupt. It appears that the husband of the respondent has long since renounced and abandoned all his marital rights and duties. For twelve years Mrs. Lyons has lived separate and apart from him, supporting herself and her minor children by her own exertions. In the course of her business as keeper of a lodging-house, she has contracted an indebtedness for rent, and being so indebted, and in contemplation of bankruptcy and insolvency, has made, as is alleged, an assignment of her property in fraud of the bankrupt act.

It is urged by the respondent's counsel that the contract of a married woman for the pay-

ment of money is void, and that the petitioning creditor has no debt which the court can recognize. On this point numerous authorities are cited; but as they, for the most part, are decisions under the act of April 17, 1850, and the amended act of May 12, 1862, no examination of them is necessary. The decision of the question before us turns upon the force and effect to be given to the act of March 9, 1870. (Laws of 1870, p. 226.)

The first three sections of that act are as follows: Section 1. "The earnings of the wife shall not be liable for the debts of the husband." Section 2. "The earnings and accumulations of the wife and her minor children living with her, or being in her custody, while the wife is living separate and apart from her husband, shall be the separate property of the wife." Section 3. "The wife, while living separate and apart from her husband, shall have the sole and exclusive control of her separate property, and may sue and be sued without joining her husband, and may avail herself of, and be subject to, all legal process in all actions, including actions concerning her real estate." The fourth section prescribes the mode in which she may convey her real estate.

The object of these enactments is apparent. It was to secure to the wife, when abandoned by her husband, the fruits of her own industry, and to enable her to support herself and her children out of her earnings and accumulations, free from his interference or molestation. For this purpose her earnings and accumulations, which at common law belonged to her husband, are declared her separate property, and her rights in respect of such property are carefully defined. She is to have the sole and exclusive control of it; she may separately sue or be sued, and may avail herself of and be *subject* to *all legal process* in *all actions*. That the principal intention of the legislature was to protect deserted wives in their just rights, and not to impose upon them additional liabilities, is admitted. For this purpose they were placed in the position of *quasi femes sole*, and were granted all the powers necessary to enable them to earn their own livelihood, and to retain and enjoy the fruits of their industry. But to accomplish this object, it was evidently necessary to create new liabilities as well as to confer new rights. The ability to sue for moneys earned by or due to her was clearly indispensable to enable the wife to attain the object contemplated by the law.

Justice and reason, and even her own interests, demanded that she should herself be liable for all debts contracted by her. For without such liability how could she obtain the credits usually necessary in the conduct of any business; and what could be said of the morality of a law which should announce to a woman that for all debts and demands due her she shall have the right to sue and enforce payment, but as to debts due by her she may plead her coverture as a conclusive bar to the action?

The separate property of a married woman has, on general principles of equity, been held liable for debts contracted in respect to it or in and about its management and improvement. The act of 1870 created a new species of separate property in the earnings and accumulations of the wife while separated from her husband.

The equitable principles already adopted by the courts, and usually enforced by statute, required this new species of separate property should be liable for debts incurred in its creation or management, and in the course of the business, the proceeds of which the statute enables the wife exclusively to enjoy. Further discussion, however, is needless, as the language of the act is too explicit to be mistaken. It enacts that the wife separated from the husband "may sue and *be sued*, and that *she* shall be subject to all *legal process in all actions*." This language is obviously inconsistent with any exemption from liability to suit for a just debt on the pretext that, being a married woman, her contracts for the payment of money are void.

The respondent being thus found to have incurred a valid indebtedness and a liability to be sued therefor as if a *femc sole*, she may, if she has committed an act of bankruptcy, be adjudged a bankrupt. Hillard on Bankruptcy, p. 49; Avery and Hobbs on Bankruptcy, pp. 33-4; *in re* Kinkead, 7 N. B. R., p. 439.

The demurrer is overruled and the respondent allowed ten days to answer the petition.—*Pacific Law Reporter.**

* Whether a married woman may be proceeded against under the bankrupt act, would seem to depend, in each particular case, upon her power of making contracts, or of engaging in trade or other business independently of her husband. The general rule of the common law is that a married woman possesses no such power; but that if she enters into contracts or engages in trade or other business with her husband's consent or ratification, she acts simply as his agent; and hence that the fruits of such contracts, or the accumulations of such trade or business, belong to him and not to her. Bish. Mar. Wom., s. 733; *Switzer* v. *Valentine*, 4 Duer, 96; *Jenkins* v. *Flinn*, 37 Ind., 349. Wherever this rule of the common law obtains in full force, it is clear that she cannot be adjudged a bankrupt. *In re* Goodman, 8 N. B. R., 380.

But this rule admits of exceptions, and these may be arranged into two classes: 1. Exceptions created by local custom or by local law. 2. Exceptions growing out of a temporary cessation of the coverture.

Under the first of these exceptions is the case of frequent occurrence in the English books, where a married woman acts as a *sole trader* according to the custom of London. *Ex parte* Carrington, 1 Atk., 206; *Lavie* v. *Philips*, 3 Burr., 1776; S. C. 1 W., Black. Rep., 570. See also in Pennsylvania, *Burke* v. *Winkle*, 2 Sergt. and Rawle, 189; in South Carolina, *Newbiggin* v. *Pillans*, 2 Bay, 162; in Louisiana, *Christensen* v. *Stumpf*, 16 La. An., 50; *Spalding* v. *Godard*, 15 La. An., 227; *Bowles* v. *Turner*, 352 ib.; in California, *Melcher* v. *Cuhland*, 22 Cal., 522; *Abrams* v. *Howard*, 23 Cal., 388. Under the same head would fall those cases like *re Lyons*, *supra*, where by statute in particular states, a married woman may, under certain circumstances, contract liabilities, carry on business and sue and be sued independently of her husband, and as a *feme sole*. In these cases there would seem to be no doubt that she is amenable to the bankrupt law. As in New York: *In re O'Brien*, N. B. R. Sup., 38; *Graham* v. *Starks*, 3 N. B. R., 92. Or in Illinois: *In re Kinkead*, 7 N. B. R., 439. Thus it was held, in the last case in the United States district court at Chicago, by BLODGETT, J., that where a husband and wife carried on a business in partnership, their status was such, under the statutes of Illinois relating to married women, that the *firm* might be proceeded against in bankruptcy; and hence that the partnership creditors were entitled to a preference in the distribution of the assets, over a creditor of the husband, whose demand had accrued prior to the organization of the firm. And it was intimated that the wife would be separately adjudicated a bankrupt if it should be found necessary in the course of the proceeding to do so, in order to reach any individual property she might have. In the case of *Re Rachel Goodman*, 8 N. B. R., 380, determined in the United States district court for Indiana, before CRISHAM, J., the principle above stated is fully recognized; but when applied with reference to the statutes of Indiana relating to married women, as interpreted by the supreme court of that state, the case resulted in a dismissal of the petition. It was found under the Indiana statutes, as expounded by the state supreme court, (1), that a married woman cannot engage in any kind of trade or business on her own account unless she have separate property; (2) that if a married woman, not having separate property or means of her own, engage in and carry on business, the profits, if any there be, belong to the husband as the earnings of the wife; and (3), that a married woman in Indiana, possessed of no separate estate, is relieved of none of the disabilities imposed upon her by the common law. The petition failed to show that Mrs. Goodman was possessed of any separate property or means with which she was carrying on her business, and it was held to follow that she could not be adjudged a bankrupt. So in the case of *Re Slichter*, 2 N. B. R., 107; in Minnesota, where the statute allows a married woman, under certain circumstances, to engage in trade in her own name, upon obtaining a license from a probate justice, in which case the business and profits become her separate property, and she is bound by her contracts as a *feme sole*, NELSON, district judge, held that a married woman who had been engaged in business as a member of a partnership firm, but without complying with the statute, could avail herself of the plea of coverture to defeat the bankruptcy proceedings against her.

Under the second head, which embraces the question whether a married woman may be adjudged a bankrupt where the marriage relation has been temporarily interrupted, the books furnish many instructive decisions defining the circumstances under which, independently of local custom or statute, a married woman may be separately sued. These decisions embrace cases where a married woman lives apart from her husband on a separate maintenance; in which case it has been held and afterwards denied, in England, that the wife may be sued at law as a *feme sole*. *Corbet* v. *Poelnitz*, 1 Term R., 5. *Contra*, *Compton* v. *Collinson* 1 H. Blacks., 350; *Clayton* v. *Adams*, 6 Term R., 604; *Marshall* v. *Ratton*, 8 Term R., 545. And Chancellor KENT states (2 Com. 161) that the rule of *Corbet* v. *Poelnitz* has never been adopted in this country. It has also been held in England that a wife may be sued at law whose husband is an absent alien enemy, and is under an absolute disability of returning. *Derry* v. *Duchess of Mazarine*, 1 Ld. Raym., 147. Or where he has been transported. *Sparrow* v. *Carruthers*, 2 W. Black., 1197. Or had been banished or had abjured the realm. *Lady Belknap & Wayland*, 1 Co. Lit., 132 b, 133 a. So it has been held in Massachusetts that a married woman who had been divorced *a mensa et thoro* might sue and be sued as a *feme sole* in respect of property acquired or debts contracted by her subsequently to the divorce. *Dean* v. *Richmond*, 5 Pick., 461: *Pierce* v. *Burnham*, 4 Metcf., 303. And it has been held in the same state that a *feme covert*, whose husband had deserted her in a foreign country, and who had thereafter maintained herself as a single woman, and for five years had lived in that commonwealth, the husband being a foreigner and having never been within the United States, was competent to sue and be sued as a *feme sole*. *Gregory* v. *Paul*, 15 Mass., 31. And the question is now said to be settled in Massachusetts, as a necessary exception to the rule of the common law, placing a married woman under a disability to contract or maintain a suit, that where the husband was never within the commonwealth, or has gone beyond its jurisdiction, has wholly renounced his marital rights and duties, and deserted his wife, she may make and take contracts, and sue and be sued in her own name as a *feme sole*. "It is," said SHAW, Ch. J., "an application of an old rule of the common law, which took away the disability of coverture where the husband was exiled or had abjured the realm." *Gregory* v. *Pierce*, 4 Metcf., 478. And within the meaning of this principle, the residence of the husband within another of the United States is held to be equivalent to his residence in a foreign state. *Abbot* v. *Bayley*, 6 Peck, 89. "But," said SHAW, Ch. J., in *Gregory* v. *Pierce*, *supra*, "to accomplish this change in the civil relations of the wife, the desertion by the husband must be absolute and complete; it must be a voluntary separation from and abandonment of the wife, embracing both the fact and intent of the husband to renounce *de facto*, as far as he can do it, the marital relation, and leave his wife to act as a *feme sole*. Such is the renunciation, coupled with a continued absence in a foreign state or country, which is held to operate like an abjuration of the realm." In *Love* v. *Moynehan*, 16 Ill., 277, 282, the supreme court of Illinois, after reviewing many modern cases, hold the law to be, "that where the husband compels the wife to live separate from him, either by abandoning her, or by forcing her, by whatever means, to leave him, and such separation is not merely temporary and capricious, but permanent and without expectation of again living together, and the wife is unprovided for by the husband in such manner as is suited to their circumstances and condition in life, she may acquire property, control her person and acquisitions, and contract, sue and be sued in relation to them, as a *feme sole*, during the continuance of such condition."

So it has been held in a recent case in Georgia, that, on general principles, a married woman whose husband has deserted her and resided in another state, has the right

to contract and be contracted with, to sue and be sued, as if *sole*. *Clark* v. *Valentino*, 41 Ga., 143. See also as supporting the same view, the following cases: *Rhea* v. *Rhermer*, 1 Peters, 105; *Cornwall* v. *Hoyt.*, 7 Conn., 427; *Arthur* v. *Broadnax*, 3 Ala., 557; *Jones* v. *Stewart*, 9 Ala., 855; *Roland* v. *Logan*, 18 Ala., 307; *Rose* v. *Bates*, 12 Mo., 47; *Starrett* v. *Wynn*, 17 Serg. & Rawle, 130; *Bean* v. *Morgan*, 4 McCord, 148; *Valentine* v. *Ford*, 2 P. A. Brown, 193.

It would seem to follow, by reasonable analogy, that where a married woman is, for any such reason, liable to be sued as if *sole*, at least in an action at law, she may, if otherwise amenable to the provisions of the bankrupt act, be proceeded against thereunder. Accordingly it was held in England in *ex parte* Franks, 7 Bing., 762, that the wife of a convict sentenced to transportation was liable to be made a bankrupt, she having become a trader, although her husband had not been sent out of England. The sentence of transportation against her husband rendered her liable to suit generally; and the fact that she had become a trader brought her within the provisions of the English bankrupt law.—*Editor of Central Law Journal.*

SUPREME COURT OF PENNSYLVANIA.

John Scott et al. v. The National Bank of Chester Valley.

Bank—Bailment—Negligence.

The plaintiffs below, who keep an account with the defendant, made a special deposit of certain bonds for safe keeping, paying nothing for the privilege; the bonds were stolen by the teller, who had always borne a good character.

Held, 1. That the bank was a gratuitous bailee, and as such not liable, except for gross negligence.

2. That neither the fact, that the bank might have discovered that the teller was dishonest, by a more frequent or accurate examination of his accounts, nor that he was allowed to keep the "individual ledger," which was the only book which was a check upon him, nor that he was not dismissed, when it was discovered that he had made a successful speculation in stocks, was such negligence as to render the bank liable.

3. That nothing short of knowledge or reasonable grounds of suspicion by the bank, that the teller was unfit to be appointed or retained, would render it liable: *Foster* v. *Essex Bank*, 17 Mass., 478, approved and followed; *Lancaster Bank* v. *Smith*, 12 P. F. S. (62 Penna. Stat.), 47, remarked on.

[Feb. 16, 1874.]

Error to the Court of Common Pleas of Chester County.

Agnew, C. J.—As early as the case of *Tompkins* v. *Saltmarsh*, 14 S. & R., 275, it was decided that a delivery of a package of money to a gratuitous bailee, to be carried to a distant place and delivered to another for the benefit of the bailor, imposes no liability upon the bailee for its safe keeping, except for gross negligence. In that case, the package was stolen from the valise of the bailee, at an inn in the course of his journey, after it had been carried to his room, in the usual custom of inns in that day (1822). The same rule is laid down by Justice Coulter, *arguendo*, in *Lloyd* v. *West Branch Bank*. He says, a mere depository, without any special undertaking, and without reward, is answerable for the loss of the goods only in case of gross negligence, which in its effects on contracts, is equivalent to fraud. He further remarks, that the accommodation here was to the bailor, and to him alone, and he ought to be the loser, unless he in whom he confided, the bank or cashier, had been guilty of bad faith in exposing the goods to hazards to which they would not expose their own. These rules he derives from *Coggs* v. *Bernard*, 2 Lord Raymond, 909 (1 Smith's Lead. Ca., Part I., 369, ed. 1872); and *Foster* v. *Essex Bank*, 17 Mass., 501. In the latter case, the law of bailment was exhaustively discussed by Parker, C. J., and the conclusions were as above stated. It was further held that the degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the bailee uses towards his own property of a similar kind. When such care is exercised, the bailee is not answerable for a larceny of the goods, by the theft even of an officer of the bank. It is further said, that from such special bailments, even of money in packages, for safe keeping, no consideration can be implied. The bank cannot use the deposits in its business; and no such profit or credit from the holding of the money can arise as will convert the bank into a bailee for hire or reward of any kind. The bailment in such case is purely gratuitous, and for the benefit of the bailor, and no loss can be cast upon the bank for a larceny, unless there have been gross negligence in taking care of the deposit. These appear to be just conclusions, drawn from the nature of the bailment. The rule in this State is stated by Thompson, C. J., in *Lancaster Bank* v. *Smith*, 12 P. F. Smith, 54. He says, "The case on hand was a voluntary bailment, or, more accurately speaking, a bailment without compensation, in which the rule of liability for loss is usually stated to arise on proof of gross negligence." That case went to the jury on the question of ordinary care, and hence the observation of the Chief Justice, that the same idea was sufficiently expressed by the judge below in using the words, want of ordinary care. It may be proper, however, to say, that want of ordinary care is applicable to bailees with reward, when the loss arises from causes not within the duty imposed by the contract of safe-keeping, as from fire, theft, &c., and hence is not the measure in such a case as that before us, which we have seen is gross negligence.

That case was one where the teller of the bank delivered the deposited bonds to a stranger, calling himself by the name of the bailor, without taking sufficient care to be certain that he was delivering the package to the right person, and the bank was held responsible for his negligence. There the teller, in giving out the deposit, was acting in his official capacity, and hence the liability of the bank. The case before us now is different, the bonds being stolen by the teller, who absconded. This teller was both clerk and teller; but the taking of the bonds was not an act pertaining to his business, as either clerk or teller. The bonds were left at the risk of the plaintiff, and never entered into the business of the bank. Being a bailment merely for safe keeping, for the benefit of the bailor, and without compensation, it is evident the dishonest act of the teller was in no way connected with his employment. Under these circumstances, the only ground of liability must arise in a knowledge of the bank that the teller was an unfit person to be appointed, or to be retained in its employment. So long as the bank was ignorant of the dishonesty of the teller, and trusted him with its own funds, confiding in his character for integrity, it would be a harsh rule that would hold it liable for an act not in the course of the business of the bank, or of the employment of the officer. There was no undertaking to the bailor that the officers would not steal. Of course there was a confidence that they would not, but not a promise that they should not. The case does not rest on a warranty or undertaking, but on gross negligence in care taking. Nothing short of a knowledge of the true character of the teller, or of reasonable grounds to suspect his integrity, followed by a neglect to remove him, can be said to be gross negligence, without raising a contract for care higher than a gratuitous bailment can create. The question of the bank's knowledge of the character of the teller was fairly submitted to the jury.

But it turned out that after the teller absconded, his accounts were found to be false, and that he had been abstracting the funds of the bank for about two years, to an amount of about $26,000.

It was contended that the want of discovery of the state of his accounts for such a length of time, especially as he had charge of the individual ledger, was such evidence of negligence as made the bank liable.

The Court negatived this position, and held that the bank was not bound to search his accounts for the benefit of a gratuitous bailor, whose loss arose not from the account as kept by him, but from a larceny, a transaction outside of his employment.

We perceive no error in this. The negligence constituting the ground of liability, must be such as enters into the cause of loss. But the false entries in the books, and the want of their discovery, were not the cause of the bailor's loss, and not connected with it. True the same person was guilty of both offences, but the acts were unconnected and independent.

Another complaint is, that the teller was suffered to remain in employment after it was known that he had dealt once or twice in stock. Undoubtedly the purchase or sale of stocks is not *ipso facto* the evidence of dishonesty; but as the judge well said, had he been found at the gaming table, or engaged in some fraudulent or dishonest practice, he should not be continued in a place of trust. So if the president of the bank, when he called on the brokers who acted for the teller in the purchase of stock, had discovered that he was engaged in stock gambling, or in buying and selling beyond his evident means, a different course would have been called for. No officer in a bank, engaged in stock gambling, can be safely trusted; and the evidence of this is found in the numerous defaulters, whose peculations have been discovered to be directly traceable to this species of gambling. A cashier, treasurer, or other officer, having the custody of funds, thinks he sees a desirable speculation, and takes the funds of his institution, hoping to return them instantly, but he fails in his venture, or success tempts him on, and he ventures again to retrieve his loss or increase his gain, and again and again he ventures. Thus the first step, often taken without a criminal intent, is the fatal step which ends in ruin to himself and to those whose confidence he has betrayed. Hence, any evidence of stock gambling, or dangerous outside operations, should be visited with immediate dismissal. In this case, the operations of the teller in stocks, as a gambler in them, were unknown to the officers of the bank until after he had absconded. Upon the whole, the case appears to have been properly tried, and finding no error in the record, the judgment is affirmed.—*Legal Intelligencer.*

Law Society—Easter Term, 1874.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Easter Term, 37th Victoria.

DURING this Term, the following gentlemen were called to the Degree of Barrister-at-Law:

Joseph Egbert Terhune.
Peter McGill Barker.
Charles Egerton Ryerson.
Alfred Servos Ball.
Charles Edgar Barber.
Frank D. Moore.
Harnruel Madden Deroche.
Clarence Widmer Ball.
E. George Patterson.
George Levack B. Fraser.

These gentlemen are called in the order in which they entered the Society and not in the order of merit.

Joseph James Gormully, Esq., of the Middle Temple, England, Barrister-at-Law, was admitted into the Society and called to the degree of Barrister-at-Law.

The following gentlemen obtained Certificates of Fitness as Attorneys, namely:

Joseph James Gormully.
E. George Patterson.
Thomas Horace McGuire.
Charles Egerton Ryerson.
David Robertson.
George Levack B. Fraser.
A. Basil Klein.
Alfred Trevos Ball.
Josiah R. Metcalf.
Arthur Lyndhurst Colville.
Clarence Widmer Ball.
D. Ellis McMillan.

And on Tuesday, the 19th of May, 1874, the following gentlemen were admitted into the Society as Students-at-Law and Articled Clerks:

Graduates.

George Robert Grasett.
John Maxwell.
William Seton Gordon.
James Craig.

Junior Class.

Frank Fitzgerald.
Duncan Dennis Riordan.
David Haldane Fletcher.
Isaac Campbell.
Jas. W. Holmes.
Nicholas DuBois Beck.
Arthur Beatty.
John Sandfield McDonald.
John Arthur Patrick McMahon.
William James Lavery.
John Lewis.
Andrew Halley Hunter.
John Jacob Wheeler Stone.
John Gibson Currell.
Maxfield Sheppard.
George Albert Fletcher Andrews.
Walter James Read.
Thomas William Phillips.
Nathaniel Mills.
John Malcolm Munro.
John Joseph Blake.
Wm. Edgar Stevens.
Charles Egerton Macdonald.
Colin Scott Rankin.
Charles Michael Foley.
John Greeley Kelly.
John Ross McColl, and
Ernest Joseph Beaumont as an articled clerk.

Ordered, That the division of candidates for admission on the Books of the Society into three classes be abolished.

That a graduate in the Faculty of Arts in any University in Her Majesty's Dominion, empowered to grant such degrees, shall be entitled to admission upon giving a Term's notice in accordance with the existing rules, and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission shall pass a satisfactory examination upon the following subjects, namely, (Latin) Horace, Odes Book 3; Virgil, Æneid, Book 6; Cæsar, Commentaries Books 5 and 6; Cicero, Pro Milone. (Mathematics) Arithmetic, Algebra to the end of Quadratic Equations; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition.

That Articled Clerks shall pass a preliminary examination upon the following subjects:—Cæsar, Commentaries Books 5 and 6; Arithmetic; Euclid, Books 1, 2, and 3. Outlines of Modern Geography, History of England (W. Douglas Hamilton's) English Grammar and Composition, Elements of Book-keeping.

That the subjects and books for the first Intermediate Examination shall be:—Real Property, Williams; Equity, Smith's Manual; Common Law, Smith's Manual; Act respecting the Court of Chancery (C. S. U. C. c. 12), (C. S. U. S. caps. 42 and 44).

That the subjects and books for the second Intermediate Examination be as follows:—Real Property, Leith's Blackstone, Greenwood on the Practice of Conveyancing (chapters on Agreements, Sales, Purchases, Leases, Mortgages, and Wills); Equity, Snell's Treatise; Common Law, Broom's Common Law, C. S. U. C. c. 88, Statutes of Canada, 29 Vic. c. 28, Insolvency Act.

That the books for the final examination for students-at-law shall be as follows:—

1. For Call.—Blackstone Vol. i., Leake on Contracts, Watkins on Conveyancing, Story's Equity Jurisprudence, Stephen on Pleading, Lewis' Equity Pleading, Dart on Vendors and Purchasers, Taylor on Evidence, Byles on Bills, the Statute Law, the Pleadings and Practice of the Courts.

2. For Call with Honours, in addition to the preceding, —Russell on Crimes, Broom's Legal Maxims, Lindley on Partnership, Fisher on Mortgages, Benjamin on Sales, Jarman on Wills. Von Savigny's Private International Law (Guthrie's Edition), Maine's Ancient Law.

That the subjects for the final examination of Articled Clerks shall be as follows:—Leith's Blackstone, Watkins on Conveyancing (9th ed.), Smith's Mercantile Law, Story's Equity Jurisprudence, Leake on Contracts, the Statute Law, the Pleadings and Practice of the Courts.

Candidates for the final examinations are subject to re-examination on the subjects of the Intermediate Examinations. All other requisites for obtaining certificates of fitness and for call are continued.

That the Books for the Scholarship Examinations shall be as follows:—

1st year.—Stephen's Blackstone, Vol. i., Stephen on Pleading. Williams on Personal Property, Griffith's Institutes of Equity, C. S. U. S. c. 12, C. S. U. C. c. 43.

2nd year.—Williams on Real Property, Best on Evidence, Smith on Contracts, Snell's Treatise on Equity, the Registry Acts.

3rd year.—Real Property Statutes relating to Ontario, Stephen's Blackstone, Book V., Byles on Bills, Broom's Legal Maxims, Story's Equity Jurisprudence, Fisher on Mortgages, Vol. 1, and Vol. 2, chaps. 10, 11 and 12.

4th year.—Smith's Real and Personal Property, Russell on Crimes, Common Law Pleading and Practice, Benjamin on Sales, Dart on Vendors and Purchasers, Lewis' Equity Pleading, Equity Pleading and Practice in this Province.

That no one who has been admitted, on the books of the Society as a Student shall be required to pass preliminary examination as an Articled Clerk.

J. HILLYARD CAMERON,
Treasurer.