DIARY FOR DECEMBER.

1. Wed. New Trial Day C. P. Clerk of every Municipality except County to return number of Resident rate-payers to Receiver General.
2. Thur. Re-hearing Term in Chancery commence.
3. Fri.. New Trial Day, Queen's Bench.
5. SUN. *2nd Sunday in Advent.*
6. Mon. Last day for notice of trial for County Courts.
12. SUN *3rd Sunday in Advent.*
14. Tues. General Sessions and County Court sittings in each County. Grammar and Common school Assessments payable. Collectors roll to be returned, unless time extended.
19. SUN. *4th Sunday in Advent.*
20. Mon. Nominations of Mayors in towns, Aldermen, Reeves and Councillors, and Police Trustees.
24. Fri.. Christmas Vacation in Chancery commence.
25. Sat.. *Christmas Day.*
26. SUN. *1st Sunday after Christmas. St. Stephen.*
27. Mon. *St. John Evangelist.*
27. Tues. *Innocents Day.*
19. Frid. School returns to be made. Last day on which remaining half G. S. fund payable. Deputy Registrar in Chancery to make returns and pay over fees.

THE

Canada Law Journal.

DECEMBER, 1869.

DEATH OF THE CHANCELLOR.

We again refer to this melancholy event which has deprived the country of such an able judge, and his friends and relatives of such a kind amiable companion. At the time when Mr. Van Koughnet was appointed to the Chancellorship of Upper Canada, in March, 1862, we took occasion (8 U. C. L. J., 85) to give a short sketch of his career up to that time, it is therefore unnecessary to repeat what may there be found.

Whilst at the Bar, Mr. Van Koughnet was remarkable for the quickness and keenness of his perceptive faculties, enabling him to ascertain the strong points of his own, and the weak ones of his adversary's case, with wonderful rapidity. In examining a witness he is said not to have had an equal. On the Bench, though very ingenuous and open to conviction, his mind was rapidly made up, and he much more generally than the other judges decided cases on the spot, not feeling in his own mind the necessity of further consideration of evidence of which his quickness enabled him at once to comprehend the full bearing. It was a pleasure to conduct cases before one so fair, courteous and considerate; and here we may remark, that the courtesy and patience of the Chancellor was not confined to himself, but is a pleasing attribute of both of his learned brethren on the Equity Bench.

Upon his impartiality and uprightness as a judge we deem it unnecessary to dilate; the character of the Bench of Upper Canada in this respect has always stood so high, that it is sufficient to say, that he was the fitting chief of a court of "equity and good conscience."

He lent a helping to many reforms in the administration of the Court of Chancery, simplifying the procedure, and facilitating business, and was the author of the system of having the arguments of counsel immediately after the examination of the witnesses.

But, when speaking of him in his judicial capacity, we cannot do better than quote the words of Mr. Vice-Chancellor Mowat, who was holding circuit at Cobourg, when the news of of the Chancellor's death arrived there:—

"As a judge, he was most conscientious; he had a profound love of justice, and an exalted sense of judicial duty. In the discharge of his office, he acted without fear, favor, or affection, if any judge ever did. He was from the first prompt in deciding, and that he was generally accurate as well as prompt is shown by the fact that his decrees were generally (I believe), as seldom appealed from successfully as those of any judge we ever had. He had long been suffering from ill-health, but he was never willing to allow us to relieve him from any of his work, and he often insisted on doing his full share when he was ill able to endure the fatigue which it occasioned him. He had completed his last circuit without assistance, but a few days before his sad death. A Conservative by birth, education, and party connections, in his court he was a Reformer. He did not a little to complete those ameliorations in the practice of the Court of Chancery, which were commenced under the auspices of his distinguished predecessor, Chancellor Blake,—of whose able services, ill health so soon deprived the country, but who, though ever since unable to take part in public duty, still lives, and will, I hope, long live to be a comfort to his family and friends. Chancellor Van Koughnet originated valuable reforms himself, and always listened with interest to those suggested by others. I believe that he was the author of the present practice of hearing the arguments at these Circuit Courts, and of disposing of the cases at once, wherever practicable, a practice by which business has been greatly expedited, the expense of suits much diminished, and a knowledge of the doctrines of

equity diffused amongst the people—all objects, I need not say, of great public moment."

Personally, the late Chancellor was very generally liked; more so, perhaps, than any other man of his day. Without seeking popularity, he was essentially popular, for none could resist his unaffected good humour, charm of manner, and evident warmth of heart. Mr. Vice-Chancellor Spragge at the opening of Court after the event, spoke in the most feeling manner of his death; and we are sorry we can only give the substance of his remarks:—

"Since I last met you, gentlemen of the Bar, an event has occurred, a most sad and unexpected one, which we all, the Bench and the Bar alike, most deeply deplore. The learned and able man, who for the past seven years has presided as its chief Judge, has passed away from amongst us, in the very prime of life, when, according to the ordinary course of nature, many years of honourable usefulness lay before him.

"The late Chancellor, let me add our late friend, for he was the warm and sincere friend of all of us, possessed many admirable qualities. With talents of a very high order, he combined one of the kindliest natures that it has ever been my lot to meet with; and he discharged, with rare ability and the purest integrity, the duties of his high office. We have lost an able and upright Judge, and a man as beloved as he was respected. The country and the Judiciary, and in an especial manner this Court have much to deplore in the loss of such a man.

"He is dead, and we shall see his face no more, but his memory will long be held by all of us in affectionate remembrance."

And Mr. Mowat, on the occasion already alluded to, further said:—

"He was, indeed, one of the most amiable of men; he had a warm and tender heart, and his friendship was deep and never failing. I never knew any one who had in him more to attract and less to repel. He probably never had a personal enemy. * * * During the period that he was engaged in politics, he was not only successful in obtaining and keeping the confidence of his political supporters, but he soon secured and he ever afterwards retained the personal friendship of, I believe, every one of his opponents in the House. Whatever those opposed to him, politically, may have thought of the measures or proceedings of the government of which he formed part, nobody doubted the purity of his motives or the soundness of his patriotism. He loved this Canada of ours, which was the land of his birth, and he earnestly desired to promote its interests. * * * Few men will die leaving more friends to mourn his loss. Speaking for myself and for you, gentlemen of the Bar, I am sure that I may say, that we loved him very dearly, and that we mourn him very deeply, sorrowing greatly to remember that we are never again to press his hand, or hear his kindly voice."

The day before the funeral, a meeting of the Bar was called, in the Library of Osgoode Hall, to express the feelings of the profession on the melancholy occasion, and their sympathy with the members of his family in their bereavement. The Attorney-General of Ontario, having introduced the subject in a few appropriate remarks, the following resolutions were passed:—

"*Resolved.*—1. That the Bar of Ontario desire to express their unfeigned grief at, and deep sense of the loss sustained by the Profession in the death of the late lamented the Hon. P. M. M. S. Van Koughnet, Chancellor of this Province.

"2. That the Bar attend the funeral of the late Chancellor in their robes, as a mark of respect to the deceased.

"3. That a copy of the foregoing resolutions be furnished to the Treasurer of the Law Society [absent from Toronto at the time], with a request that they may be entered on the books of the Society, and, that he be requested to call a meeting of the Bar for to-morrow, at two o'clock, at Osgoode Hall, to attend in a body the funeral of our late Chancellor."

The funeral was largely attended by all classes, and amongst them might be seen many of the clerks who were under him when Commissioner of Crown Lands, by all of whom he is held in affectionate remembrance. The Pall-bearers were Hon. W. H. Draper, C. B., Chief Justice of the Court of Appeal, the Chief Justice of Ontario, Chief Justice Hagarty, Vice-Chancellors Spragge and Mowat, Judges Morrison, Wilson, Gwynne, and Galt, and Judge Duggan. The body was interred in St. James' Cemetery.

His name will be remembered in the history of Canada as that of a man endowed with a very high order of intellect, as an eloquent and effective speaker; both at the Bar and in Parliament; as an able administrator, shewn as well in the management of the Crown Lands Department, as in the reforms in the Court of Chancery; and, to crown all, a man with as kindly a heart as ever made a friend or disarmed an enemy.

COMMON LAW CHAMBERS.

At last something has been done to facilitate business in Chambers, and to remedy to a certain extent that inconvenience to the profession and loss to the public, which we have referred to as often occurring. It is proper to be thankful for small mercies, but the expedient that has been adopted cannot be looked upon otherwise than in the light of a temporary relief, unless it be intended hereafter to make the appointment of Clerks of the Crown of the Queen's Bench with reference to the duties that will devolve upon them under this act.

The thought of using the material now available in Osgoode Hall would, in all probability, never have occurred, but from the fact that the present Clerk of the Queen's Bench is in many respects admirably qualified for the position he must now occasionally occupy. Mr. Dalton is of long and good standing at the Bar; a Queen's Counsel (in matters of arbitration probably he knows more than any other man in the Province), and though at present not as familiar with the details of practice, as he soon will be, he is well up in pleading; a sound lawyer; a gentleman of courteous manners, with a judicial mind, proved by his success as an arbitrator, and commands the respect of those who are brought in contact with him. It is fortunate we can truly say all this, but, at the same time, the true remedy was the appointment of another judge, either simply to hold Practice Court and Chambers, or else to sit with the other judges as occasion might require, or as might be arranged—in fact, becoming one of them, and all taking Chambers in rotation, as has been the practice hitherto, but of course, so arranging the business that one judge should always be free to attend to the work in Chambers.

The first plan is objected to, as it is thought by many, including some of the judges, that it is advisable for the judges occasionally to sit in Chambers so as to keep themselves up in practice; while others think it a waste of the judges time, and that there would be more uniformity in decisions, and that the practice would be more settled by adopting the former suggestion. We incline to think that it would be of doubtful expedience to take the latter course, and for other reasons besides that above mentioned; for example, by the present system we, in effect, get the benefit of the views and arguments of many judges, in place of one, on the same or similar points, and we must confess to a theory, not very clearly defined, certainly, that a more extended sphere than the routine of Chambers practice is required to enable a person to adjudicate satisfactorily upon the multitudinous variety of cases that go there for decision, many of them of great importance and difficulty.

We do not know to what extent the judges intend to avail themselves of Mr. Dalton's services under this act. Of course they will do so during the sittings of the York Assizes, and when the judges are unavoidably absent, &c.; if, also, in Term time, some assistance would probably be necessary in the Queen's Bench office. We have no doubt we shall soon learn from the authoritative source all about it.

The judges have, under this Act, power to regulate the scale of costs to be adopted in Chambers practice. We trust they will act liberally in this respect and allow fees to counsel which will be worth charging, and proportioned to the labour bestowed upon the case. It is scarcely fair that a Barrister should be asked to lose half a day and argue a case for the *honorarium* of 25c., or that his country principal should have to pay the difference between this 25c. and such fee as his agent may reasonably charge out of his own pocket, for it often has to come to that in the end.

COMMON LAW CHAMBERS ACT.

The following is the Act already spoken of, as it stood after being amended in committee:

Whereas it is expedient to make provision for proceedings in Judges' Chambers in the Superior Courts of Common Law: Therefore, Her Majesty, etc., enacts as follows:—

1. Any person acting as judge of assize and *nisi prius*, in the city of Toronto, whether for the business of the county of York, or for the city of Toronto, shall, while so sitting or acting as such judge, or while the sittings shall last, be enabled to act as a judge in chambers in all matters, as if he were a judge of one of the superior courts of common law.

2. Any person acting as a judge of assize and *nisi prius* shall, in and for the county for which he is acting, and while the sittings of the said court shall last, be enabled to act as a judge in chambers in all matters entered for trial before him, as if he were a judge of one of the said superior courts.

3. Every judge of the said superior courts is hereby authorized to transact such business at chambers or elsewhere depending in either of the said superior courts, as relates to matters over which said courts have a common jurisdiction and as may according to the course and practice of the court be transacted by a single judge.

4. Every judge of the superior courts is hereby authorized to transact out of court such business as may, according to the course and practice of the court, be so transacted by a single judge, relating to any suit or proceeding in either of the said Courts of Queen's Bench or Common Pleas, or relating to the granting writs of *certiorari* or *habeas corpus*, or to the admitting of persons on criminal charges to bail, or approving of bonds with sureties when given in any matter of appeal from the judgment of either of the said courts, or to the issuing of extents or other process for the recovery of debts due to Her Majesty, or relating to any other matter or thing usually transacted out of court, in like manner as if the judge transacting such business had been a judge of the court to which the same by law belongs.

5. Whereas a great part of the business in the chambers of the said judges might with advantage to the public, be disposed of by the clerks of the Crown and Pleas of the said Court of Queen's Bench, be it enacted, that it shall be lawful for a majority of all the judges of the said courts, which majority shall include the two Chief Justices, or one of the Chief Justices, and the senior of the Puisne Judges of the said courts, from time to time, to make and publish general rules for the following purposes, that is to say:

(1). For empowering the clerks of the Crown of the said courts of Queen's Bench to do any such thing, and to transact any such business, and to exercise any such authority and jurisdiction in respect of the same as by virtue of any statute or custom, or by the rules of practice of the said respective courts or any of them respectively are now done, transacted or exercised by a judge of the said respective courts sitting at chambers, and as shall be specified in any such rule, except in respect of matters relating to the liberty of the subject.

(2). For regulating the attendance of the said clerks at chambers, the course of practice to be there pursued, and the scale of costs to be there adopted.

(3). For fixing the table of fees to be taken in respect of business to be transacted before the said clerks of the Crown at chambers, and for abolishing or altering from time to time such table of fees.

6. Every rule to be made under this Act shall be read aloud in open court—in each of said courts, ten clear days at least before the day fixed for such rule coming into operation, and within one month after that day a copy of every such rule shall be transmitted by one of the said Chief Justices to the Provincial Secretary.

7. Every rule to be made under this Act shall be laid before the Legislative Assembly by the Provincial Secretary, within one month after the making thereof, if the Legislature be then sitting, or if not, then within one month after the commencement of the next session of the Legislature.

8. Every order or decision made or given under this Act by the said clerk of the Crown sitting at chambers, shall be as valid and binding on all parties concerned, as if the same had been made or given by a judge sitting at chambers; provided always that it shall be lawful for any person affected by any order or decision of the said clerk of the Crown forthwith, or within such time as shall be appointed by any rules to be made under this Act, and subject to such conditions as to costs, as may be provided under any such rules or orders to appeal from such decision to a judge sitting at chambers.

The Bill which was introduced by Mr. Clarke, to change the mode of appointing the Benchers by making them elective, has been withdrawn, the Speaker having ruled that it was a private Bill. It is a subject of great importance, and not to be dealt with without full and careful consideration, and therefore, beside all the objections on the face of the Bill itself, we are glad that it was thrown out. We shall have something to say on this subject hereafter.

Mr. Spragge has been offered and has accepted the Chancellorship, and that Mr. Strong has been appointed one of the Vice-Chancellors.

SELECTIONS.

SHALL WE PUNISH MURDER?

The crime of murder is an atrocious one. For one human being, deliberately, with studied purpose and malice afore-thought, to take the life of another, is an act at the bare thought of which even many a hardened wretch shudders. That there should be circumstances, under whose cover a murderer may not only be excused, but also justified; not only justified, but even glorified, is at first thought almost inconceivable; nevertheless, such circumstances exist.

Woman in America occupies an anomalous condition. Treated in some respects as if far superior to the masculine sex, in others denied all participation in rights and privileges accorded to its lowest specimens, her outward conduct is a fit and faithful representation of the

inconsistencies of her position. This is the only country in the world in which a woman who has murdered her seducer, is honorably acquitted by a jury, and in which a husband can with impunity take the life of his wife's paramour. Why the perpetration of an act, to which the woman alleged to be injured thereby has given her full consent, should exempt her from being punished according to law for any crime she may commit, it is impossible to understand; unless she commit the crime in self-defence, or be regarded and treated as an irresponsible being, possessing and exercising no will or discretion of her own, and a completely passive instrument in the hands of others. Both of these suppositions are untenable. In watching for a man and shooting him unawares, she, far from acting on the defensive, is acting very offensively, and no one will for a moment maintain the latter supposition, and assert, that women have no wills of their own.

What are the arguments commonly adduced in support of the barbarous practices above named? Great stress is always laid upon the unsuspecting innocence of the deceived, the base designs of the deceiver, and the social stigma which his villainy casts upon her. That in this case, as in every other, it takes two to make a bargain, is a fact perpetually lost sight of. To say that every seducer is an unprincipled villian, whose arts it is impossible for weak women to resist, is to say something of which every one of us knows to be absurd. Taking the strongest possible case, that of a young woman seduced under promise of marriage, what are the facts? Overcome by her passions, trusting in his promises, although conscious that by yielding to his premature solicitations she cannot but compromise herself in his eyes, she falls from her high estate. The man deserts her, and the usual consequences follow. Who is to blame? The man only? Is she to be in no wise responsible for her rash and inconsiderate conduct?

But the plea most frequently urged in behalf of the murderess is the enormity of the punishment with which society visits her transgression against chastity, and the slight censure it passes upon him in concert with whom she transgresses. To state this plea is to refute it. If in leaving the path of virtue a young woman has committed an offence, in the estimation of society, for which she deserves to be excluded from its precincts, then society can not, if it desire to remain consistent, sanction the murder by her of a man whom it regards in no very reprehensible light. On the contrary, a man known to be successful with the opposite sex, is generally regarded by his fellows as a lucky dog; his success, far from rendering him odious in their eyes, is envied by them; and the women themselves, in many cases, feel much more flattered than repelled by the attentions of a man, whom they know to have achieved success with so many of them. If we really regarded a seducer as a scoundrel we would treat him as one. This, however, we do not. In considering his capacities for an office, it does not occur to us to inquire whether these are effected by his fancied rascality; in introducing him into society, and in generally treating him as we do other men, we also contrive to overlook it. And yet after his violent death we say "served him right," and acquit and applaud the murderess. The question here is not whether he ought to be treated as a scoundrel, but whether he is. If he is not, then, without being so grossly inconsistent as to make our judgment go for nought, we cannot consider his conduct after his death differently from what we did before it.

It may, however, be asked what a woman accomplishes by murdering her seducer. It is difficult to understand what motive impels her to the deed, unless it be the ignoble passion of revenge. She can obtain civil redress from every tribunal in the land; there is not a jury which would not award her heavy damages. But with these she is not satisfied; they do not appease her thirst for revenge. She wants that which public opinion and therefore the law does not give her, the death of her seducer. Not that it does her any good to kill him. She does not thereby restore her shattered reputation; the doors of society remain closed against her. Enraged at beholding what different results the same indiscretion brings about to her and to him, she concludes that the best mode of wreaking her revenge is to take his life. She, whose offence against society consisted in illegally giving birth to one being, now atones for it by illegally destroying another.

A fugitive allusion has been made to the case of the husband killing his wife's paramour. All that has hitherto been said applies with double force to him. That a husband, who, as has repeatedly happened, in cold blood, has shot down the supposed destroyer of his peace, should, as has also repeatedly happened, be allowed to go unpunished for his crime, is a spectacle at which we may well stand aghast. We venture to assert that no instance of conjugal infidelity on the part of the wife has ever happened in this country, in which she was not fully as culpable as he with whom she sinned. No married woman can ever be approached by one harboring evil designs against her honor without her becoming aware of them before it is too late; no man can ever cause her to prove faithless to her husband, unless it be with her full consent. What grounds of justification, then, has the husband who deliberately shoots her paramour? The honor of his family, it is said, has been invaded; does he by his bloody deed restore it? The purity of his wife has been defiled; does he wash the stain away? Indeed, no injury has been done him; he simply ascertains that he has been mistaken in his wife; she, whom he thought virtuous, is shown to be otherwise. Is he to be justified in killing a man, because of a mistake which he himself has made,

To take the life of any human being, except in self-defence or when the law commands it, is illegal. That the laws of any country conform in the main to its public opinion is a threadbare truth. We have no law punishing seduction with death, simply because we dont want it. To the passage of any such law, public opinion would be overwhelmingly opposed. But we have a law punishing murder. Then why not apply it to a case falling within it? Why not teach our young women to be on their guard against designing men, and discourage them from committing that awful crime, murder? One of the most pernicious consequences of the acquittal of this class of murderesses is the direct encouragement it gives to others to commit murder under similar circumstances. Recently, in Maryland, a woman was made a heroine of for having twice in succession shot her lover, who did not marry her because, being the only support of a mother and several sisters, he could not. A premium is thus set on deliberate, cowardly homicide. But this is not all. The murdered person may have had good and substantial reasons for refusing to keep his promise of marriage. All these, however, are buried with him; every opportunity to present them, to explain his conduct, to show that the murderess, in her double role as judge and executioner, acted unjustifiably, inexcusably, is gone; for at her trial the public prosecutor is confined to proving the naked fact of the murder, and is not allowed to invalidate or weaken what is called the defence by submitting to the jury any evidence in explanation or extenuation of the murdered man's conduct. The vale of human life, already so frightfully low in this country, is in this way lowered still more.

The inconsistencies of public opinion have already been pointed out. Although a man, known to be a seducer, is treated none the worse for this, and has the same access to society as anybody else, yet his violent death elicits applause, or at least no condemnation. Although a proposition to make seduction legally punishable with death would not have the least prospect of being adopted by any legislature, yet when a woman in violation of the law kills her seducer, thus doing that illegally which no one is willing to make legal, no voice is heard in reprobation of the outrage. Such a remarkable phenomenon calls for an explanation, for which, in the case of the husband killing his wife's paramour, we need not be at a loss. The only supposition, upon which his act could possibly be excused, is the very one upon which, in matters relating to husband and wife, the common law has always proceeded, viz.: that the wife has no will or mind of her own, and that, therefore, the paramour is the only person to whom any blame or guilt attaches. That husband and wife are but one person, has always been a maxim of the common law, by which, however, is practically meant that the husband is the one person. The wife, being supposed to be always acting under the coercion of her husband, has no power to contract; her agreements are of no effect whatever; she can not even commit a crime in his presence, save in a few excepted cases. In fact so much is she regarded as under his control that he has the right, solemnly confirmed by an English court of justice a few years ago, to chastise her corporally whenever he thinks it necessary. There can be no doubt that the above quoted maxim took its rise in the same modes of thought and action which, prevailing universally seven or eight hundred years ago, gave birth to the system of law denominated the common. At that period, and indeed long thereafter, this maxim was living law, in perfect consonance with the semi-civilization to which the English had attained. Although in the course of time opinions have greatly changed, so that in this country, at least, the husband can no longer enjoy the privilege of whipping his wife, without having to pay dearly therefor, yet in other respects there has been but little advance; venerable traditions fetters the minds of men, and, unbeknown to them, warp their judgments; and the husband is still looked upon as, to some extent, the owner of his family whose honor he is required to guard. The absurd notion of duelists, that the infliction of a bodily wound cures a mental one, is among sensible people happily exploded, but the parallel notion of husbands, similarly dating back to, and transmitted from the middle ages, that by killing their wives' paramours they repair their lacerated honour, is received with applause. It is only when juries will cease regarding the husband as the owner of his family, and will cease divesting the wife of those qualities of free will and responsible action with which she is naturally endowed, that they will also cease acquitting the man, who, after having deliberately satisfied himself of his wife's guilt, deliberately kills her accomplice.

In the case also of the murder of the seducer by the seduced, the woman is either habitually regarded as having no will, or else it is considered as overcome by the insidious wiles of the seducer. That he also has strong, frequently ungovernable passions, is a consideration always overlooked; he is constantly represented as the smooth, calm, scheming villain, who effects her ruin with undisturbed placidity. An additional element, however, enters into this case, viz.; the dim, vague consciousness under which juries, and indeed all of us, labor, that the relations between the sexes are not what they should be, that the one is oppresed and occupies a subordinate position to the other. We do not here refer to the political disabilities of woman, but only to the social inequalities and prejudices from which she suffers. Though our confidence may be strong that the time is near at hand when no one will any longer presume to dictate to woman her supposed peculiar sphere, yet at the present moment that time has not come, and it is in

consequence of perceiving this that our sympathies are always so copiously excited in her favor. We are passing through a transition period in which some women, bolder than the rest, defy and shatter old prejudices by following occupations for merely aspiring to which they in byegone times would have been ostracised. Hence the social oppression of the entire sex is forced upon the attention of the public mind, which, by a beautiful provision of nature, immediately seeks to re-establish an equilibrium by causing an increased gallantry, sympathy and devotion to be shown them as a temporary substitute for that freedom of action of which they have always been deprived. In other countries, where this transition period has not yet set in, a woman killing her seducer is punished like any other murderess, because she is looked upon as a responsible being, and because the public mind, not having become aware of the disadvantages of position incident to her sex, has not yet begun to sympathize with her on account of them. A removal of these disadvantages will operate in the same way as a failure to perceive them. Thus with us, as soon as woman will be at full liberty, both socially and politically, to follow whatever occupation she chooses, as soon as the prejudices are disipated which now debar her from devoting her energies to many a field of action, as soon as she is placed on a footing of perfect equality in every respect with man, who will then of himself demand that, having the same rights with him, she should be held equally responsible for their use or absue, then, but not before, all motives for bestowing any extra amount of sympathy upon her, will vanish; her crimes will be judged as severely and impartially as those of man, and juries will no longer deliver verdicts which, unconsciously prompted by a general appreciation of her depressed condition, work injustice in each particular case.—*Bench and Bar.*

REPAYMENT OF MORTGAGE MONEY. TRANSFER WITHOUT NOTICE.

Whitington v. *Tate*, L.C., 17 W. R. 559.

It is well settled that when a mortgagee assigns the mortgage and notice is not given to the mortgagor, the assignee is subject to all the equities between the mortgagor and the original mortgagee. Thus, if the mortgagor were to pay off the debt to his original mortgagee that would be a good payment as against the assignee. The principle has been carried to the length of affecting the transferee by the balance of a general account between the mortgagor and original mortgagee: *vide Norrish* v. *Marshall* (5 Madd. 481), where the mortgagor claiming that he had extinguished the mortgage-debt by wines and money supplied to the plaintiff, the Vice-Chancellor of England decreed an account, observing that, "as against an assignee without notice the mortgagor has the same right as he has against the mortgagee, and whatever he can claim in the way of mutual credit as against the mortgagee he can claim equally against the assignee. In *Ex parte Monro*, *Re Fraser* (Buck, 300), a bond having been assigned without notice to the obligor, the debt was held to be still in the order and disposition of the obligee within 21 Jac. 1, c. 19. *Williams* v. *Sorrell* (4 Ves. 390) affords an example o the simple case. There the mortgage having been assigned without notice to the mortgagor, a payment afterwards made by the mortgagor to the original mortgagee was held a valid payment as against the assignee, and on a foreclosure bill filed by the assignee, the mortgagor tendering the balance, which tender was refused, the mortgagor was required to pay costs to the time of tender only. *Matthews* v. *Wallwyn* (4 Ves. 118) is another case in which this principle is clearly ruled and explained.

Upon the consideration—what is notice? it is worthy of observation that in *Lloyd* v. *Banks* (16 W. R. 988) Lord Cairns held that any actual knowledge on the part of the person to be affected is notice, provided the knowledge were such as would operate on the mind of a reasonable man of business. In *Dearle* v. *Hall* (3 Russ. 1) and *Foster* v. *Cockerell* (3 Cl. & F. 456), and the cases above that date, the question of notice seems to have been regarded as being not so much whether or no there had been actual knowledge as a question of the conduct of the incumbrancer. But the decision in *Lloyd* v. *Banks*, by treating actual knowledge, by whomsoever or howsoever conveyed, as the thing to be looked for, puts the matter upon rather a different footing.

In the principal case, without at all controverting the principle of *Matthews* v. *Wallwyn*, *Williams* v. *Sorrell*, &c., a payment made by the mortgagor, after an assignment of the mortgage without notice to himself, was held to have been made in his own wrong. The case, which was a very unfortunate one, arose out of the defalcations of a Liverpool solicitor named Stockley, who absconded in the latter end of 1867. The defaulter was the solicitor both of the original mortgagor and of the transferee. He gave no notice to the mortgagor. The transferee left the deeds in his custody. As between himself and the mortgagor, the solicitor had authority to receive the interest on behalf of the mortgagee, but had no authority to receive the principal. The mortgagor wishing to pay off the mortgage, the solicitor got the transferee to execute a reconveyance under the impression that he was merely joining in an appointment of new trustees (the mortgaged property being trust property); he handed this deed to the mortgagor with all the other deeds (except the transfer), but he kept the money himself, merely paying the transferee from time to time the interest on the original mortgage-money. Three years afterwards the transferee filed a foreclosure bill against the astonished mortgagors, and

Lord Hatherley, affirming the Master of the Rolls, held that the mortgagee must pay his principal a second time or be foreclosed. The first payment was held to have been in his own wrong, because he made it to a person who was not authorised to receive it; if he had gone with his money to his original mortgagee, the original mortgagee would have said, "The mortgage is transferred," and passed him on to the transferee, and so the payment would have got into the right hands. But if the original mortgagee had played the knave and pocketed the money, the fault would have been the transferee's, for not giving to the mortgagor notice of his having taken the transfer.

The case was a particularly hard one upon the mortgagor, because, receiving back his deeds, his mortgage, with a re conveyance, he had everything to assure him that the mortgage was extinguished. Yet the decision is unimpeachable. If, when the mortgage was created, the mortgagor had from the mortgagee been given to understand that the solicitor had authority to receive principal as well as interest, here, we imagine, the transferee, not having given notice, would have been bound by this arrangement, and the payment made would have been good as against him. The moral of the case is—that mortgagors should, unless they have a special authority, take care, in paying off their mortgages, to pay direct to the mortgagor, and not to the solicitor through whom the advance was effected.—*Solicitors' Journal.*

BANKERS AS GRATUITOUS BAILEES.

Since the days of Chief Justice Holt the subject of bailments has probably never been so elaborately dealt with as in the case of *Giblin* v. *McMullen*, in the Privy Council*, a most important case as affecting the relationship between bankers and their customers.

The facts were, that a customer of the Union Bank of Australia entrusted to it certain railway debentures. These debentures were placed in the ordinary depository, but they were extracted by a dishonest cashier, and converted to his own purposes. The jury, at the trial found a verdict against the bankers for the full value of the securities. A rule was made absolute to set aside the verdict, and from this decision of the colonial court, an appeal was made to the Privy Council which upheld the decision.

The bankers being gratuitous bailees, the question really turned on the meaning to be given to the term "gross negligence." It was contended by the Solicitor-General on behalf of the appellant that the question of negligence being one of fact, had been properly left to the jury, whose finding ought not to be disturbed. The negligence alleged against the bank was in allowing the cashier access alone to the strong room, and in not employing an honest person as cashier, and it was contended that although the individual had been long in the employ of the bank, the fact that a gentleman from England had called on the manager and told him that he had expected to receive money from the cashier, and had not received it, was such a notification as ought to have put the bank on its guard, and consequently that they were guilty of gross negligence in the keeping of the securities.

On the other hand, it was argued that if the question whether bankers have taken proper care of the securities of their customers is to be left to the jury, no banker would accept such a liability without reward, and that the negligence to make the respondents liable must be wilful negligence, which would be near to fraud. We will first see what the Privy Council say as to gross negligence. Upon this the dictum of Lord Cranworth in *Bond* v. *The South Devon Railway Company*, 11 L. T. Rep. N. S. 184, and the judgment of Willes, J., approving of that dictum in *Grill General Iron Screw Collier Company*, 14 L. T. Rep. N. S. 715, were adopted. Willes, J., said: "Confusion has arisen from regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." Crompton, J., in delivering the opinion of the court said: "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the court below, where he says, 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and he added, "for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill and diligence, is gross negligence." M. Smith, J., in the case in which the above-mentioned observations of Willes, J., were made, said: "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." Commenting on this case, Lord Chelmsford said: "It is hardly correct to say that the Court of Exchequer Chamber in the case referred to adopted the view of Lord Cranworth as to the impropriety of the term "gross negligence;" and the judgment of the Privy Council proceeds:—The "epithet 'gross,' is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs liability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment, but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise corresponds with the degree of negligence for which he is respon-

* See *post*, page 318.

sible, and there would be the same difficulty of defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject, and, though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the judge to distinguish, as well as they can, degrees of things which run more or less into each other."

Here we have another of the judicial difficulties which abound in our procedure, similar to which is the dilemma when a Judge is to decide the question of libel or no libel, and what is the meaning of "corruptly" in the Corrupt Practices Act. Such difficulties are inevitable, and call for the exercise of the highest order of judicial mind.

Incidentally as regards this case we would notice a point which is of some importance. It was argued by the Solicitor General that when a banker takes charge of extremely valuable securities every care for their safety ought to be supplied, and that such was not taken may be presumed from the fact that additional precautions have been adopted since this loss occurred. The fallacy of such an argument is shown in a case in the Exchequer which we report to-day. There a pointsman had run an engine on to a branch line and caused damage for which the company was sued. The engine was a runaway, the one man in charge of it, who for twenty years had single-handed taken it to be coaled, having fallen in a fit. Since the accident the company took precautions to prevent a recurrence of the catastrophe. It was argued that this fact was evidence of negligence previous to the catastrophe; but the court held not, Mr. Baron Bramwell observing that because the world grows wiser every day it is not to be concluded that it was foolish before. The argument is a very seductive one, and likely to lead to error.—*Law Times.*

A WARNING.

A solicitor at Braintree has been sentenced to twelve months' imprisonment for appropriating to his own use the moneys of his client. This is, we believe, the first time that the offence, which is only too common, has been punished by indictment; plundered clients having been ignorant of the remedy or reluctant to enforce it. Now that it is known there can be no doubt that it will be more frequently resorted to by those whose confidence has been betrayed. Nor in the true interests of the Profession can we object to the law itself or its enforcement. In very truth there is no real difference between robbery by appropriating the money which clients have confided to the care of a solicitor, or which he has received for them in the course of business, and picking a pocket, or robbing a till. If anything, the solicitor is guilty of the greater crime, for he adds breach of trust to theft, and uses the confidence of his employer for the purpose of robbing him. No excuse whatever can be offered for this crime, for no circumstances whatever will justify a solicitor in using for his own purposes the money which he holds in trust for others, whether that money has been given to him by his client for investment, or whether it has been received by him for his client. The moment he applies any portion of that money to his own use, he is guilty of dishonesty, and has committed a crime, even if done with design to refund it.

We fear that the offence of thus misappropriating the property they hold in trust is more frequent than the public are aware. It results from the practice, against which we have so often and earnestly warned our readers, of mingling their clients' money with their own—a course to be sedulously shunned by every prudent solicitor. Debts recovered, purchase moneys received, rents collected, and such like, are too frequently paid to the private account of the solicitor at the bank; he cannot, or will not, distinguish what of the balance is his own, and what the property of others which he holds in trust; he draws upon the whole balance for his private uses, invades the property of his client, deluding his conscience with the suggestion that he does not know what is his own, averts some present pressure by the tempting crime, in the vain hope that something may turn up to save him. It is thus that hundreds of solicitors have been brought to ruin in times past, and if the Woodbridge example should be followed, it is thus that many will hereafter be brought to the felon's dock and the convict's prison.

The warning we have given before we would emphatically repeat now. Make it an inflexible rule never to mingle your client's money with your own. Keep a separate account at the bank and pay over whatever you receive for a client with the least possible delay. By observing this rule, you will avoid the double risk of temptation and of error. You will both gain clients and keep them; for there is nothing that so recommends a solicitor to men of business as prompt paying over of debts collected and moneys received, and it will promote your peace of mind as much as it will advance your prosperity.—*Law Times.*

CURIOUS TENURES.

Ludewell, County of Oxford.—Robert de Eston and Jordan de Wotton hold of our lord the King one hide of land, in the town of Ludewell, by the serjeanty of preparing or dressing the herbs of our lord the King in Woodstock.

Margery de Aspervil held one yard-land † of

† The quantity varies in different places from 16 to 40 acres.

our lord the King in capite,* in Aylesbury, in the County of Bucks, by the serjeanty of keeping all the distresses made for the King's debt by the summons of the Exchequer.

The manor of Banbury was held by the Bishop of Lincoln, by the serjeanty of one hundred and forty hens, and one thousand three hundred eggs.

All the bondmen (servi) of Chakendon, in the County of Oxford, for the service of mowing, were to have of the lord one ram of the price of eight-pence at least, and every mower was to have a loaf of the price of a half-penny; and they jointly were to have a cartload of wood, and a cheese of the price of fourpence, and a certain quantity of small beer. And every yard-land was to have six tods of grass, and half a yard-land three tods.

The Barons Furnival held Fernham, in the County of Bucks (now called Franham Royal), by the service of finding their sovereign lord the King, upon the day of his Coronation, a glove for his right hand, and to support his right arm the same day, whilst he held the regal verge or sceptre in his hands.

At the Coronation of King Henry IV. Sir Thomas Neville, Lord Furnival, by reason of his manor of Furneham, with the Hamlet of Cere, which he held by the curtesie of England, after the decease of his wife, the Lady Joane, gave to the King a glove for his right hand, and sustained the King's right arme so long as he bare the sceptre.—*Oxford Journal.*

ONTARIO REPORTS.

COMMON LAW CHAMBERS.

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

Morris v. Leslie.

Prochein amy—Security for costs.

1. An application to remove the next friend of an infant plaintiff on the ground of insolvency, or to stay proceedings till security for costs is given, must be made promptly after declaration served, according to the rule in ordinary cases when security for costs is applied for.
2. When the court has appointed the natural guardian of the infant as next friend, and it appears probable that no one else can be found to act in time for the assizes, and no imposition has been practised upon the court in making such appointment, such next friend will not be removed nor will he be ordered to give security for costs although in destitute circumstances.

[Chambers, September 21, 1869.]

An order was made on the 1st September, 1869, to admit Margaret Morris, mother of the plaintiff, to prosecute the action as her next friend. This order was served on defendant's attorney along with the declaration on the 4th September. After allowing the time for pleading to expire the defendant delivered a summons to plead several matters, upon which an order was obtained on 16th September. The pleas were served on the 18th September, and on the same day issue was joined and notice of trial was served just in time for the Belleville Assizes.

On the 21st September the defendant obtained a summons calling on the plaintiff to show cause why the appointment of the above named *prochein amy* should not be revoked, and why all proceedings herein should not be stayed until a responsible person be appointed as *prochein amy* in his stead, or why all further proceedings herein should not be stayed until such next friend should give to the defendant security for his costs herein; upon the ground that the said *prochein amy* is not a responsible person, and not in solvent circumstances, and not good for defendant's costs herein.

J. A. Boyd shewed cause. He filed affidavits detailing the proceedings, and in which it was alleged, that compelling the plaintiff to give security for costs would be equivalent to preventing her from prosecuting the action, and that in any event she could not get such security in time for the approaching Assizes. He contended,

1. That the delay in making the application had been too great: See Rule of Court, No. 23, *Harrison's* C. L. P. Act 603; *Fogo* v. *Pypher*, 3 P. R. 309; *Somers* v. *Carter*, *Ib*, 328; *Adshead* v. *Upton*, 22 U. C. Q. B. 430; *Torrance* v. *Gross*, 2 P. R. 55; *Morgan* v. *Hellems*, 1 P. R. 363; *Wainwright* v. *Bland et al.*, 2 C. M. & R. 740, (*per* Alderson, B.)

2. Insolvency of the *prochein amy* is not established here, and even if established, she is the natural guardian, and no other person can be had to act: *Lees* v. *Smith*, 5 H. & N. 632; Adair on Costs, pp. 10, 11; *Watson* v. *Frazer*, 8 M. & W. 660; Morgan & Davey on Costs, 254; *Duckett* v. *Satchwell*, 12 M. & W. 779.

The following authorities were cited in support of the summons: Arch. Prac., 12th ed., p. 1242; *Lees* v. *Smith*, 29 L. J. Ex. 294; *Mann* v. *Berthen*, 4 Moo. & P. 215.

Galt, J.—The summons must be discharged on both grounds.

Summons discharged.

Wallace v. Acre.

Ejectment—Vacant possession—Setting aside writ.

A writ of ejectment was issued against the defendant, who (as was alleged by the plaintiff and not denied by the defendant) claimed to be owner of the land in question. The possession was vacant; and it was not shewn that the defendant was last in possession.

Held, that the defendant was entitled to have the writ set aside without disclaiming title.

[Chambers, Sept. 23, 1869.]

This was a summons calling on the plaintiff, amongst other things, to shew cause why the writ of summons in ejectment herein, copy and service thereof, and præcipe therefor, or some or one of them, should not be set aside with costs, on ground that said defendant was improperly made a defendant.

The facts antecedent to the bringing of this suit appear in *Livingstone* v. *Acre*, 15 Grant 610, and *Acre* v. *Livingstone et al.*, 26 U. C. Q. B. 282. The defendant in this suit had brought an action of ejectment against the plaintiffs and the said Livingstone, to which they appeared. Wallace limiting his defence to one-half, and Livingstone to the other. An order was subsequently made directing their appearances to be withdrawn, and

*Capite was a tenure held of the King immediately.

giving Acre leave to sign judgment. Wallace neglected to withdraw his appearance as directed, and Acre took no steps to obtain judgment, or to take possession of the land which was offered to him. It consequently remained vacant, at least so far as concerned the fifty acres claimed by Wallace.

Many other facts appeared on affidavit and were discussed, but were not material to the point on which the case turned.

O'Brien shewed cause:—

1. So long as a defendant is either in possession of or claims any interest in the land, the writ against him cannot be set aside; and he does not now, as he should do to make out his case for relief on this application, disclaim title or interest: *Hall* v. *Yuill*, 2 Prac. R. 242; *D'Arcy* v. *White*, 24 U. C. Q. B. 570, and see *Kerr* v. *Waldie et al.*, 3 C. L. J., N. S., 292, 4 Prac. R. 138.

2. The writ may properly be directed to the person "entitled to defend the possession of the property claimed," even though he be not in actual possession: Ejectment Act, sec. 1, 2. And the writ need not now be directed, in case of a vacant possession, to the person last in possession, as was the law under 14, 15 Vic. cap. 114, sec. 1.

J. A. Boyd, contra:—

The writ should have been directed, this being vacant land, to the person last in actual possession: *Street* v. *Crooks et al.*, 6 U. C. C. P. 120; *Benson* v. *Connor*, *Ib.*, 359; and the writ not being addressed to the tenant in possession is irregular: *Thomson* v. *Slade*, 25 L. J. Ex. N. S. 306.

The sole question to be determined in ejectment is, who is entitled to the possession without regard to the manner in which he has entered: *Robinson* v. *Smith*, 17 U. C. Q. B. 218.

Richards, C. J.—I cannot hold that a person can be compelled to defend an action brought to recover possession of land of which he is not at the time in possession, even though he may claim to be the owner of it. Of course if he does not desire to litigate, he need not appear, but then he makes himself liable for costs in an action for mesne profits. Possession in this case appears to be open to either party, but neither seems to be desirous of taking it.

I think the order should go, but as the conduct of the defendant does not appear to me to be what it should have been, looking to all the facts as they appear from the affidavits, the order will go without costs.

Order accordingly.

Barber v. Armstrong.

Replevin—Pleading.

Held, 1. That section 18, Con Stat. U. C. cap. 29, applies only to cases of a wrongful taking and detention within the latter part of section 1 of that act.

2. That the second count of the declaration set out below was in case and not in replevin, and could not therefore be joined with an ordinary count in replevin; but even if intended to be a count in replevin under the provisions in the latter part of section 1 it is improper, the facts being, that the action was against a pound-keeper for detaining certain horses distrained *damage feasant*, and therefore a case "in which by the law of England replevin might be made," and in either case the count must be struck out.

[Chambers, November 1, 1869]

This was an action of replevin. The declaration contained two counts; the first an ordinary count in replevin, but omitting to state the locality in which the taking took place. The second count in its introductory part stated that the defendant was a pound-keeper, and as such received and took into his custody certain goods and chattels of the plaintiff, to wit, certain horses, &c., and that whilst the said goods and chattels were in the defendant's custody as such pound-keeper as aforesaid, and previous to the sale thereof, he, the plaintiff, considering and contending that the said goods and chattels had been and were illegally impounded in pursuance of and as required by the fourth sub-section of section 355 of 29 & 30 Vic. ch. 51, offered to give to the defendant and tendered to him good and sufficient and satisfactory security for all costs, damages and expenses that might be established against him, and did thereupon, as the owner of the said goods and chattels, demand from the said defendant the delivery up of the said goods and chattels to him, the plaintiff, as he lawfully might. Yet the defendant wrongfully refused to accept the said security or any security whatsoever, and wrongfully refused to deliver up to the said plaintiff the said goods and chattels, and unjustly detained the same from the said plaintiff against sureties and pledges, until, &c.

Upon being served with this declaration the defendant obtained a summons calling upon the plaintiff to show cause why the second count of the declaration should not be struck out, on the ground that the same is calculated to prejudice, embarrass and delay the fair trial of this action, and that the said count cannot, if in case, properly be joined with the first count of the said declaration, and if in replevin is separable; or why the defendant should not be at liberty to plead and demur to the declaration, on the ground that there is a misjoinder of counts, or why the first count should not be amended at plaintiff's expense, by stating the particulars of the place whence the chattels, &c., therein mentioned, were taken.

D. McMichael shewed cause, contending that although the first count was in replevin yet that supposing the second count to be in case, it might be joined under the provisions of the first section of Con. Stat. U. C. ch. 29, entitled, "An Act relating to Replevin," otherwise it would not be possible for the plaintiff to avail himself of the provisions therein contained for "the recovery of the damages sustained by reason of such unlawful caption and detention, or of such unlawful detention, in like manner as actions are brought and maintained by persons complaining of unlawful distresses." And if even nominal damages are given, and such would be the result without such a count as this, such recovery could be pleaded in bar of any subsequent action for substantial damages.

Osler, for the defendant, contended that the count was in case, in which event it was a misjoinder of action, under the provisions of the Common Law Procedure Act, section 73, or if it should be held to be in replevin then it was unnecessary and should be struck out, and that the provisions of the act relating to replevin respecting damages did not refer to cases like the present, but to cases where the plaintiff brought replevin in place of trespass or trover. He also contended that in this case it was necessary to

state the place where the wrongful taking and detention took place, as this case did not fall within the provisions of section 18 of the replevin act.

Galt, J.—It is very difficult to say whether the second count is in replevin or in case for wrongfully refusing to accept the security mentioned in the declaration, although it concludes in the ordinary form of a count in replevin. I incline to think that it is in case, and, as such, is in contravention of the 73rd section of the Common Law Procedure Act, and must be struck out, but it is of very little consequence whether I am correct in this view, because if it is intended to be in replevin, it ought to be struck out as superfluous for the following reasons—From the affidavits filed it appears that this is an action against a pound keeper for detaining certain horses distrained damage feasant and placed in the pound, it is therefore a case "in which by the Law of England replevin might be made," and does not fall within the latter part of the 1st section of the replevin act, which was the portion relied upon by Dr. McMichael. The part referred to is as follows, "or in case any such goods, &c., have been otherwise wrongfully taken or detained, the owner or other person capable at the time this act takes effect of maintaining an action of trespass or trover for personal property may bring an action of replevin for the recovery thereof, and for the recovery of the damages sustained," &c., as before mentioned. If, therefore, the second count is intended to be in replevin under the foregoing provisions, it is wrong, because being a case in which by the law of England replevin might be made, the said provisions do not apply. It also appears to me that the 18th section applies only to cases of a wrongful taking and detention within the latter portion of the first section, and not to cases of unlawful distresses for damage feasant, and therefore that local description is necessary. The summons is therefore made absolute to strike out the second count, and to amend the first with costs, and the defendant to have eight days time to plead to the amended declaration.

Order accordingly.

ENGLISH REPORTS.

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(*Reported by* Douglas Kingsford, Esq., *Barrister-at-Law.*)

Giblin and others v. McMullen.

Victoria—Deposit of property at a banker's—Liability of gratuitous bailees—Gross negligence—Nonsuit.

A box containing debentures and other securities was deposited at a bank, the depositor keeping the key. The bank received no payment for their care of the box, which was kept in a strong room with similar boxes of other customers, and with property belonging to the bank.

The debentures were stolen by the cashier of the bank.

In an action by the depositor against the bank, the jury found a verdict for the plaintiff, but a rule to enter a nonsuit was afterwards made absolute.

On appeal to the Judicial committee,

Held, that the bank were not bound to more than ordinary care of the deposit entrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary care which men of common prudence generally exercise about their own affairs.

It is not, however, sufficient to exempt a gratuitous bailee from liability, that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence.

The term "gross negligence" is not intended as a definition, but is useful as expressing the practical difference between the degrees of negligence for which different classes of bailees are responsible.

The modern rule as to nonsuit is that in every case before the evidence is left to the jury there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly find a verdict for the party producing it, upon whom the onus of proof is imposed.

A nonsuit may be directed even after the defendant has entered on his case, and evidence given by the latter may be used for the purpose of a nonsuit.

[21 L. T. Rep. N. S. 214.]

This was an appeal against a judgment of the Supreme Court of Victoria. The then plaintiff, Mr. Richard Lewis, brought an action against the defendant (the present respondent), as inspector of the Union Bank of Australia.

The declaration stated that the plaintiff delivered to the said bank certain railway debentures to be safely kept and taken care of by the bank for reward, and the bank received the debentures into their care and keeping, for the purpose and on the terms aforesaid, yet the bank kept the debentures in a negligent manner, and took no care of the same, whereby they were lost to the plaintiff. The second count charged the bank with negligence as gratuitous bailees.

The defendant pleaded not guilty, and a traverse of the delivery and receipt of the debentures by the bank.

At the trial, in Nov. 1866, on the close of the plaintiff's case, the counsel for the defendant applied for a nonsuit. The judge refused to stop the case, but gave leave to move to enter a verdict for the defendant It was understood, however, that the rule, if absolute, should be for a nonsuit, and not to enter a verdict. The defendant then called evidence, and the jury found a verdict for the plaintiff for £10.450.

The rule to set aside the verdict and enter a nonsuit was subsequently made absolute, the respondent thereupon signing final judgment.

The appellants were the executors of Mr. Lewis, who died in Nov. 1867.

The circumstances of the case are fully stated in the judgment.

The Solicitor General (Sir J. D. Coleridge, Q. C.) for the appellants.—In all cases where negligence is imputed to a bailee, whether gratuitous or for hire, the question is, what amount of attention, care, and skill can be insisted on by the bailor, so that on damage for its omission he may have an action against the bailee. This question is one of fact for a jury. A confusion has arisen from the use of the word "gross," as expressing the degree of negligence for which gratuitous bailees are to be liable, and from misusing the term "negligence" as if it were an affirmative word. Willes, J. stated the principle correctly in *Grill* v. *General Iron Screw Collier Company*. 14 L. T. Rep. N. S. 715; 35 L. J., N. S. 330, C. P. "I own I entirely agree with the *dictum* of Cranworth, L. J. in *Wilson* v. *Brett*, 11 M. & W. 113; 12 L. J., N. S. 264, Ex., that

'gross negligence' is ordinary negligence with a vituperative epithet That was the law laid down in *Wyld* v. *Pickford*, 8 M. & W. 443, and upheld and recognised in the Exchequer Chamber in the judgment of Crompton, J. in *Beal* v. *South Devon Railway Company*, 3 H. & C. 337; 11 L. T. Rep. N. S. 184. The confusion seems to have arisen in using the word 'negligence' as if it was an affirmative word, whereas in truth it is a negative word; it is the absence of such care, skill, and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed. Then, if you begin with that, what is the amount of care, skill, and diligence which a man ought to bring? In the case of a gratuitous bailment it is said, if you employ a man of no skill to ride your horse, he is bound to use such skill as he possesses, and that you can require no more, and that he is liable for gross negligence in that sense. But if you employ a man to ride your horse who professes to be a groom, he would be answerable unless he had competent skill in horseridi g. Therefore the word "gross" is a word which, as pointed out by Sir Patrick Colquhoun in his summary of the Roman civil law (ss. 1539-3), is used as a description, not as a definition. If we have to separate law from fact, and to leave the question of fact to the jury, we could not get nearer to a practical definition of 'gross negligence' than such negligence as is actionable." This, then, was a question rightly left to the jury, and their finding ought not to be disturbed. And the evidence given at the trial was sufficient to support the verdict. When a banker takes charge of extremely valuable securities, every care for their safety ought to be supplied, and that such was not taken may be presumed from the fact that additional precautions have been adopted since this loss occurred. It may be true that Fletcher had been long in the employment of the bank, and that nothing was known against him, but it would appear from the evidence that a gentleman from England called on the manager of the bank and told him that he had expected to receive money from Fletcher and had not received it. This should have put him on his guard against Fletcher. Then there is evidence that violence had been attempted on the box, and it was suggested that Fletcher took the box away, had it picked by a locksmith, and then returned it. If this were possible, there must have been negligence in the arrangements at the bank. The mere fact that the bank took as great care of Lewis's strong box as they did of their own property would not rebut their liability. Lord Holt's dictum in *Coggs* v. *Bernard*, 1 Sm. L. Cas. (5th edit.) 179, was, that if a mere depositary "keeps the goods bailed to him but as he keeps his own, though he keeps his own but negligently, yet he is not chargeable for them, for the keeping them as he keeps his own is an argument of his honesty. . . . . As suppose the bailee is an idle, careless, drunken fellow, and comes home drunk, and leaves all his doors open, and by reason thereof the goods happen to be stolen and his own, yet he shall not be charged, because it is the bailor's own fault to trust such an idle fellow." But this was clearly overruled in *Doorman* v. *Jenkins*, 2 A. & E. 256, where Denman, C. J., directed the jury that it did not follow from defendant's having lost his own money, at the same time as the plaintiff's, that he had taken such care of plaintiff's money as a reasonable man would ordinarily take of his own; and he added that that fact afforded no answer to the action if they believed that the loss occurred from gross negligence. [Lord Chelmsford said the degree of negligence for which a particular bailee is liable must be a matter of law on which the jury would have to be directed by the judge, and referred to *Shiells* v. *Blackburne*, 1 H. Bl. 159] The case of *Shiells* v. *Blackburne* has been misunderstood, and has been supposed to show that the question of negligence is a matter of law, but the verdict was there set aside because the court thought that there was no evidence of negligence to go to a jury, and that they had found the fact erroneously. (See the comments of Patteson, J., in *Doorman* v. *Jenkins*, 2 A. & E. 263)

Watkin Williams (*Beresford* with him) on the same side.—The rule to set aside the verdict and to enter a nonsuit ought not to have been made absolute but should have been discharged. The judge at the trial below ought to have left to the jury the question whether the bank was guilty of that particular degree of negligence for which gratuitous bailees are liable. The defendant at the trial, instead of relying on the objections that plaintiff had not made out a case for the jury, chose to go into evidence of his own. Some of this evidence, particularly the fact of the change made in the bank arrangements after the discovery of the loss, was favorable to the plaintiff. This evidence might have been in answer to the application for a nonsuit. [*Mellish*, Q. C., agreed that it should be considered whether upon the whole evidence there ought to have been a nonsuit.] We admit that the bankers were gratuitous bailees; that they are not liable for deposited property stolen by a clerk or servant employed about the bank, unle s they have knowingly hired or kept in their service a dishonest servant, and that they were only bound to take ordinary care; but whether they took this care is a question for the jury. The rule given by Lord Loughborough, in *Shiells* v. *Blackburne*, 1 H. Bl. 163, is that "if a man gratuitously undertakes to do a thing to the best of his skill, where his situation is such as to imply skill, an omission of that skill is imputable to him as gross negligence." Here the bankers, if they neglected precautions which their business ought to have suggested, were guilty of gross negligence. As observed by Lord Denman, in *Doorman* v. *Jenkins*, 2 A. & E. 265, it is "impossible for a judge to take upon himself to say whether negligence is gross or not." In *Wilson* v. *Brett*, 11 M. & W. 113, a person conversant with and skilled in horses, rode a horse at the owner's request, for the purpose of showing it for sale; the horse fell and was injured, and the judge in summing up told the jury that the rider, the defendant in the action, having been shown to be skilled in the management of horses, was bound to take as much care of the horse as if he had borrowed it. The jury found a verdict for the plaintiff, and the court refused a new trial on the ground of misdirection. Alderson, B., observes: "This defendant being shown to be a person of competent skill, there was no dif-

ference between his case and that of a borrower; because the only difference is, that then the party bargains for the use of competent skill, which here becomes immaterial, since it appears that the defendant had it." And in the judgment of Rolfe, B., who tried the case, occurs the passage, "If a person more skilled knows that to be dangerous which another not so skilled as he does not, surely that makes a difference in the liability? I said I could see no difference between negligence and gross negligence—that it was the same thing with the addition of a vituperative epithet—and I intended to leave it to the jury to say whether the defendant, being, as it appeared by the evidence, a person accustomed to the management of horses, was guilty of culpable negligence." [Lord Chelmsford said that *Wilson* v. *Brett* was a case of misfeasance, not of negligence, and that he saw no objection to the term "gross" negligence, which was useful in expressing the degree of negligence for which certain classes of bailees are responsible. The term, moreover, had been approved by Lord Holt, Sir William Jones, and other eminent authorities.] A similar rule was laid down in *Beal* v. *South Devon Railway Company*, 3 H. & C. 341; 11 L. T. Rep. N. S 184. See, too, the cases of *Peninsular and Oriental Steam Navigation Company* v. *Shand*, 1 Moo. P. C. N. S 272; 12 L. T. Rep. N. S. 809; *Dansey* v. *Richardson*, 3 E. & B. 144.

Mellish Q.C., for the respondent.—Where bankers take charge of their customers' goods under such circumstances as the present, it must be understood that the customers will take their chance of loss. If whether they have taken proper care is to be a question dependent on the opinion of a jury, what banker would accept such a liability without reward? There was no evidence of negligence, except that the cashier was allowed to have access by himself to the strong room. The plaintiff knew that this was the custom of the bank, and after the deposit of his property if any change was made it was for his benefit, rather than to his disadvantage. And, indeed, to allow access to the confidential servant alone would probably involve less risk than to let two go together. The boxes were kept in the strong room for the convenience of depositors, and it cannot be contended that there was any negligence in the bankers because they did not put these bonds in the one of the two inner rooms which they reserved for bullion and unsigned notes. Lord Holt, in his judgment in *Coggs* v. *Bernard*, in saying that, when a man takes goods into his custody to keep for the bailor without reward, the bailee will be chargeable if guilty of "some gross neglect," clearly means "wilful" negligence, which would be near to fraud. [Lord Chelmsford.—It is difficult of definition; but gross negligence seems to mean "utter carelessness."] For he bases this part of his judgment on Justinian's Institutes, Book III., tit. 15, where the liability of a depositary is thus defined: "Ex eo solo tenetur, si quid dolo commiserit; culpæ autem nomine, *it est*, desidiæ ac negligentiæ non tenetur." And this rule was acted on in an American case, very like the present, *Foster* v. *Essex Bank*, 17 Mass. 478, where a cask of doubloons was deposited by the plaintiff with the defendants, and the cashier or clerk of the bank stole a great portion and afterwards absconded. The bank was held not to be liable on the grounds expressed in the following passage from the judgment of Parker, C. J., (p. 497), "It will not be disputed that if (this contract) amounts only to a naked bailment, without reward, and without any special undertaking, which in the civil and common law is called *depositum*, the bailee will be answerable only for gross negligence, which is considered equivalent to breach of faith; as everyone who receives the goods of another in deposit, impliedly stipulates that he will take some degree of care of them. The degree of care which is necessary to avoid the imputation of bad faith, is measured by the carefulness which the depositary uses towards his own property of a similar kind. For although that may be so slight as to amount even to carelessness in another, yet the depositor has no reason to expect a change of character in favor of his particular interest, and it is his own folly to trust one who is not able or willing to superintend with diligence his own concerns. . . The dictum of Lord Coke that the bare acceptance of goods to keep implies a promise to keep them safely so that the depositary will be liable for loss by stealth or accident (*Southcote's case*, 4 Co. 83), is entirely exploded . . . having been fully and explicitly overruled by all the judges in *Coggs* v. *Bernard*. . . . 'Now the law seems to be settled that such a general bailment will not charge the bailee with any loss, unless it happen by gross neglect, which is construed to be an evidence of fraud. But if he undertakes specially to keep the goods safely and securely, he is bound to answer all perils and damages that may befall them for want of the same care with which a prudent man would keep his own:' (2 Bl. Comm. 453.) And this certainly is the more reasonable doctrine, for the common understanding of a promise to keep safely would be that the party would use due diligence and care to prevent loss or accident; and there is no breach of faith or trust if, notwithstanding such care, the goods should be spoiled or purloined. Anything more than this would amount to an insurance of the goods, which cannot be presumed to be intended, unless there be an express agreement and an adequate consideration therefor. The doctrine, as thus settled by reason and authority, is applicable to the case of a single deposit in which there is an accommodation to the bailor, and the advantage is to him alone. He shall be the loser, unless the person in whom he confided has shown bad faith in exposing the goods to hazards to which he would not expose his own. This would be *crassa negligentia*, and for this alone is such a depositary liable." The court then went into the facts, and proceeded (p 504): "Upon this state of facts, we think it most manifest that, as far as the bank was concerned, this was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank, which can tend to increase its liability beyond the effect of such a contract. No control whatever of the chest or the gold contained in it was left with the bank or its officers. It would have been a breach of trust to have opened the chest or to inspect its contents. The owner could at any time have withdrawn it,

there being no lien for any price of its custody, and it was not right that the bank had authority to remove it to a place of greater safety without the orders of the owner. If it be possible to constitute a gratuitous bailment, or simple deposit, this was one. . . . Such deposits are indeed simply gratuitous on the part of the bank, and the practice of receiving them must have originated in a willingness to accommodate members of the corporation with a place for their treasures, more secure from fire and thieves than their dwelling-house or stores. . . . (P. 507): The contract being, then, only a general bailment, the third question to be discussed is whether the contract has been cancelled by the bank. . . . The rule to be applied to this species of bailment is that the depositary is answerable in case of loss for gross negligence only or fraud which will make a bailee of any character answerable. Gross negligence certainly cannot be inferred here, for the same care was taken of this as of other deposits, and of the property belonging to the bank itsself. . . . We have thus prepared the way for the discussion of the great question in the case, and we believe the only one on which doubts could be entertained. The loss was occasioned by the fraud or felony of two officers of the bank, the cashier and chief clerk. We shall not consider whether the act of taking the money was felonious or only fraudulent, as the distinction is not important in this case, the question being whether there was gross negligence, and that fact may appear by suffering goods to be stolen, as well as if they were taken away by fraud. . . . No fraud is directly imputed to the bank, it being found that the directors who represent the company were wholly ignorant of the transactions of the cashier and chief clerk in this respect. The point, then, is narrowed to the consideration whether the corporation, as bailee, is answerable in law for the depredations committed on the testator's property by two of its officers. (Authorities were reviewed by the court) . . . I think it may be inferred from all this, as a general rule, that to make the master liable for any act of fraud or negligence done by his servant, the act must be done in the course of his employment; and that if he steps out of it to do a wrong, either fraudulently or feloniously, towards another, the master is no more answerable than any stranger. The cases of innholders, common carriers, and perhaps ship masters or seamen, when goods are embezzled, are exceptions to the general rule, founded on public policy. We are then to inquire whether, in this case, when the gold was taken from the cask by the cashier and clerk, they were in the course of their official employment. Their master, the bank, had no right to meddle with the cask or open it, and so could not lawfully communicate any such authority, and that they did not in fact give any, is found by the verdict. . . . The cask was never opened but by order of the owner, until it was opened by the officers for a fraudulent or felonious purpose. It was no more within the duty of the cashier than of any other officer or person to know the contents or to take any account of them. If the cashier had any official duty to perform relating to the subject, it was merely to close the doors of the vault when banking hours were over, that this, together with other property, should be secure from theft. He cannot, therefore, in any view be considered as acting within the scope of his employment when he committed this villainy, and the bank is no more answerable for this act of his than they would be if he had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank. . . . The undertaking of banking corporations, with respect to their officers, is that they shall be skilful and faithful in their employments; they do not warrant their general honesty and uprightness." The principles above stated are all applicable to the present case; though the latter is weaker against the bank than the American case, for in that it appears that an exact account of the gold deposited was left with the cashier, who gave a receipt for it, while here the bank knew nothing about the contents of the plaintiff's box. There are doubtless observations in *Doorman* v. *Jenkins*, 2 A. & E. 256, tending to show that the question of negligence is for the jury. But there was some evidence of gross negligence in the opinion of the court. And many modern cases establish the proposition that, unless there is some evidence upon which the jury can reasonably find that negligence existed, the question should be withdrawn from them. Thus in *Toomey* v. *London, Brighton, and South Coast Railway Company*, where the plaintiff, while waiting at the defendants' station, mistook the lamp room for the urinal, fell down some steps and was injured, Williams, J., says, "It is not enough to say there was some evidence; for every person who has had any experience in courts of justice knows very well that a case of this sort against a railway company could only be submitted to a jury with one result. A scintilla of evidence, or a mere surmise that there may have been negligence on the part of the defendants, clearly would not justify the judge in leaving the case to the jury; there must be evidence upon which they might reasonably and properly conclude that there was negligence." And this rule was adopted and approved in *Cornman* v. *Eastern Counties Railway Company*, 4 H. & N. 781, and in *Cotton* v. *Wood*, 8, C. B., N. S. 568. In the latter case Erle, J., observes (p 573), "The very vague use of the term 'negligence' has led to many cases being left to the jury in which I have been utterly unable to find the existence of any legal duty or any evidence of a breach of it." And Williams, J., adds, "There is a rule of the law of evidence, which is of the first importance, and is fully established in all the courts, viz., that, where the evidence is equally consistent with either view, with the existence or non-existence of negligence, it is not competent to the judge to leave the matter to the jury. A still stronger case is that of *Crafter* v. *Metropolitan Railway Company*, 1 L. Rep. C. P. 300, where the plaintiff was injured by falling, in consequence of the slippery brass nosings on the stairs. Two witnesses of the plaintiff's, one of whom was a builder, stated that in their opinion the staircase was a dangerous one, and the defendants called no witnesses to contradict. Yet it was held that there was no evidence to go to a jury. M. Smith, J., remarks, "The court is, in an especial manner, bound to see that the

evidence submitted to the jury in order to establish negligence is sufficient and proper to go to them." [Lord Chelmsford referred to *Ryder* v. *Wombwell*, L. Rep. 4 Ex. 32; 19 L. T. Rep. N. S. 491.]

Jos. Brown, Q.C., (*Murray* and *J. D. Wood* with him), on the same side.—It is admitted that plaintiff's box had the same care as other customers' property, and as the property of the bank. The appellants are in fact urging that we ought to have taken special care of plaintiff's property. Even in the case of a bailment of goods to be kept for hire, it was held by Lord Kenyon, in *Finucane* v *Small*, 1 Esp. 314, that positive negligence must be proved, and that if "the goods were lodged in a place of security, where things of much greater value were kept, this is all that it was incumbent on the defendant to do; and if such goods are stolen by the defendant's own servant, that is not a species of negligence of a description sufficient to support this action, inasmuch as he has taken as much care of them as of his own:" (See, too, Story on Bailments, ss 63, 65, 66, 67, 71–3, 75–9.) *Doorman* v. *Jenkins* (*ubi sup*.), differs from the present case, for there the plaintiff did not get the care he expected, which here he did. And it would not fix the bank with liability to show that there were some additional precautions which they might have adopted, for as said by Montague Smith, J., in *Crafter* v. *The Metropolitan Railway Company*, 1 L. Rep. C. P. 304, "the line must be drawn in these cases between suggestions of possible precautions and evidence of actual negligence, such as ought reasonably and properly to be left to a jury."

Watkin Williams replied.

Judgment was delivered by Lord Chelmsford:—This is an appeal from a judgment of nonsuit of the Supreme Court of the colony of Victoria in an action by the appellant's testator against the respondent. The action was brought against the defendant as inspector of the Union Bank of Australia, to recover damages for the negligent keeping of certain railway debentures delivered to the bank to be safely kept and taken care of. The plaintiff, who resided at Hobart Town, in Tasmania, had an account with the Union Bank of Australia from the year 1857. From the earliest period of his becoming a customer of the bank, he had placed in their care a box, of which he kept the key, containing securities, deeds and debentures. The bank received no consideration for taking care of the deposits of their customers. In the month of January, 1862, the plaintiff purchased the railway debentures in question and put them in his box. The box appears always to have been kept in a strong room underground, in which the boxes of other customers of the bank were placed. There were also in this strong room the manager's box, containing bills for discount and collection, worth from £1,500,000 to £2,500,000, teller's boxes, worth £50,000, and securities of the Royal, Central, and Agra Banks, in which the Union Bank was interested. The access to this room could only be obtained by passing through a compartment of the office which was separated from the part where the clerks were employed by a partition about five feet high. In this compartment Fletcher, the cashier, always sat during bank hours, and a messenger slept there during the night. There was a wooden door in this compartment which opened upon a flight of steps leading to the room where the plaintiff's box was deposited. This room had two iron doors, which were opened by separate keys. Fletcher always kept the key of the wooden door, and also, during the day, the keys of the two iron doors, but at the time the debentures in question were placed in the box one of the keys of the iron doors only was kept by him at night, the other being taken care of by another officer of the bank. Beyond the room where the box was there were two other rooms; in the outer of the two uncoined gold was kept, in the inner, bullion, and unsigned notes of the bank. The manager kept the key of the outer of these two rooms, and one of the directors of the bank that of the inner one. The plaintiff had frequent opportunities of seeing how and where his box with the debentures was kept. The customers were permitted to have access to their boxes during the bank hours, but always in the presence of a bank clerk. The plaintiff occasionally went down to the strong room to take the coupons from his debentures for collection, but generally the box was brought up to him. The coupons when taken from the debentures were always given by the plaintiff to Fletcher to collect for him. On the 19th April, 1864, the plaintiff went to the bank and asked for his box. Fletcher brought it to him. The plaintiff opened the box, took out his debentures, and carried them away. He then cut off the coupons, took back the debentures, replaced them in the box, locked it, and gave the coupons to Fletcher to collect for him as usual. Before the plaintiff's next visit to the bank, Fletcher had abstracted the debentures. The exact time at which this act of dishonesty was committed cannot be ascertained, but it must have been before the month of July, 1864, as Fletcher then left the bank on leave of absence and never returned. Up to the time of his leaving he had always maintained a good character. The plaintiff did not come again to the bank till the 3rd July, 1865. He then went into the strong room and took out of his box some gas shares. On the following day he returned to the bank and had his box brought up to him, when he discovered that the debentures were gone. All the material facts above stated were proved in the course of the plaintiff's case; that the bank were gratuitous bailees; that the plaintiff had known for years the manner in which the bank kept the property of their customers deposited with them, and the means which they employed for its protection, and that the debentures were dishonestly taken away by Fletcher. At the close of the plaintiff's case, the counsel for the defendant applied for a nonsuit on the ground that the bank being gratuitous bailees no evidence had been given of such negligence as would render them liable for the loss of the debentures. The judge refused to stop the case, but reserved leave to the defendant to move to enter a nonsuit. The defendant thereupon went into his case and called witnesses. The only material additions which he made to the facts proved by the plaintiff's witnesses were the keeping in the strong room in which the

plaintiff's box with the debentures was placed, not only of the boxes of other customers, but also of the before-mentioned valuable property belonging to the bank; the good character of Fletcher, and his leaving the bank in the end of the month of July, 1864; and that after Fletcher left, but before the loss of the plaintiff's debentures was discovered, a rule was made in the bank that two clerks instead of one (as formerly) shou'd go with a customer wishing to examine his box in the strong room. The jury found a verdict for the plaintiff upon an issue as to the delivery of the debentures to be kept by the bank without reward, and also upon the plea of not guilty (which raised the question of negligence). and they assessed the damages at £10,450. The defendant, upon the leave reserved at the trial, moved for and obtained a rule from the Supreme Court to set aside the verdict and to enter a verdict for the defendant, or a judgment of nonsuit That rule was afterward made absolute, the Chief Justice stating that "in the opinion of the court the defendant was entitled to a verdict, but that as at the trial, when leave to enter a verdict was reserved, there was an understanding that the rule if absolute, should be for a nonsuit, and not to enter a verdict, the rule would be absolute accordingly." In the argument of the appeal the counsel for the appellant, admitting that the bank were gratuitous bailees, and therefore not responsible except fer the highest degree of negligence usually styled "gross negligence," insisted that it was a question of fact for the jury whether the bank had been guilty of this species of negligence, and that the judge would not have been justified at the close of the plaintiff's case in withdrawing the question from the jury and directing a nonsuit, and that after the defendant's case had been gone into, and the jury had pronounced a verdict upon all the evidence upon both sides, it was not competent to the court to give a judgment of nonsuit or to do more than to direct a new trial upon the question of negligence. The learned counsel contended that the bank had been guilty of negligence, because there being two iron doors with protecting locks to the strong room where the plaintiff's debentures were, the cashier was permitted to keep both keys. And they urged that the bank by their own act admitted that they had not been sufficiently careful, as after Fletcher left, they made a rule that two clerks should always accompany the customers to the strong room instead of only one, as had previously been the practice. The first question to be considered is, whether the Supreme Court was right in directing a nonsuit to be entered. It was the duty of the court to do what the judge ought to have done at the trial; and if, at the close of the plaintiff's case, there was not evidence upon which the jury could reasonably and properly find a verdict for him, the judge ought to have directed a nonsuit. Formerly it used to be held, that if there were what was called a scintilla of evidence in support of a case, the judge was bound to leave it to the jury. But a course of recent decisions (most of which are referred to in the case of *Ryder* v. *Wombwell*, L. Rep. 4 Ex. 32; 19 L. T. Rep. N. S. 491), has established a more reasonable rule,—viz., that in every case before the evidence is left to the jury, there is a preliminary question for the judge, not whether there is literally no evidence, but whether there is any upon which a jury can properly proceed to find a verdict for the party producing it, upon whom the onus of proof is imposed. If, therefore, the plaintiff's evidence in this case was such that the judge ought to have considered that it fell short of proving the bank to have been guilty of that species of negligence which would render them liable to an action, he ought to have withdrawn the case from the jury, and directed a nonsuit. But the appellant's counsel insisted that, as the defendant at the trial did not rest upon his objecttion to the sufficiency of the plaintiff's case, but went into evidence of his own, he did it at his peril; and that if he pr ved any facts which were favorable to the plaintiff, they might be used in answer to the application to the court for a nonsuit, upon the leave reserved at the close of the plaintiff's case. It is unnecessary to determine whether this position is correct or not, because the counsel for the respondent agreed that the appellant's counsel might be at liberty to use in argument any facts which they could extract from the defendant's evidence in support of their case. But it may be convenient to see how the plaintiff's case stood upon his own evidence, before considering whether it was at all improved by any facts obtained from the defendant's witnesses. Did the plaintiff, then, give any evidence of the bank having been guilty of that degree of negligence which renders a gratuitous bailee liable for the loss of property deposited with him? From the the time of Lord Holt's celebrated judgment in *Coggs* v. *Bernard*, 1 Sm. L. Ca. 177, 5th edit., in which he classified and distinguished the different degrees of negligence for which the different kinds of bailees are answerable, the negligence which must be established against a gratuitous bailee has been called "gross negligence." This term has been used from that period, without objection, as a short and convenient mode of describing the degree of responsibility which attaches upon a bailee of this class. At last, Lord Cranworth (then Baron Rolfe), in the case of *Wilson* v. *Brett*, 11 M. & W. 113 objected to it, saying that he "could see no difference between negligence and gross negligence; that it was the same thing, with the addition of a vituperative epithet." And this critical observation has been since approved of by other eminent judges. Of course, if intended as a definition, the expression, "gross negligence," wholly fails of its object. But as there is a practical difference between the degrees of negligence for which different classes of bailees are responsible, the term may be usefully retained as descriptive of that difference, more especially as it has been so long in familiar use, and has been sanctioned by such high authority as Lord Holt and Sir William Jones in his Essay on the Law of Bailments. In the case of *Grill* v. *General Iron Screw Collier Company*, L. Rep. 1 C. P. 612; 14 L. T. Rep. N. S. 715, Willes, J., after agreeing with the dictum of Lord Cranworth, and stating that the same view of the term "gross negligence" was held by the Exchequer Chamber in *Beal* v. *The South Devon Railway Company*, 3 H. & C. 337; 11 L. T. Rep. N. S. 184, said: "Confusion has arisen from

regarding negligence as a positive instead of a negative word. It is really the absence of such care as it was the duty of the defendant to use." It is hardly correct to say that the Court of Exchequer Chamber in the case referred to adopted the view of Lord Cranworth as to the impropriety of the term "gross negligence." Crompton, J., in delivering the opinion of the court, said: "It is said that there may be difficulty in defining what gross negligence is, but I agree in the remark of the Lord Chief Baron in the court below, where he says 'There is a certain degree of negligence to which every one attaches great blame. It is a mistake to suppose that things are not different because a strict line of demarcation cannot be drawn between them;'" and he added, "for all practical purposes the rule may be stated to be, that the failure to exercise reasonable care, skill, and diligence, is gross negligence." M. Smith, J., in the case in which the above-mentioned observations of Willes, J., were made, said: "The use of the term gross negligence is only one way of stating that less care is required in some cases than in others, as in the case of gratuitous bailees, and it is more correct and scientific to define the degrees of care than the degrees of negligence." The epithet "gross," is certainly not without its significance. The negligence for which, according to Lord Holt, a gratuitous bailee incurs inability is such as to involve a breach of confidence or trust, not arising merely from some want of foresight or mistake of judgment but from some culpable default. No advantage would be gained by substituting a positive for a negative phrase, because the degree of care and diligence which a bailee must exercise, corresponds with the degree of negligence for which he is responsible, and there would be the same difficulty in defining the extent of the positive duty in each case as the degree of neglect of it which incurs responsibility. In truth, this difficulty is inherent in the nature of the subject and, though degrees of care are not definable, they are with some approach to certainty distinguishable; and in every case of this description in which the evidence is left to the jury, they must be led by a cautious and discriminating direction of the judge to distinguish, as well as they can, degrees of things which run more or less into each other. It is clear, according to the authorities, that the bank in this case were not bound to more than ordinary care of the deposit intrusted to them, and that the negligence for which alone they could be made liable would have been the want of that ordinary diligence which men of common prudence generally exercise about their own affairs. The case resembles very closely one that was mentioned by the counsel for the respondent, which was decided in the Supreme Judicial Court of Massachusetts, the case of *Foster, et al* (Executors), v. *The Essex Bank*, 17 Mass. Rep. 478. The plaintiff in that case deposited with the bank for safe custody, a cask containing a quantity of gold doubloons. This was placed with other deposits in a vault in the bank, and the agent of the plaintiff was in the habit of coming to the bank to see that his deposit was safe. There was no evidence how the vault was secured. Whenever the plaintiff gave orders to the bank (which he frequently did) to deliver some of the gold doubloons deposited, the cask was opened by the cashier or chief clerk, who delivered the doubloons pursuant to the orders. The cashier and chief clerk, both of whom had previously sustained a fair reputation, fraudulently took from the cask doubloons to the amount of 32,000 dollars, with which they absconded. The action was tried upon the general issue, and the jury found a special verdict. The court, after argument, gave judgment for the defendants. The Chief Justice, who delivered the opinion of the court, entered fully in the law of bailments applicable to the case, holding that, "as far as the bank was concerned, the deposit of the gold was a mere naked bailment for the accommodation of the depositor, and without any advantage to the bank which could tend to increase its liability beyond the effect of such a contract." "That the bank was answerable only for gross negligence or for fraud, which will make a bailee of any character answerable, and that gross negligence certainly could not be inferred from anything found by the verdict, as the same care was taken of the plaintiff's property as of other deposits, and of the property belonging to the bank itself." And the court held that the bank was not responsible for the fraud or felony of the cashier and clerk, as when they abstracted the plaintiff's gold from the cask they were not acting within the scope of their employment; "and the bank was no more answerable for their act than it would have been if they had stolen the pocket-book of any person who might have laid it upon the desk while he was transacting some business at the bank." Their Lordships entertain no doubt it was the duty of the judge at the close of the plaintiff's case, upon the application of the counsel for the defendant, to have ordered a nonsuit, or if the plaintiff refused to be nonsuited, to have directed the jury to find a verdict for the defendant, as there was an entire failure of evidence of the want of that ordinary care which the bank was bound to bestow upon the plaintiff's deposit. But the judge having refused to nonsuit, the defendant thereupon went into his case and called witnesses, and having done so the counsel for the appellants contend that there being evidence on both sides the question could not be withdrawn from the jury, and that as the judge could not have nonsuited at that stage of the trial it was not competent to the Supreme Court to give a judgment of nonsuit. It is not, however, correct to say that the judge could not have nonsuited the plaintiff after the defendant had entered upon his case, as it was decided in the case of *Davis* v. *Hardy* (6 B. & C. 225), that the evidence given by a defendant may be used for the purpose of a nonsuit. The defendant's evidence added to the plaintiff's case the important fact that in the strong room in which the plaintiff's debentures were kept, there were, besides the boxes of other customers, bills, securities, and specie, the property of the bank, to a very considerable amount. It may be admitted not to be sufficient to exempt a gratuitous bailee from liability that he keeps goods deposited with him in the same manner as he keeps his own, though this degree of care will ordinarily repel the presumption of gross negligence. But there is no

case which puts the duty of a bailee of this kind higher than this, that he is bound to take the same care of the property entrusted to him as a reasonably prudent and careful man may fairly be expected to take of his own property of the like description. This was, in effect the question left to the jury in *Doorman* v. *Jenkins* (2 A. & E. 256), where Lord Denman told them that "it did not follow from the defendant's having lost his own money at the same time as the plaintiff's that he had take such care of the plaintiff's money as a reasonable man would ordinarily take of his own, and that the fact relied upon was no answer to the action if they believed that the loss occurred from gross negligence." No one can fairly say that the means employed for the protection of the property of the bank and of the plaintiff were not such as any reasonable man might properly have considered amply sufficient. But the appellant's counsel insisted that the fact appearing for the first time in the defendant's case, that the bank, after Fletcher had abused the confidence reposed in him, had introduced additional precautions to prevent the recurrence of a similar act of dishonesty, amounted to an admission that their former safeguards were not such as prudent men ought to have been satisfied with. This argument goes the length of contending that if a gratuitous depositary does not multiply his precautions, so as not to omit anything which can make the loss of property entrusted to him next to impossible, he is guilty of gross negligence. Their Lordships are clearly of opinion that the plaintiff failed upon his own evidence to prove a case of negligence against the bank, and that the evidence produced by the defendant showed more strongly the absence of any such negligence for which they would have been liable. They will, therefore, recommend to Her Majesty that the judgment appealed from be affirmed, and the appeal dismissed with costs.

Appeal dismissed.

COURT OF EXCHEQUER.

Hart v. The Lancashire and Yorkshire Railway Company.

Railway company—Accident by collision—Driver of engine seized with a fit—Pointsman turning engine on to branch line to avoid collision with express train on main line—Collision on branch line—Alteration of siding points subsequently to accident—Evidence of negligence—Number of men on engine—Liability of railway company—Subsequent alteration of rails no evidence of previous negligence.

At the Miles Platting station on the defendants' main line of railway, a few miles from Manchester, there were sidings leading from the main line of rails to coaling and engine sheds, the points of which sidings were always open on to the main line. On the day in question, an engine had, in accordance with the usual practice, been taken by the servant of the company appointed for that purpose to the coaling shed and been coaled, and was returning slowly therefrom on its way to the engine shed. In the ordinary course of things, the engine would have gone along the siding until it had passed the points of the siding leading to the engine shed, when it would have been reversed and backed over them into that shed; but at the moment that the man in charge of the engine should have reversed its action, he fell down in a fit on the foot-board of the engine, which consequently proceeded on towards the main line. At this same time a down express train from Manchester, and an up express train from Rochdale were approaching the station at full speed, and the pointsman in charge of the points at the spot seeing the runaway engine, with the man lying on the floor approaching, in order to prevent its getting on to the main line, and coming into collision with either of these express trains, deliberately, as a choice of evils, turned the points so as to send it on to a branch line of railway from Ashton, which formed a junction at this station with the main line, at the platform of which branch line he knew that a train was stopping for tickets to be collected. The consequence was, that the engine ran into the stationary branch train, and the plaintiff, a second class passenger in one of the carriages of that train, received bodily injuries from the collision, for which he sued the company for compensation, on the ground of negligence, first, in not having two men on the engine while coaling, and running it from the coaling to the engine shed; and secondly, in having the points of the sidings so arranged that the engine must necessarily, in case of accident to the driver, pass on to the main line; and the fact of an alteration having since this accident been made, so that a runaway engine would pass on to a supplementary siding leading up to a "dead end," was urged as evidence of their previous negligence in this respect; it being admitted, on all hands, that the pointsman had acted with great presence of mind, and for the best under the circumstances.

A verdict with damages was found for the plaintiff, but upon a rule for a new trial on the ground that there was no evidence of negligence in the defendants fixing them with liability, it was

Held, by the Court of Exchequer (Kelly, C.B., and Bramwell, Channell, and Cleasby, BB.), making the rule absolute, that there was no evidence of negligence in the defendants on which the verdict could be supported. First, there being nothing dangerous or attended with peculiar risk in the operation of coaling the engines, and running them to and from the coaling and engine sheds, and it being an operation usually well performed by one man, the not employing two men to perform it was not negligence in the defendants. Secondly, the arrangement of the sidings having been used for twenty years without accident, the defendants could not be held bound to have foreseen the accident, or be held responsible for it upon its happening, nor was the subsequent alteration of the siding rails evidence of antecedent negligence on their part in that respect.

[21 L. T. Rep., N. S., 261.]

This was an action brought by the plaintiff to recover from the defendants damages in compensation for bodily injuries received by him through the negligence of the defendants whilst the plaintiff was travelling as a passenger upon their line of railway from Ashton to Manchester.

At the trial before Brett, J., and a common jury, at Liverpool, at the last spring assizes, the following appeared to be the facts of the case:—At the Miles Platting Station, on the defendants' main line of railway, a few miles from Manchester, where the accident happened, there is a junction, at which a branch line of railway leads off to Ashton, the main line running on in a straight line to Rochdale. About 400 or 500 yards from the junction, and on the Manchester side of the station, there is a siding running from a point of the main line to an engine shed, and at about 200 or 300 yards from the said point there is also a branch siding to a coaling shed. A few yards from this same point there is a signal and pointsman's box, at which the pointsman works the points, which are open towards Rochdale, so that an engine running from the siding on to the main line would, unless the points were turned, go on to the up line leading from Rochdale to Manchester; there are also points further on, on the main Rochdale line, by which a train or engine can be turned from the up to the down line, and there is communication between the signal boxes at the various points. The traffic at the station is very great, upwards of 200 passenger trains, besides goods trains, passing the station daily.

The plaintiff was travelling in a second-class carriage from Ashton to Manchester, and the train by which he was travelling was stopping for the purpose of the Manchester tickets being collected at the Miles Platting platform of the branch line from Ashton before-mentioned, and some 300 or 400 yards from the spot where the points from the sidings open on to the main line.

The coaling shed before-mentioned is the place where the engines are supplied with coal, and on the 20th October an engine which had just come off a journey had, in accordance with the usual practice in such cases, been given in charge by its driver and stoker to a servant of the company, whose business it was to see to the coaling of the engines. It had been coaled by him at the coaling shed, and was slowly returning therefrom, and in the course of being taken by him from the coaling shed siding to the other siding leading to the engine shed. In the ordinary course of things, the engine after coming from the coaling shed would have gone along the siding, until it had passed the points of the siding leading to the engine shed, when it would have been reversed and backed over them into that shed, but just at the moment when the man in charge of the engine should have reversed its action, he was seized with a fit and fell across the footboard of the engine in a state of insensibility. The consequence was, that the engine, instead of being backed into the engine shed, proceeded onwards upon the siding towards the points opening on to the main line at the moment that a down express train from Manchester, and an up express train from Rochdale were approaching the station at full speed on the up and down main lines. At this juncture, the pointsman in charge of the signal box and points at the part of the line, seeing the engine, with the man lying across the footboard, approaching the main line of rails, and having but an instant in which to decide what to do, came to the conclusion that the least hazardous and dangerous course to pursue, was to turn the points of the main line, so as to send the engine on to the Ashton branch line, knowing that if any train might happen to be there it would be either slackening its speed, or at a stand still, whereas if he had let it go upon either of the main lines of rail it would infallibly have come into collision with one or the other of the before-mentioned express trains travelling at top speed, when the consequences would in all probability have been far more disastrous. Under these circumstances, therefore, the pointsman deliberately turned the runaway engine on to the Ashton branch. The result of his so doing was, that the engine ran on until it reached the spot where the train in which the plaintiff was sitting was standing as before-mentioned, and, coming into collision with it, caused the injuries to the plaintiff of which he complained in his declaration.

It appeared too that, since the accident, the defendants had altered the siding in question, so that on leaving the coaling shed the engines now run, not on the same line, but on a supplementary siding, leading to a "dead end," where a runaway engine would be brought to a standstill.

The learned judge told the jury that the liability of the defendants depended on the negligence of their servants being proved, and that it was negligence to do that which, under the circumstances, was dangerous, or to omit to do what ought to be done, but it was not negligence simply to omit to do the best under the circumstances. The question was for the jury; was there any negligence in the pointsman, or was there negligence in the defendants having only one man to coal the engine? The man had done it for years, and, but for his unforeseen and unexpected illness it would have been safely done on this occasion. The company did not know, nor was it proved, that he was liable to fits. Then as to the siding, no doubt it had been altered since the accident, but it was not negligent in them not to guard beforehand against an accident which could not reasonably have been foreseen.

The jury found a verdict for the plaintiff for £110 damages, and a rule was afterwards moved for and obtained by *Manisty*, Q C., on the part of the defendants, for a new trial, on the ground that there was no evidence of negligence in the defendants to go to the jury, upon which liability could be fixed on them, and also that the verdict was against the weight of the evidence, and now

Holker, Q C., and *McConnell*, for the plaintiff, showed cause against it, and contended that the verdict of the jury establishing negligence in the defendants was well warranted by the facts and evidence of the case. We do not complain of the act done by the pointsman, for probably he did the best thing which under the circumstances of the moment he could do, for had the engine been allowed to proceed as it was going it would have gone on to the main Rochdale line and came into collision with the Yorkshire express, and had he turned it on to the other main line of rail a like result would have followed with the Manchester express. The jury, however, considered there was negligence in the company, and the plaintiff says the negligence consisted in this; first, that there should have been two men employed on the engine at the coaling process. A man engaged in such a job is very liable to become affected by the sulphurous vapour arising from the burning coal. By one of their printed regulations they seem to provide against the very event of the sudden illness of a driver of an engine, by always having two men attached to the engine on a journey, and it cannot be contended that, if two men are necessary on an engine when running on the main line, they are not equally so when travelling up and down a siding, where if the engine runs away it must get upon the main line. [Bramwell, B. — You might almost as reasonably argue that there ought to be three men on the engine in case two should fall ill at the same moment.] The second point of negligence was in the arrangement of the siding rails, the points of which before the accident stood always open on to the main line, but which have been altered since by adding a small supplementary siding, so that an engine now running away from the coaling shed would not get upon the main line as it would previously have done, but would run on until brought up at a "dead end." This obviously shows what the defendants should have done before; the precaution is an obvious one, and the defendants as public carriers were bound to use and adopt every possible reasona-

ble precaution against accident, and especially at so dangerous and much frequented a part of their line. [Bramwell, B.—It is a mistake to say that because the company are wiser now they were foolish before. Kelly, C.B.—You would say it was the duty of the railway company to anticipate every possible form of accident] No doubt Brett, J., took a strong view at the trial against the plaintiff, but we contend that it was more, indeed that it was peculiarly, a question for them, and that the verdict was right. They cited *Christie* v *Griggs*, 2 Camph. 79, and the observations of Sir J. Mansfield C.J.

Manisty, Q.C., and *Edwards*, for the defendants, *contra*, were not called on to support their rule.

Kelly, C.B.—I am of opinion that the defendants' rule in this case must be made absolute. The jury, no doubt, have found that the accident to the plaintiff was caused by negligence on the part of the railway company, but I think that there was no negligence at all, and I must confess that I see no evidence of any. It has been contended on the part of the plaintiff that there ought always to be two men on the engine, not only, as is the case when it is being used to pull or propel a train of carriages on the main line, but on every occasion whenever an engine is moved about on a line of rails, whether by itself or attached to carriages, so that if one of the men should happen to drop down dead, the other may be at hand at once to take his place, and thus the probability of such an accident as the present happening may be avoided. But, if it be that that is a necessary regulation in the present case, I see no reason why it should not be a necessary one in every imaginable case where a man is employed in any duty whatever about a railway. But we must use our common sense in the matter. Now, in the present instance there was nothing dangerous or attended with any peculiar risk in the duty upon which the man was occupied, although the learned counsel for the plaintiff assumed, as a matter of course, that it was an occupation very liable to produce a fit of some kind. But surely it was never heard that sickness of any kind was ever produced by it. If then this be an operation usually conducted by one man, and without any ill results arising therefrom, it would surely be a very strong thing to say that the not employing two men to perform the operation was negligence on the part of the company. There is, I think, nothing in that contention of the plaintiff. But then it has been suggested that the siding leading to the coaling shed should be so constructed that what is called a "runaway engine" could not by possibility get upon the main line. But if it must be so in one case it must be so in another. No doubt the company have altered the mode of constructing the sidings. But it is a new mode of construction, and I see no reason for saying that there is not as much danger from the one way as from the other. It is enough to say that it is new. The old plan had been adopted and used by the company for twenty years, and no accident had ever before happened; and it appears to me that it would be most unreasonable to suppose that the company could or ought to have foreseen this accident, or to hold them responsible for it upon its happening.

Bramwell, B.—I am entirely of the same opinion, and am quite satisfied that this rule must be made absolute. I agree with the Lord Chief Baron and my brother Brett, and confess that I cannot see any evidence of negligence in the matter. Although I have no desire to occupy time unnecessarily, I think that there are matters of considerable importance involved in this particular case. One of them is, that people do not furnish evidence against themselves simply by adopting a new plan in order to prevent the recurrence of an accident. I think that a proposition to the contrary would be barbarous. It would be, as I have often had occasion to tell juries, to hold that, because the world gets wiser as it gets older, therefore it was foolish before. Moreover, I think that in such a case as the present, an expert, if I may so say, some scientific medical man, practically acquainted with the nature of the duty to be performed by the engine man here should have been called to inform the minds of the court and the jury as to the duty in question, and whether or not it was a dangerous one, and likely to be productive through the fumes arising from the burning coal of any attack in the nature of a fit, and that it should not have been left to the bare statement of the learned counsel. Here counsel on the one side assert that it was a very dangerous occupation, and the counsel on the other side assert the contrary. Who is to decide between them? But suppose that we were to hold that this verdict is right, and the Lancashire and Yorkshire Railway Company were to do, what I think they would not be blamable for doing, viz., to publish a new and increased tariff of their rates of charge, and to say, "Whereas the Court of Exchequer have laid it down as law that two men are necessary on every engine, under all possible or conceivable circumstances, where only one man was accustomed to be employed before, therefore we have raised our fares to such and such prices, to meet the extra expense imposed on and incurred by us in complying with the decision of the court," what, I wonder, would people think of the Court of Exchequer then? But there is another point to be noticed in this case. Here it was owing to the voluntary and deliberate act of the pointsman himself that the engine went in the direction in which it did go. Mr. Holker even, on the part of the plaintiff, says that he does not blame the man for that; on the contrary, he really thinks the man exercised a wise discretion in doing what he did, and that I think is quite true. But, nevertheless, the man did it; it was his own voluntary and wilful act; and if the truth must be spoken, I cannot see what answer he would have had if an action had been brought against him. He might say, and no doubt with extreme truth, "it is a very hard case, I did the best I could, and my duty," and no doubt it would be a very hard case; but the plaintiff might also truly say, "I cannot help that, you ran over me, and hurt me very seriously." Take the case of a man driving a carriage through a street, and, to avoid a certain accident, he turns a little out of his course and drives over A. and inflicts upon him serious injuries. surely A. might say to him, "Why did you select me as the object to be driven over?" Then it is said that people are responsible for

the acts of their servants. Here I doubt very much whether the pointsman had not the authority of the company for what he did, for he was not only doing the best he could to avoid an accident, but the best probably for the property of his employers, as the result of a collision on the main line with the coming express train then just due, had the engine been permitted to pursue its course on that line, would, in all human probability, have been attended with infinitely more serious results. I have thought it right to mention these points, for peradventure the case may go fatrher, and I think there is a point upon it in the plaintiff's favour, though it has not been discussed. But the present rule must be made absolute, on the ground that the verdict is against, or rather without, evidence.

Channell, B.—I am of opinion that this rule should be made absolute, on the ground that there was no evidence on which the verdict can be supported. I think the pointsman was justified in turning the points in the way he did, and that the railway company are not bound to warrant that the men employed by them on their engines shall be free from attacks of illness. With regard to the branch siding and its alteration since the accident, it is not because the defendants have become wiser and done something subsequently to the accident that their doing so is to be evidence of any antecedent negligence on their part in that respect.

Cleasby, B.—I am of the same opinion. In all these cases we are bound to look at the proximate cause of the accident, and, if that is found, we cannot in general go beyond it. No doubt it is a very hard case for the plaintiff, sitting quietly and lawfully as he was in his proper place in the railway carriage, that the points should be deliberately turned so as to send the engine down straight upon him; but so it is. That act was the voluntary act of the pointsman himself, and was, as is admitted on all hands, the best thing that could be done under the circumstances; and I have grave doubts whether the company could be held responsible for an injury proximately caused by such an act of their servant done under such circumstances. As to the other question, namely, that the company have, by subsequently altering the sidings, made some evidence against themselves of previous negligence, I agree with my Lord and my learned brother that that is not so.

Rule absolute.

CHANCERY.

Marshall v. Ross.

Trade mark—Word "patent"—Definition of.

The word "patent" may be used, in certain cases, although the party using it has not, in fact, obtained a patent for the manufacture of the article so said to be patented.

[21 L. T. Rep. 260.]

This was a motion in the terms of the prayer of the plaintiff's bill, to restrain the defendant, James Ross, a shipping agent, from removing or parting with certain packages of thread, in wrappers, bearing labels in imitation of the plaintiff's labels. The thread had been manufactured in Belgium, and had been consigned by the manufacturers, Messrs. Dietz and Company, to the defendant Ross in this country, for the purpose of being shipped by him to Australia. The label which the plaintiff had adopted contained the words "Marshall and Co., Shrewsbury." "Patent Thread."

The labels of the defendants were worded, "Marchal; Schrewsbury." "Patent Thread." It appeared that the thread manufactured by the plaintiff was not, in fact, patented: but it was alleged and proved that the word "patent" was so used to designate a certain class of thread well known in the trade; that that term had for many years past been used by manufacturers to distinguish it from thread of a general class.

E. E. Kay, Q.C., and *A. G. Marten*, in support of the motion, contended that it was an evident infringement of the plaintiff's trade mark, which the word "patent" implied; was deceptive in its character, and caused injury to the plaintiffs.

Davey, contra, urged that the defendant was in the present case only a simple consignee, and could not be presumed to know anything of the label in question as an imitation of the plaintiffs' label. The plaintiffs, in fact, had no right to make use of the word "patent" in reference to the character of their thread, when no patent had ever been granted in respect of it, and they therefore could not have the relief by injunction as prayed.

The Vice-Chancellor said, that the word "patent" might be used in such a way as not to deceive anyone, or cause a belief that the goods so called were protected by a patent. He instanced the case of "patent leather boots." In the present case the term "patent thread" had been so long used in this particular trade that it might be said to have become a word of "art." He did not consider that there had been any such misrepresentation by the plaintiffs in using the term to prevent them from having it protected by the injunction prayed for. There must therefore be an order for the injunction as prayed.

Order accordingly.

UNITED STATES REPORTS.

SUPREME COURT, UNITED STATES.

[*From the Pittsburgh Legal Journal.*]

Thorington v. Smith & Hartley

The rights and obligations of a belligerent were conceded to the government of the Confederate States in its military character from motives of humanity and expediency by the United States. To the extent of actual supremacy in all matters of government within its military lines the power of the insurgent government is unquestioned.

Such supremacy made civil obedience to its authority not only a necessity, but a duty.

Confederate notes issued by such authority and used in nearly all business transactions by many millions of people, while its contracts in themselves in the event of unsuccessful revolution they were nullities, must be regarded as a currency imposed on the community by irresistible force.

Contracts stipulating for payment in that currency cannot be regarded as made in aid of the insurrection; they are transactions in the ordinary course of civil society, and are without blame except when proved to have been entered into with actual intent to further the invasion.

Such contracts should be enforced in the courts of the United States after the restoration of peace, to the extent of their first obligation.

The party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract in lawful money of the United States.

Chase, C. J—This is a bill in equity for the enforcement of a vendor's lien.

It is not denied that Smith & Hartley purchased Thorington's land, or that they executed to him their promissory note for part of the purchase money, as set forth in his bill; or that, if there was nothing more in the case, he would be entitled to a decree for the amount of the note and interest, and for the sale of the land to satisfy the debt. But it is insisted, by the way of defence, that the negotiation for the purchase of the land took place, and that the note in controversy, payable one day after date, was made at Montgomery, in the state of Alabama, where all the parties resided in November, 1864, at which time the authority of the United States was excluded from that portion of the State, and the only currency in use consisted of Confederate Treasury notes, issued and put in circulation by persons exercising the ruling power of the States in rebellion, known as the Confederate government.

It was also insisted that the land purchased was worth no more than three thousand dollars in lawful money; that the contract price was forty-five thousand dollars; that this price, by the agreement of the parties, was to be paid in Confederate notes; that thirty-five thousand dollars were actually paid in these notes, and that the note given for the remaining ten thousand dollars was to be discharged in the same manner; and it is claimed on this state of facts, that the vendor is entitled to no relief in a court of the United States; and this claim was sustained in the court below, and the bill was dismissed. The questions before us on appeal are these: First, can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so called Confederate States, be enforced at all in the courts of the United States? Second, can evidence be received to prove that a promise expressed to be for the payment of dollars was, in fact, for the payment of any other than lawful money of the United States? Does the evidence in the record establish the fact that the note for ten thousand dollars was to be paid, by agreement of the parties, in Confederate notes?

The first question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the Government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contract made in aid of such an attempt can be enforced through the courts of the country whose government is thus assailed. But was the contract of the parties to this suit a contract of that character—can it be fairly described as a contract in aid of the rebellion? In examining this question, the state of that part of the country in which it was made must be considered. It is familiar history that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment within its boundaries of a separate and independent confederation. A governmental organization representing these States was established at Montgomery, in Alabama, first under a provisional constitution, and afterwards under a constitution intended to be permanent. In the course of a few months four other States acceded to this confederation, and the seat of the central authority was transferred to Richmond, in Virginia. It was by the central authority thus organized, and under its direction, that the civil war was carried on upon a vast scale against the Government of the United States. For more than four years its power was recognized as supreme in nearly the whole of the territory of the States confederated. It was the actual government of all the insurgent States, except those portions of them protected from its control by the presence of the armed forces of the national government. What was the precise character of this government in contemplation of law? It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* government will, we think, conduct us to a conclusion sufficiently accurate. There are several degrees of what is called *de facto* government. Such a government, in its highest degrees, assumes a character very closely resembling that of a lawful government. This is when the usurping government expels the regular authorities from their customary seats and functions, and establishes itself in their places, and so becomes the actual government of a country. The distinguishing characteristic of such a government is that adherents to it in war against the government *de jure* do not incur the penalties of treason; and, under certain limitations, obligations assumed by it in behalf of the country or otherwise will, in general, be respected by the government *de jure* when restored.

Examples of this description of government *de facto* are found in English history. The statute 11, Henry VII, C. I. (Brit. Stat. at large), relieves from penalties for treason all persons who, in defence of the King for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by the lawful monarch (4 Bl. Comm. 77).

But this is where the usurper obtains actual possession of the royal authority of the kingdom; not when he has succeeded only in establishing his power over particular localities. Being in such possession, allegiance is due to him as king *de facto*.

Another example may be found in the government of England under the Commonwealth, first by Parliament and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a government *de jure*, but it was a government *de facto* in the absolute sense. It made laws, treaties, and conquests, which remain the laws, treaties and conquests of England after the restoration. The better opinion is that acts done in obedience to this government could not be justly regarded as treasonable, though in hostility to the king *de jure*. Such acts were protected from criminal prosecution by the spirit, if not the letter, of the statute of Henry the Seventh.

It was held otherwise by the judges by whom Sir Henry Vane was tried for treason (6 State Trials, 119) in the year following the restoration, but such a judgment in such a time has little authority.

It is very certain that the Confederate Government was never acknowledged by the United States as a *de facto* government in this sense, nor was it acknowledged as such by other powers. No treaties were made by it. No obligations of a national character were created by it binding after its dissolution, on the States which it represented on the national government. From a very early period of the war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

But there is another description of government called by publicists a government *de facto*, but which might perhaps be more aptly denomiuated a government of paramount force. Its distinguishing characteristics are (1) that its existence is maintained by active military power within the territories and against the rightful authority for established and lawful government; and (2) that while it exists it must necessarily be obeyed in civil matters by private citizens, who by acts of obedience rendered in submission to such force, do not become responsible as wrongdoers for these acts, though not warranted by the laws of the rightful government. Actual governments of this sort are established over districts differing greatly in extent and conditions; they are usually administered directly by military authority but they may be administered also by civil authority, supported more or less by military force.

One example of this sort of government is found in the case of Castine, in Maine, reduced to a British possession (the War of 1812). From the 1st of September, 1814, to the ratification of the treaty of peace in 1815, according to the judgment of the court in the *United States* v. *Rice* (4 Wheat., 253), "the British government exercised all civil and military authority over the place." The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced then or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender the inhabitants passed under a temporary allegiance to the British government, and were bound by such laws and such only, as it chose to recognize and impose. It is not to be inferred from this that the obligations of the people of Castine, as citizens of the United States, were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example is found in the case of Tampico, occupied during the war with Mexico by the troops of the United States. It was determined by this court, in *Fleming* v. *Page* (9 How., 614), that although Tampico did not become a part of the United States in consequence of that occupation, still having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular governments at war with the country of which the territory so possessed was part. The central government established for the insurgent states differed from the temporary governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war; but it was not on that account less active or less supreme, and we think that it must be classed among the governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it in its military character, very soon after the war began, from motives of humanity and expediency, by the United States. The whole territory controlled by it was thereafter held to be the enemy's territory, and the inhabitants of that territory were held in most respects for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent govarnment connot be questioned. That supremacy would not justify acts of hostility to the United States. How far it should excuse them must be left to the lawful government upon the re-establishment of its authority. But it made civil obedience to its authority not only a necessity but a duty. Without such obedience civil order was impossible. It was by this government exercising its power through an immense territory that the Confederate notes were issued early in the war, and these notes in a short time, became almost exclusively the currency of the insurgent States. As contracts in themselves, in the contingency of successful revolution, these notes were nullities, for except in that event there could be no payer. They bore, indeed, this character upon their face, for they were made payable only "after a ratification of a treaty of peace between the Confederate States and the United States of America." While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency imposed on the community by irresistible force. It seems to follow as a necessary consequence from the actual supremacy of the insurgent government, as a belligerent, within the territory where it circulated, and the necessity of civil obedience on the part of all who remained in it, that this currency must be regarded in the courts of law in the same light as if it had been issued by a foreign government temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in that currency cannot be regarded as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relation to the hostile government, whether invading or insurgent. They are transactions in the ordinary course of civil society, and, though they may indirectly and remotely promote the ends of the unlawful government, are without blame, except when proved to have been entered into with actual intent to further the invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their first obligation. The first question, therefore, must receive an affirmative answer.

The second question, whether evidence can be

received to prove that a promise made in one of the insurgent States, and expressed to be for the payment of dollars, without qualifying words, was, in fact, made for the payment of any other than lawful dollars of the United States, is next to be considered. It is quite clear that a contract to pay dollars made between citizens of any State of the Union maintaining its constitutional relations with the national government is a contract to pay lawful money of the United States, and cannot be modified or explained by parol evidence. But it is equally clear, if in any other country coins or notes denominated dollars should be authorized of different value from the coins or notes which are current here under that name, that in a suit upon a contract to pay dollars made in that country, evidence would be admitted to prove what kind of dollars was intended; and, if it should turn out that foreign dollars were meant, to prove their equivalent value in lawful money of the United States.

Such evidence does not modify or alter the contract. It simply explains an ambiguity which, under the general rules of evidence may be removed by parol evidence. We have already seen that the people of the insurgent States, under this Confederate Government, were, in legal contemplation, substantially in the same condition as inhabitants of districts of a country occupied and controlled by an invading belligerent. The rules which would apply to the former case would apply to the latter, and, as in the former case, the people must be regarded as subjects of a foreign power, and contracts among them be interpreted and enforced with reference to the laws imposed by the conqueror, so in the latter case the inhabitants must be regarded as under the authority of the insurgent belligerents, actually established as the government of the country; and contracts made with them must be interpreted and inferred with reference to the condition of things created by the acts of the governing power.

It is said, indeed, that under the insurgent government the word dollars had the same meaning as under the government of the United States; that the Confederate notes were never made a legal tender; and, therefore, that no evidence can be received to show any other meaning of the word when used in a contract.

But it must be remembered that the whole condition of things in the insurgent States was matter of fact, rather than matter of law; and as matter of fact these notes, payable at a future and contingent day, which has not arrived, and can never arrive, were forced into circulation as dollars, if not directly by the legislation, yet indirectly, and quite as effectively, by the acts of the insurgent government. Considered in themselves, and in the light of subsequent events, these notes had no real value, but they were made current as value by irresistible force; they were the only measure of value which this people had, and their use was a matter of almost absolute necessity, and this gave them a sort of a value, insignificant and precarious enough, it is true, but always having a sufficient definite relation to gold and silver, the universal measures of value, so that it was easy to ascertain how much gold and silver was the real equivalent of a sum expressed in the currency. In the light of these facts it seems hardly less than absurd to say that these dollars must be regarded as identical in kind and value with the dollars which constitute the money of the United States. We cannot shut our eyes to the fact that they were essentially different in both respects, and it seems to us that no rule of evidence, properly understood, requires us to refuse, under the circumstances, to admit proof of the sense in which the word dollar was actually used in the contract before us.

Our answer to the second question is, therefore, also in the affirmative. We are clearly of the opinion that such evidence must be received in respect to such contracts in order that justice may be done between the parties, and that the party entitled to be paid in these Confederate dollars can only receive their actual value at the time and place of the contract in lawful money of the United States. We do not think it necessary to go into a detailed examination of the evidence in the record in order to vindicate our answer to the third question. It is enough to say that it has left no doubt in our minds that the note for $10,000, to enforce payment of which suit was brought in the Circuit Court, was to be paid by agreement in Confederate notes. It follows that the judgment of the Circuit Court must be reversed and the cause remanded for a new trial, in conformity with the opinion.

Coyne et al. v. Souther et al.

A mortgagor or purchaser at sheriff's sale, is not bound to look beyond the judgment docket. All entries thereon are supposed to be properly made by authority. A defective entry of judgment or unauthorized entry of satisfaction, renders the prothonotary liable to any party injured.

Error to the Court of Common Pleas of Elk county.

Opinion by Sharswood, J.

It is very important that bidders at sheriffs' sales should feel well assured as to whether they are offering to buy a clear or an incumbered title. It is well known that the law as to them is *caveat emptor*. As far as possible, the rules upon the subject should be so clear and intelligible as to preclude mistake if due diligence be used. In regard to the lien of judgments, the judgment docket has been provided, which as to purchasers and subsequent incumbrancers, is intended to afford them certain information. It is the creditors duty to see that his judgment is properly entered thereon; and if there is any mistake, the remedy of the party aggrieved is against the prothonotary. Hence, as has been held, if the entry is in a wrong name, so that those searching may be misled; or if it is wrongly described as to amount, or in any other material particular, third parties will always be proteeted in acting on the faith of it. There are few points in which the cases are more clear and consistent: *Blur* v. *Patterson*, 3 W. & S. 233; *Mehaffy's Appeal*, 7 W. & S. 200; *Wood* v. *Reynolds*, Ibid. 406; *Mann's Appeal*, 1 Barr, 24; *Hance's Appeal*, Ibid. 408; *Ridgway, Budd& Co.'s Appeal*, 3 Harris, 177; *Goepp* v. *Gardiner*, 11 Casey, 130. It is said, however, that the prothonotary had no power to mark the judgment satisfied on the docket; that the mortgagee was bound to look further, and

ascertain whether it has been so marked properly; in other words, whether the entry was true. The argument would have great force, if the prothonotary, in no case, had authority to enter satisfaction of a judgment on the judgment docket. But the prothonotary has such authority. Not to mention the Act of April 11, 1856, Pamph. L. 304, it will be sufficient to refer to the provision of the Act, entitled "An Act relating to the satisfaction of judgments in courts of record in this commonwealth," passed March 27th, 1865 (Pamph. L. 52), because it has a more direct application to the case before us. It provides, that when a judgment has been entered in any court of record, "and it shall appear, by the production of the record, that the same has been fully paid, under or by virtue of an execution or executions issued thereon, and satisfaction has not been entered upon the judgment index or judgment docket of said court, it shall be the duty of the Court * * * to direct the prothonotary to enter satisfaction upon the judgment index or judgment docket, or the record thereof." Now, if there had been an order of the Court pursuant to the provisions of this Act, no one can entertain a doubt that the entry upon the judgment index or docket by the prothonotary, just as the entry was made here "Satisfied on fi fa.," would have been perfectly regular and conclusive as to all third persons, to whom the judgment itself, regularly docketed, was constructive notice, and who, therefore, were bound to search. Finding the judgment marked "satisfied on fi. fa.," they would have a right to conclude that it was so marked by the order of the Court. It would not be incumbent on them to search further to ascertain whether there was any record of such an order. If false, and made without authority, the prothonotary was responsible to whatever party might be injured thereby. The common presumption in favor of the lawfulness and regularity of the acts of a public officer applies here in all its force, *omnia presumuntur rite esse acta.* It is especially necessary that the judicial records of the country should have the benefit of this presumption in favor of those who are entrusted with the duty of making them up. To hold the contrary, would be in the teeth of the familiar principle, that a record imports on its face absolute verity; otherwise, the Act of Assembly of March 29th, 1827, sect. 3, (Pamph. L. 155), which requires the prothonotary of every Court of Common Pleas to keep a docket, to be called the judgment docket, instead of a convenience and security to the community, would prove a snare. It is manifest, as Judge Kennedy has remarked, that the great object of having this docket is to promote the facility and certainty of ascertaining whether there are judgments against a particular individual, and what are their amounts: *Bear* v. *Patterson*, 3 W. & S. 237. Now it will not be pretended, that a person wishing to purchase, and desirous to know how much he may safely bid, who finds on the docket a judgment prior to a mortgage, is obliged to look further, and assure himself that it is in fact a judgment entered by the Court or by its authority; neither then ought a mortgagee or subsequent incumbrancer, who is equally interested in determining how to bid, in order to protect himself, when he finds an entry of satisfaction apparently regular, bound to go further and inquire whether it was made by order of the Court. This disposes of the first and second specifications of error, and renders any consideration of the third unnecessary.

The fourth error assigned is in these words: In rejecting the testimony of J. L. Blakely, Esq., embraced in the offer of defendants below, which is the ground of the bill of exceptions sealed for defendants. This error is not assigned according to the eighth rule adopted at Pillsburg, Sept. 6th, 1852, 6 Harris, 578. It should, therefore, in strictness, "be held the same as none." The offer, however was rightly rejected. It was as follows: defendant offers to prove by this witness that he gave notice to Mr. Souther, one of the mortgagees, on the day when the rule (that is the rule to show cause why the entry of satisfaction should not be stricken off) was applied for of such application, and that the judgment was in fact paid. Let us see in what position the mortgagee would be placed if he was bound to pay any attention to such a notice. If he assumes that the judgment was not paid, and that of course the lien of his mortgage would be divested, he must bid at least to the full amount of the prior judgment and costs, and as much more as he chooses, so as to cover his mortgage, and if the property is knocked down to him, he must pay the money to the sheriff. If, when the fund comes to be distributed, it should be proved that the entry was right and the judgment paid and satisfied, then he must hold subject to his own mortgage, which would of course be merged, and the whole fund would be applied to satisfy subsequent incumbrances, or go the defendant. In other words, he would lose the whole amount of his bid. Between two stools he must fall to the ground. The position of the mortgagee is peculiar in this, that he must decide at the peril of loss. But if such a notice were publicly given at the time of sale, and it was to be held that bidders would be affected by it, though in the face of the record, would any man of ordinary prudence be willing to bid a fair price when the danger of loss would be so great, and at best, he would only be buying a lawsuit? The cases cited do not sustain this assignment. In the *York Bank's Appeal*, 12 Casey, 458, it was held, that if a subsequent incumbrancer have actual notice of a judgment defectively entered on the judgment docket before his rights attach, it is equivalent to the constructive notice of the prescribed record. That is certainly an entirely different case from this. The incumbrancer having such notice, has a right to refuse to give credit to the debtor. He need not encounter the risk. To the same effect is *Stephen's Executor's Appeal*, 2 Wright, 4. In *Magaw* v. *Garrett*, 1 Casey, 319, it is true that Mr. Justice Knox, in delivering the opinion of the Court, said, "as the record showed the Pearson judgment, at the time of the sheriff's sale, to be an exisiing lien equal in point of time with the mortgage, and as there was no evidence tending to prove notice of its entire payment to the purchasers, the Court of Common Pleas properly held that the estate sold passed into the hands of the sheriff's vendees discharged from the mortgage lien." But that was a mere extra-judicial dictum. There was no evidence of notice in the case, and of course, the question,

whether it would have made a difference, did not arise.

Judgment affirmed.

—*Philadelphia Legal Intelligencer.*

DIGEST.

DIGEST OF CASES REPORTED IN THE PROVINCE OF QUEBEC.

Accident.

Held, that in an action for damages (under C. S. C. Cap, 78) for the death of a relative killed by accident, the relationship must be established by legal proof, and special damages must be alleged.—*Francois Provost et ux.* v. *William Jackson et al.*, 13 L. C. Jur. 170.

Joint Stock Company.

Held, 1. That subscription for stock in a Railway Company may be conditional.

2. That until the fulfilment of the condition imposed, no action at law would lie in favour of the Railway Company as against the subscriber.—*William H. Rodgers et al* v. *Francois Laurin*, 13 L. C. Jur. 175.

Corporations.

Held, That by the laws of the Province of Quebec, Corporations are under a disability to acquire lands without the permission of the Crown or authority of the legislature, and therefore a foreign corporation has no right to hold lands in the Province, without such permission or authority.—*The Chaudière Gold Mining Co.* v. *Desbarats et al*, 13 L. C. Jur. 182.

Service of Process.

Held, That service of a writ upon the clerk of the Recorder's Court at his office attached to the Court, during office hours, and whilst he is engaged in his official duties, but not *à l'audience*, is a valid service.—*Wilson* v. *Ibbotson*, 13 L C. Jur. 186.

Criminal Law.

Held, That an indictment signed by an advocate prosecuting for the Crown and as representing the Attorney-general for the Province of Quebec, and not as representing the Minister of Justice of the Dominion, is valid.—*Regina* v. *John Downey*, 13 L. C. Jur. 193.

REVIEWS.

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

The third number brings this work as published, down to section 204 of the Common Law Procedure Act. Great care is evidently being taken with this most valuable work, so as to make it as correct and reliable as possible. We shall be glad to have it complete. The necessity for it is more apparent with every page that is published.

The investigation of Titles to Estates in fee simple, by Thomas Wardlaw Taylor, M. A., Barrister-at-Law, Referee of Titles, author of "Chancery Statutes and Orders," &c. Toronto: Adam, Stevenson & Co., Law Publishers, King Street East, 1869.

We are in receipt of this book, but must defer further notice of it until next month.

Law Magazine and Law Review. November, 1869. London: Butterworths.

The articles for this quarter are the Penal Code of New York; on Primogeniture; Foreign Debtors in England; Imprisonment for Debt; Suggestions for the Irish Law Bill; on the Turnpike System; on Reform in the Law of Patents; Naturalization and Allegiance; Rights of Colonial Legislatures; State Appropriations of Railways, &c.

American Law Review. October, 1869. Boston: Little, Brown & Co.

This number contains articles on Government Contracts; The Senatorial Term; the Alabama Claims (which we shall reprint). The leading case in England as to the extent of the Liability of Common Carriers of Passengers, is reprinted from the Law Times Reports with a note by the editors, referring to some American decisions on the same subject. Then follows the Digest of the English Law Reports, Selected Digest of State Reports, &c. This publication is a mine of wealth to the American lawyer, and much that it contains is almost of equal interest to us. With the October number was published an index to Vols. I. II. and III. of the Review, with a Table of Cases. This will largely increase the value of the work.

The Canadian Illustrated News. Montreal: George Desbarats.

This is as creditable a pictorial as most publications, and we wish it entire success. Much improvement is manifest in the engravings since it was commenced, and we have no doubt that if a liberal encouragement is given to the proprietor and publisher, he will make greater efforts to ensure success. The reading matter is very good; it seems to be got up in good taste, and in this it is a marked contrast to the filthy rubbish that comes from the South of us, in the shape of pictorial newspapers.

United States Judicial System—Recent Change.—By an act passed at the recent session of Congress the Supreme Court is to consist hereafter of nine judges, six of whom shall be a quorum. The act also provides for the appointment of a circuit judge in each circuit, with the same powers as the judges of the Supreme Court now have on circuit. The Circuit Court is to be held by the judge of the Supreme Court assigned to the circuit, or the circuit judge, or the judge of the District Court, or by any two of them sitting together. We do not perceive that the jurisdiction of the Circuit Court is in anywise affected, the sole purpose of this part of the act being apparently to relieve the judges of the Supreme Court from the pressure of their present circuit duty.

But the feature of the act which attracts special attention is a clause providing that "any judge of any court of the United States who shall, after having attained the age of seventy years, and served for the term of ten years, resign his office, shall thereafter during the rest of his natural life, receive the same salary which was by law payable to him at the time of his resignation." This we believe is the first provision ever made in the United States for a retiring pension for those who have devoted themselves to the public service. Regarding it as we do, as a decided step forward in civilization and good government, we trust that it may be a permanent portion of our judicial system.—*American Law Register.*

The House of Lords.—The removal of Lord Stanley to the House of Lords will add to the debating power and statesmanship of an assembly which is already unrivalled for the eloquence and administrative capacity of its members. The politician will be struck with the appearance of the 15th Earl Derby, the Marquis of Salisbury, and Lord Cairns on the Opposition benches in the Lords. All these are in the foremost rank as Parliamentarians and administrators. On the Ministerial side are the veteran Earl Russel, the accomplished tactician Earl Granville, the ripe diplomatist Lord Clarendon, and the Duke of Argyll. Earl Carnarvon, Earl Grey, Bishop Magee, and many others, are noted for their legislative ability or their oratory. Lord Cairns, Westbury, Penzance, Hatherly and Romilly constitute a legal junta of unsurpassed brilliancy. Shall we deplore or rejoice in our hereditary and legal system which crowds the House of Lords with men of pre-eminent talent? It depends upon whether we utilize the force in the Lords or suffer it to lie waste. In the Lords there are some of the first and best men in the country, ready and anxious to devote themselves to the service of the country, and all that we have to do is to divide the business between the two Houses, which may be done without in the least interfering with the real or assumed privileges of the Commons. If the recommendations of the Select Committee are acted upon the Lords will not be idle; the arrears of business will be cleared off; important measurss such as the Irish Church Bill and the Irish Land Bill will not stop all other legislation; and the great ability in the Lords will not be lost to the country, but on the contrary will be turned to excellent account.—*Law Journal.*

John Scott, after his great argument in *Ackroyd* v. *Smithson*, became a favorite with Lord Thurlow. On one occasion, after Richard Pepper Arden, afterward Lord Alvanley, whom Thurlow disliked exceedingly, made a very able argument before him, Mr. Scott rose to address the court on the same side, and his Lordship said, "Mr. Scott, I am glad to find that you are engaged in this case for I now stand some chance of knowing something about it."—*Bench and Bar.*

One day Lord Alvanley, Master of the Rolls, sent his respects to Lord Thurlow, regretting that extreme indisposition prevented him from sitting that day at the Rolls. "What ails him?" roared Thurlow to the bearer of the message. "If you please, my lord, he is laid up with dysentery." "Confound him," exclaimed his lordship, "let him swallow an act of parliament. He'll find nothing so binding."—*Ibid*

APPOINTMENTS TO OFFICE.

DEPUTY CLERK OF THE CROWN.

JAMES CANFIELD, of the Town of Ingersoll, Esquire, to be Deputy Clerk of the Crown and Pleas, and Clerk of the County Court of the County of Oxford, in the room and stead of William A. Campbell (temporarily acting) resigned. (Gazetted October 16, 1869.)

CORONERS.

FREDERICK WILLIAM STRANGE, of the Village of Aurora, Esquire, M.D., to be Associate Coroner within and for the County of York. (Gazetted November 20, 1869.)

DANIEL JOSEPH KING, of the Village of Canonbrook, Esquire, to be an Associate Coroner within and for the County of Perth. (Gazetted November 27, 1869.)

GEORGE ROILTON, of the Village of Bothwell, Esquire, to be an Associate Coroner within and for the County of Kent. (Gazetted December 4th, 1869.)

CHARLES SAMUEL HAMILTON, of the Village of Roslin, Esquire, M.D., to be an Associate Coroner within and for the County of Hastings. (Gazetted December 18th, 1869.)

HENRY ADAMS, of the Village of Embro, Esquire, M.D., to be an Associate Coroner within and for the County of Oxford. (Gazetted December 18th, 1869.)

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