THE

MANITOBA LAW JOURNAL.

VOL. II. AUGUST, 1885. No. 8.

APPEALS UPON QUESTIONS OF FACT.

"THE question was one of fact, and the jury has found for the plaintiff," is the usual answer to an application for a new trial upon the weight of evidence. But this answer is not, and should not be, conclusive. It throws heavily the *onus* of argument upon the defendant, but the plaintiff cannot consider himself impregnable under its shelter. All the cases show no more than this, that *if the verdict be against the weight of evidence it must be set aside.*

Various attempts have been made to formulate a rule for the decision of such cases. Mr. Justice Dubuc, in *Maddill v. Kelly, 1 Man. L. J. 280,* states the effect of the decisions as concisely and fairly as it is usually done. He says that a verdict should only be reversed when it "is perverse, or clearly and evidently against the weight of evidence." This simply means that if the verdict is against the weight of evidence, it ought to be set aside; for the words "clearly and evidently" merely imply that the judges are to be sure about the fact that it is so. They do not qualify the rule, that *if the verdict be against the weight of evidence it must be set aside.* They merely require that fact to be apparent and indubitable.

Judges under the pressure of work are too apt to decline an analysis of a large mass of evidence for the purpose of

ascertaining whether or not the verdict is consonant with it. And we cannot blame them. It rarely happens that something cannot be said for the verdict, and where counsel can raise a real contention it is an extremely difficult and laborious task to thoroughly master the evidence and decide upon all its bearings. There are many cases, however, in which it has been done; and, long as the evidence may be, and involved, an appeal upon a question of fact can only fairly be decided, if there be any reasonable doubt, after a thorough study of the testimony.

Douglass v. *Ward*, *11 Gr. 39*, is a case in which the evidence as to an alleged fraudulent judgment was most thoroughly sifted and the first judgment overruled, although the learned judge (Spragge, V. C.) whose decree was in appeal remained of the same opinion as at the hearing. There are many cases in the reports of a similar character.

Returning to the later cases, *Solomon* v. *Bitton*, *8 Q. B. Div. 176*, was an action of trover in which the evidence was very conflicting. The substantial question left to the jury was, whether they believed the plaintiff's or the defendant's witnesses. The jury found for the plaintiff. The Divisional Court ordered a new trial, the trial judge having expressed himself as dissatisfied with the verdict. The Court of Appeal reversed the order and directed the verdict to stand, holding that "the rule on which a new trial should be granted on the ground that the verdict was unsatisfactory as being against the weight of evidence, ought not to depend on the question whether the learned judge who tried the action was, or not, dissatisfied with the verdict, or whether he would have come to the same conclusion as the jury, but whether the verdict was such as reasonable men ought to have come to." This again merely means that *if the verdict be against the weight of evidence it must be set aside*, for in such case reasonable men ought not to have given such a verdict.

"Such as reasonable men ought to have come to." In *Grieve* v. *Molson's Bank*, *8 Ont. R. 162*, these words are discussed. "It may well be asked what in fact is the effect of

the language 'such as reasonable men ought not to have come to?' All men are assumed to be reasonable, and unless circumstances show that the jury has acted corruptly or from improper motives, their finding would be the finding of reasonable men, and the verdict of a jury would become unassailable in the absence of evidence of their being influenced by corrupt or improper motives. A court composed of three reasonable men would be, otherwise, determining that twelve reasonable men, acting in accordance with their reason, were unreasonable. Thus it comes back to this:—Does, in the opinion of the court, the verdict do substantial justice; and, if not, is the evidence sufficient, in that opinion, to invoke the discretion appealed to, to interfere, to warrant such interference? If it is, then the court should exercise its discretion." We object to that part of this judgment which implies that if the verdict be against the weight of evidence there is any discretion in the court, on the ground of substantial justice having been done, to withhold a new trial. If there is anything we abominate it is "substantial justice," as the term is usually applied—for it is this, that while the law and the evidence are one way, the judge is the other. "Justice," as known to the law, and not "substantial justice," as known only to the judges, is what the courts are bound to administer.

Page v. *Harrison* is noted in the *Law Journal* (*Eng.*), *vol. 20, p. 337*. It was an action brought by a medical man for a slander imputing to him that he had seduced the defendant's wife while attending her professionally. The defendant pleaded a justification to the effect that his statements were true. The action was tried before Mr. Justice Hawkins and a special jury; and, after a trial extending over several days, the jury found for the plaintiff for £150. The learned judge was dissatisfied with the verdict, and a Divisional Court, consisting of Mr. Justice Grove and Mr. Baron Huddleston, granted a new trial on the ground that the verdict was against the weight of evidence, a suit in the Divorce Court between the same parties having in the meantime proved abortive, the jury being unable to agree upon a verdict. The plaintiff

thereupon brought the present appeal against the order of the Divisional Court for a new trial. The Master of the Rolls, in giving judgment, said, that at one time it had been the habit of the court to accept the report of the judge who tried the case as conclusive. It had been thought, however, that this was going too far; and the rule, therefore, which they now followed was, that the court must judge for itself upon the whole case, whether the verdict was a reasonable one or not. It had been argued, however, that since the Rules of 1883 no account was to be taken of the judge's opinion, because he was precluded from sitting in the Divisional Court upon a motion for a new trial. That was ingenious but was not the meaning of the Rule. On the contrary, the greatest regard must be paid to the report of the judge who tried the case. After reading the evidence, it was clear that if the demeanour of the plaintiff was unsatisfactory, and that of the defendant and his witnesses was satisfactory, no jury should have given a verdict for the plaintiff. He could not but think that the cross-examination of the plaintiff indicated that he was not quite candid, while Mr. Harrison seemed to have given his evidence fairly. It had been argued that the servants' evidence was false in many respects; but if so, their cross-examination had not been sufficiently pressed home. Taking, therefore, the opinion of Mr. Justice Hawkins into account, together with other circumstances, the case came precisely within the principle of the decision in *Solomon* v. *Bitton*, *L. R. 8 Q. B. Div. 176.* The verdict was not satisfactory, and there must be a new trial. The Lords Justices concurred.

This case carries us no further than before, and proves once more that if the verdict be against the weight of evidence it must be set aside.

The latest case in our own court is *Miller* v. *Brown* (not reported). It was an action by a purchaser against a vendor, to recover purchase money alleged to have been paid under a contract into which the plaintiff was induced to enter by the fraudulent misrepresentations of the defendant. The fraud alleged was a representation that the land was situated

in Clearwater, whereas the fact was otherwise. The jury found for the plaintiff. In ordering a new trial, the Chief Justice delivered the judgment of the court, and said :—

"The second count is for fraudulent representation, that the land was in Nelsonville. There was a representation to that effect proved by plaintiff, and denied by defendant; the evidence of such representation most relied on was that contained in the deed itself. This, in my opinion, was the mere clerical error of the conveyancer, (he ought to have proved that himself) whilst the evidence charged that as defendant's fraudulent representation : whether the defendant himself represented the land to be in Nelsonville independent of the deed, is very uncertain." "I cannot say there is no evidence of a misrepresentation. I think the evidence to the contrary very strongly preponderates. If the case had been before me as judge, and not before a jury, I should have found against the misrepresentation, but there was a jury, and their verdict cannot be ignored ; there should be a new trial, costs to abide the event."

The rule acted upon in this last case is that with which we started : *If the verdict be against the weight of evidence it must be set aside.*

It is strange that if there were any qualification of this rule no objection has ever been taken to the form of a rule *nisi* seeking to set aside a verdict on the ground that it is "against the weight of evidence." Unless this be a good ground in itself, without qualification, then the form of the rule *nisi* is defective. But it has never been thought to be defective, and there can be no better ground given for setting aside a verdict than that it is against the weight of evidence. A point of law is more easily dealt with, but the facts in many cases involve the whole dispute. And there is no reason why a decision based upon a wrong view of the law should be reversed, and a decision based upon a wrong view of the facts should be allowed to stand.

"*A wrong view of the facts.*" It is not so frequently that the judge or jury believe one man and disbelieve another; but that they have failed to grasp a harmonizing view of the testimony. The solution of the problem has not occurred to them, or having taken some prejudice early in the case they see the evidence that follows through partial spectacles. They have not got the facts before their minds in the right light or proper relation. One point has improperly shut out the others. Matthew Arnold takes what he calls a literary view of the Bible. That is, he refuses to take any one text, chapter, or book, but reads the whole and summarizes its teaching and tendency in a few words. It is easy enough to show him text after text which will not jump with his summation, but this does not affect his verdict. Juries must take a literary view, in this sense, of the evidence. Squeeze it all—not a portion merely—and give us the result to which the true weight of the evidence tends.

If this be omitted, it is then the duty of the appellate court to subject the facts to proper process, in order that right may be done.

A LAWYER'S CABINET.

THE popular prejudice against lawyers will be somewhat offended by the knowledge of the fact that all the members of Mr. Cleveland's cabinet, except one, are members of the legal profession. Mr. Cleveland himself is a lawyer, though not specially distinguished in his profession. Indeed, a lawyer who would quit his practice at thirty-five to take the office of sheriff, could not have possessed a very great love for his profession, and could not have achieved, or expected to achieve, any great success therein. On the contrary, the lawyers in the cabinet may, all of them, be set down as good lawyers.

Mr. Bayard, the Secretary of State, like several of our greatest men, did not have the advantage (or disadvantage) of a collegiate education; but like the late Mr. Justice Byles, he did have the advantage of a business training before he commenced the study of the law. Instead of graduating from a college, he graduated from a Philadelphia counting-house into his legal studies, which he took up at the age of twenty, and pursued for three years before being admitted to the bar, which took place in 1851. Two years later he was appointed District Attorney for Delaware. He resigned his position in the following year, and devoted himself assiduously to his profession until his election to the National Senate in 1869, at the age of forty-one.

Mr. Endicott, of Massachusetts, will be recognized by all lawyers as Mr. Justice Endicott, who held a position on the Supreme Judicial Court of that State from 1873 until 1882. His opinions, running through many volumes of the reports of that State, speak sufficiently of his standing in the legal profession.

Mr. Whitney, the Secretary of the Navy, was, at the time of his appointment, a practitioner of the law in New York City. His principal distinction consisted in the fact that he was active, some years ago, in the crusade against the Tweed ring, in which he acquired the friendship of Mr. Tilden, which he never lost. Upon the downfall of the Tweed ring, he became corporation counsel for New York City, and made a reputation in litigations respecting fraudulent claims against the city, in which he is credited by newspaper biography with saving the city $2,000,000. It is said that it was Mr. Tilden's intention, if inaugurated, to give him a seat in his cabinet. He married a daughter of Senator Payne, of Ohio, and this has given rise to sinister suggestions that the influence of the Standard Oil Company may have had something to do with putting him in the cabinet; but we believe that there is no foundation for these suggestions whatever.

Mr. Vilas, of Wisconsin, the Postmaster-General, is the only representative in the cabinet of the twenty millions of

people of the great West and Northwest. He is also a lawyer of good standing and ability. He was one of the revisers of the edition of the Wisconsin Statutes published in 1878. Those who share in the ignorant prejudice against lawyers feel more inclined to criticise the appointment of Mr. Vilas, because it is said that he not only carries on his soul the sin of being a lawyer, but the darker sin of being a railroad lawyer. But as Mr. Lincoln was a railroad lawyer, having been the salaried attorney of the Illinois Railroad Company, it would appear that the circumstance of being a railroad lawyer does not place Mr. Vilas wholly beyond redemption's skill.

Mr. Lamar, of Mississipi, the Secretary of the Interior, is a lawyer, as are all Southerners who are prominent in political life. He is a distinguished figure in national affairs. At one time, shortly after the war, he held the position of professor of law in the University of Mississipi.

Mr. Garland, of Arkansas, the Attorney-General, is regarded by many as the ablest member of the bar of the Supreme Court of the United States. His appointment was one so eminently fit to be made, that its propriety has been universally recognized. He won his spurs, if we mistake not, in arguing the celebrated Test-Oath case in the Supreme Court of the United States, soon after the war.

Mr. Manning, of New York, the Secretary of the Treasury, must either be credited to the profession of journalism, or set down as a business man. He has been connected with the Albany *Argus*, in one way or another, since he was a boy, and has been president of the corporation which owns that paper since 1873. If Mr. Vilas has committed the sin of being a railroad lawyer, Mr. Manning has committed the equal sin of being a railroad director, having been, from 1869 to 1882, a director in the Albany and Susquehanna Railroad Company. He has also been a national bank director, and was, we believe, at the time of his appointment, the president of the National Commercial Bank of Albany. He is regarded as a successful organizer, a careful financier, and a shrewd business man.—*Am. Law Review.*

The Golden Rule.

SIC UTERE TUO UT ALIENUM NON LŒDAS.

(*Continued from page 102.*)

FIRE.—Apart from the distinction, raised by the statutes 6 Anne, c. 31, s. 6; and 14 Geo. III, c. 78, ss. 86 and 101, between house, and field, property, "the law is general; the fire which a man makes in his fields is as much his fire as his fire in his house; it is made on his grounds with his materials and by his order; and he must at his peril take care that it does not, through his neglect injure his neighbor. If he kindle it at a proper time and place, and the violence of the wind carry it into his neighbor's ground, and prejudice him, this is fit to be given in evidence." *Per Holt, C. J.* in *Turberville v. Stamp, 12 Mod.* These principles are said to have governed all the subsequent cases both in England and Ontario. *Furlong v. Campbell, 7 Ont. App. R. p. 162.* And they seem to be in accordance with the second of the rules above quoted.

Fire Caused by Railway Engines. If a company be expressly authorized by Parliament to use engines it is only liable in case of negligence. If not so authorized the common law rule (above No. II), applies. *Vaughan v. Taff, Vale R. Co., 5 H. & N. 579; Jones v. Festiniog R. Co., L. R. 3 Q. B. 733; and see Hammersmith R'y. Co., v. Brand, L. R. 4 H. L. 171.* Negligence may consist in failure to make use of the most effectual contrivances for preventing the escape of sparks, or in allowing combustible matter to lie upon the railway grounds. *Smith v. L. & S. W. R. Co., L. R. 5 C. P. 98; Furlong v. Campbell, 7 Ont. R. p. 165.*

IS NEGLIGENCE MATERIAL IN ASCERTAINING LIABILITY.—Is the second rule above quoted absolute, or may the defendant escape if he has been guilty of no negligence. Can a man bring water upon his land and in answer to an action for its escape say that he did all he could to keep it there. If there is any doubt of his ability to keep it there, should he have brought it? And if there is no doubt then he must be guilty of negligence.

"The question in general is, not whether the defendant has acted with due care and caution, but whether his acts have occasioned the damage. He can excuse himself by showing that the escape was owing to the plaintiff's fault; or, *perhaps*, that the escape was the consequence of *vis major* or the act of God." *Per Lord Canworth, in Rylands v. Fletcher, L. R. 3 H. L. 341.* The careful "perhaps" of Lord Cranworth was altogether unnecessary if the decision in *Nichols v. Marsland, 2 Ex. Div. 1,* be sound. In that case it was held, not only that the act of God was a sufficient defence to an action for the bursting of the defendant's ornamental pools, (whereby the plaintiff was damaged), but that an extraordinary rain-fall which could not reasonably have been anticipated was an interposition of Providence. It is hard to see why the plaintiff in this case should have failed in his action. Extraordinary rain-falls will happen, and the damage was caused by the ornamental ponds being only strong enough for ordinary showers. An analogy may be sought in the spreading of fire by a sudden wind, in which case there is no liability. But the authorities apply to fires set out in the course of good husbandry, or for some other useful purpose. We know of no case where a man built a bonfire for his own amusement and was held not to be liable in case it got beyond his control and did damage. And the analogy between a sudden wind, which in all possibility will not arise during the continuance of a necessary fire, and an unusual rain-fall, which is sure to come some time, is not very convincing.

In the United States, negligence seems to be an important factor. Chancellor Wallworth in *The Mayor &c., of New York v. Bailey, et al 2 Denio 433*, lays down the law as follows:—"The degree of care which a party who constructs a dam across a stream is bound to use, is in proportion to the extent of the injury which will be likely to result to third persons, provided it should prove insufficient. . . . It is not enough that the dam is sufficient to resist ordinary floods. If the stream is occasionally subject to great freshets, those must likewise be guarded against. . . . . Such a measure of prudence is required in such cases as a discreet person would see if the whole risk were his own." See also upon the same subject *Livingston* v. *Adams, 8 Con. 175; Losee* v. *Buchanan, 51 N. Y. 476; Marshall* v. *Wellwood, 38 N. J. (Law) 339; Hoffman* v. *Toulumne Co. Water Co., 10 Cal. 413; Garland* v. *Torme, 55 H. H. 55; Todd* v. *Cochell, 17 Cal. 97; Everett* v. *Hydraulic Flume Co., 23 Cal. 225; Lapham* v. *Curtis, 5 Verm. 371; Gray* v. *Harris, 107 Mass. 492; Shrewsbury* v. *Smith, 12 Cush. 177; Graham* v. *Gross, 125, Mass. 238.*

Snow on Roofs.—For an injury resulting from the sliding of a mass of ice or snow from a roof upon a person travelling with due care upon the highway, the owner of the building is liable, if he suffers the ice and snow to remain an unusual time after he had notice of its accumulation, and ought to have removed it. *Shipley* v. *Fifty Associates. 101 Mass. 251.*

"There is no doubt that the owner of property is not liable for the flow of water, or the sliding of snow, to the injury of another, when such water or snow falls upon his land in a state of nature, or upon an erection that should not cause it to flow differently from what it would if it had fallen on land in a state of nature. But when the owner of property by an act of his does anything to cause the water or snow to be precipitated on his neighbor in an unusual quantity, or with unusual force to the detriment of that neighbor he becomes liable. It is his action, and not

the action of nature, that does the mischief, though without the action of nature the mischief would not be done." *Landreville* v. *Gouin, 6 Ont. R. p. 461.* The question whether there has been any negligence or improper construction of the roof, is a question for the jury. *Ibid.* Apart from these there is no common law liability. *Lazarus* v. *Toronto, 19 U. C. 9.*

ICE ON SIDEWALKS.—The defendants (in *Shelton* v. *Thompson, 3 Ont. R. 11,*) were the owners of a building on a street. A pipe connected with the eave trough, conducted the water from the roof down the side of the building, and by means of a spout, discharged it upon the sidewalk, where in the winter it was formed into a ridge of ice, upon which the plaintiff slipped and fell. The jury found that the defendants did not know of the accumulation of the ice, and that he ought not reasonably to have known of it. *Held* that the carrying of the water to the sidewalk was a harmless act; the action of the weather was the proximate cause of the accident; and the defendants not having knowingly allowed ice to accumulate, were not responsible. Armour, J., however, dissented upon the very reasonable ground, that the formation of the ice was the natural, certain, and well known result of conducting the water to the sidewalk, and that the defendants were, therefore, responsible for the result of their action.

OBSTRUCTIONS TO HIGHWAY OPPOSITE PLAINTIFF'S WINDOWS OR DOORS.—At first sight it might appear reasonable to say that if A. and B. have adjoining wharves, that A. should have no right to bring alongside of his wharf vessels which would necessarily overlap B's. wharf; and yet when it is considered that each has the same right to use the *water*, the question comes back to whether or not A. is making an unreasonable use of it. If A. take a vessel alongside both wharves at a time when B. does not wish to bring in another vessel, B. cannot complain. *Original Hartlepool Collieries Co.*, v. *Gibb, 5 Ch. Div. 713.* There is no differ-

ence in this respect between drawing up a vessel at your wharf and drawing up a carriage at your front door. The carriage may, quite necessarily, overlap your neighbor, but that will not, as necessarily, give him a cause of action.

If instead of a carriage, however, you constantly kept large waggons close to your neighbor's window, loading and unloading goods, he might very fairly complain that you were abusing your privilege; and if his light were materially diminished he might well have an action. *Benjamin* v. *Storr*, *L. R. 9 C. P. 400.*

EDITORIAL NOTES.

Queen's Counsel.

In England the creation of Queen's Counsel proceeds in a manner very different to that to which we are accustomed. In Canada every barrister covets the title, while in England there are but few juniors who can afford the assumption of the honor. Etiquette requires that a Q.C. should in all cases be provided with a junior; and the effect of this is, that while a barrister, as a junior, may command a steady supply of single briefs, his talents may not be sufficient to secure the leading place in cases where two counsel are to be employed. While a junior he may take a brief and attend to the whole case. If he become a Q.C. he cannot hold the same brief unless the client will pay for a junior.

In this way it comes about that a stuff gownsman considers very carefully his hold upon his briefs before he applies to the Lord Chancellor for a patent of precedence. Not until he is confident of his position at the bar (or until he desires to leave practice) does he make his application, and without an application the patent is not conferred. The appointments being, therefore, very largely the outcome of merit, are extremely limited. It is probable that there are more Queen's Counsel in Canada to-day than in all England. After a very long delay in new creations the present Lord Chancellor has issued patents to what is spoken of as "a large number" of barristers. The "large number" being ten!

In referring to these appointments the *Times* (Eng.) says:—"Thus the new Lord Chancellor has, a few days after coming into office, done what Lord Selborne declined for months to do. About a year ago most of the new Queen's Counsel applied to be allowed to change stuff for silk. Their request was not granted. They were given to understand that the state of legal business did not require the

creation of more Queen's Counsel. Perhaps this was the right view to take; and if it was, matters have not materially changed since last November. A generation or two ago the number of Queen's Counsel might be almost counted on one's fingers. They were men of unquestioned eminence; their reception of official rank merely ratified an opinion which their profession had already pronounced. Few thought of applying for the honor without carefully counting the risk of losing the business which they had acquired as juniors, and examining carefully into what vacancy they might step. It was the unwritten law that there should be no creation until the death or elevation to the bench of a leader in a Vice-Chancellor's court, or on circuit, made it desirable to fill up a gap. But under more than one Chancellor, and for many years, there has been a policy of profusion, and the names of Queen's Counsel now fill two and a half pages of the law list. Patents have been given not only to those who have succeeded in their profession, but to those who, having failed, wish to make a dignified exit from it. The title has long since ceased to be significant of anything. To suitors it is no guide to fitness; and often it would be equally hard for the donor and the recipient to explain why the gift was ever bestowed. We took occasion some months ago to question the value, in a public point of view, of the retention of a distinction which often dooms a barrister, who has made a mistake in taking silk, to do nothing, or try vainly to do that for which he is unfit. But Queen's Counsel are not likely to go the way of serjeants for many a day to come, and in the meantime nearly a dozen new 'silks' are appointed to keep up the order."

The County Court of the Eastern Judicial District.

HIS HONOR JUDGE PRUD'HOMME.

By an Order in Council of the 21st July last the Eastern Judicial District has been divided into three divisions for County Court purposes. The Counties of Fairford, Marquette, d'Iberville, Morris, Lorrette and Carillon are to form the Central Division; the Counties of Selkirk, Varennes, Lisgar, Plessis and Gemli, the Northern; and the Counties of Rock Lake, Dufferin and Manchester, the Southern.

The necessity for this division has been for long time apparent—the work was too great for one man to cope with it. Eventually there may be a judge for each division. Meanwhile, however, it is understood that Judge Ardagh will preside in the Northern and Southern divisions, leaving the Central for M. L. A. Prud'homme, who, we are glad to notice, has been appointed to that position.

M. Prud'homme, we have no doubt, will discharge his duties faithfully and well. His division is largely populated with those speaking his own language, and it was, therefore, necessary and proper that some one of his nationality should fill the position. At the same time no interpretation of English evidence will be necessary, M. Prud'homme being thoroughly familiar with both languages. In common with most of his race, M. Prud'homme has this great advantage over British or Canadians—using this term as opposed to French Canadians. We trust that he may be long spared to fill the honorable position to which he has been called.