9 Yerg. (Tenn.)

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Winnipeg

> Yes, men may come and go; and these are gone,
> all gone. (Tennyson)

This piece of reading has a southern setting; another suitable title for it would be "Long Ago and Far Away". It is in a sense a "period piece". It is about law in the State of Tennessee at a time long before the day when Sam McGee left Plumtree down there and followed the trail of '98 to Canada's Yukon. The period coincides with the girlhood of the Princess Victoria, prior to her coronation as Queen of England at the age of eighteen in the year 1837.

The Wanderer

One hundred years and ten had passed by, and a leather-bound volume of Reports (by George S. Yerger, Reporter to the State) of Cases Argued and Determined in the Supreme Court of Tennessee During the Year 1836, and printed in that year at Nashville by S. Nye & Co., State Printers, had meandered far from its native land. In the midst of many other books it was lying scuffed and discarded, but still sturdy and intact, on a counter in a second-hand book shop at the City of Winnipeg, in the Province of Manitoba, Canada.

The glance of a Manitoba lawyer on a prowling visit to the shop fell on the derelict and, since to experienced eyes the tome had the earmarks of a law book, the lawyer naturally paused and picked it up. It's label "Yerger's Reports" was unfamiliar to him and so with interested curiosity he turned to the title page and, after a moment, to the index at the end; and when he had observed the age and birthplace of the volume, and such headings and topics in the index as Champerty, Chancery, Rule in Shelley's Case, Slave, Uncore Prist, and Murder on Pine Mountain, he forthwith parted nonchalantly with seventy-five cents and thereupon departed with "9 Yerger's Reports" under his arm. The only known previous private owner was

one George E. Boyd, of Wheeling, W. V., whose signature, dated Feby. 1887, is on the inside of the front cover.

The purchaser has found its pages — i to vii and 1 to 546 — very absorbing, and hopes that the following details may prove of interest to other members of his profession, who may feel that Isaiah's injunction, "Remember ye not the former things, nor consider the things of old", is not required by the present context.

In this article there will be nothing on the subject of divorce, since not a case on that branch of the law is to be found in the entire volume.

Tennessee and the Red River Settlement

In 1836, Tennessee was "an agricultural community . . . of sparse population, identical pursuits, equal station and infrequent crime" (page 193) and "a community . . . with a mail and post office establishment daily increasing and subject to frequent changes" (page 256), but there was not yet a Dominion of Canada or a Province of Manitoba and part of the area that Winnipeg, and her sister City of St. Boniface (sometime of the "Turrets Twain") across the Red, now occupy was then the core of the sparse Red River Settlement. That more than a very few persons of that period in the Settlement had ever heard of Tennessee, and *vice-versa*, may well be doubted; but the case was otherwise as regards the respective residents of the Settlement and of Kentucky, for in 1833 a large flock of sheep had been bought in the latter State and driven afoot to the Red River Settlement.[1]

The information that in 1836 Tennessee was an agricultural community, of sparse population and identical pursuits, would seem to need some qualification. It is true that there were numerous large land holdings — in one of the cases reported, involving disputed boundary lines, we may read about three adjoining tracts of 1000 acres each in Maury county, in another about a deed of 640 acres in Wilson county, and in another about a State grant of 5000 acres in the county of Dyer — but at the same time there were at least four banks, namely, the Union Bank of Tennessee incorporated by the State legislature in 1832 and the Planters' Bank, each with various branches, also the Nashville Bank and the United States Bank; there were the University of Nashville and several Academies; and the

[1] Report to Rome by Mgr. Provencher, March 12th, 1836.

population of the State was in the neighbourhood of 750,000, which is about what Manitoba's is today.

> Of the stock of the bank [Union, of Tennessee], other than what belongs to the State and common schools, fifteen thousand four hundred and forty-eight shares are at this time owned by citizens of New York, Philadelphia, Kentucky and Alabama. By citizens of Davidson county, Tennessee, two thousand five hundred and ten shares, and by citizens of Tennessee, residing out of Davidson county, one thousand two hundred and thirty-two shares: (p. 491)

There was considerable industry also and further commerce. For example, there were cotton gins, rolling mills, saltpetre mines, ferry boats, toll gates at bridges, public houses, and common carriers by wagon and team driven by black boys — for example, from Franklin to Columbia (page 480); and at page 446 we may read of a bill of lading in part as follows:

> Shipped in good order and well conditioned, by Carter and Nye, on board the good flat boat, called the , whereof is owner and master for the present voyage, Ralph Graves, Senr., lying in the port of Pulaski and bound for New Orleans, to say, eighty-two bales of cotton, weighing in all, 31,428 pounds.

(At Pulaski, it is stated in the Encyclopedia Britannica, the Ku Klux Klan was formed in 1865.)

Courts

The judges of the supreme court, whose decisions appear in the book, were Hon. Nathan Green, Hon. William B. Reese and Hon. William B. Turley — the last named a Shakespeare-quoting judge (page 496) — and the Attorney General was George S. Yerger. The 1836 sittings were at Nashville in March, Jackson in April, Knoxville in June and Nashville again in December.

> By the provisions of the constitution of the State, and the second section of an act passed 1st December, 1835, to establish a supreme court, it is provided, that this court shall possess such appellate, and other jurisdiction, as belonged to the supreme court under the old constitution, under such restrictions and regulations as may from time to time be prescribed by law. . . . In 1801 . . . there was no court of errors and appeals . . . all the courts had original jurisdiction. In 1809, the supreme court of errors and appeals, with only appellate jurisdiction as to matters of law, was established. . . . By the act of 1822, c. 13 . . . 'the supreme court shall not possess original jurisdiction in causes either in law or equity'. (*Per* Turley J. at pp. 16-17)

There were circuit courts of both civil and criminal jurisdiction. In civil matters there were courts of law, in which action — *e.g.* on a writing obligatory, such as a promissory note

— was commenced by writ and, where an appearance was entered, a declaration by the plaintiff followed. The defendant demurred and/or pleaded; to pleas the plaintiff could demur and/or reply; to a replication there was often a rejoinder by the defendant and/or a demurrer; and in the case of such a rejoinder sometimes a demurrer thereto by the plaintiff. Hearings in circuit courts were commonly with a jury. There was also a court of chancery, in which proceedings were brought by bill of complaint, *e.g.* for specific execution of a contract for the sale of land, and the defendant demurred and/or answered. There were also justices of the peace, whose jurisdiction included cognizance of demands of small amounts by way of summons, and county courts with jurisdiction in cases for higher amounts. Appeal lay from a justice of the peace or a county court to the circuit court, and by writ of error from the circuit court to the supreme court.

Among texts cited in these courts by counsel and the judges were the following English works: Sheppard's Touchstone, Coke on Littleton, Bacon's Abridgment, Blackstone's Commentaries, Tidd's Practice, Chitty on Bills, Williams on Executors, and Preston on Estates.

Common Law and Equity

The respective preserves of courts of law and courts of chancery were strictly recognized, as the following passages show:

> This is an action of detinue to recover from the defendant several negro slaves. . . . Reese, J. delivered the opinion of the court. . . . 'In a court of law it would never occur to counsel to inquire into the equitable interest in land of anyone. The equitable right constitutes no proper subject for investigation in the legal forum. And if there be any action touching a personal chattel, which more than all others, required the inquiry to be confined to the legal title, it is the action of detinue for slaves. . . . [There are] well defined distinctions between the jurisdiction of a court of law and a court of chancery.' (pp. 313-4)

> This is an action of debt. . . . 'We think the judgment of the circuit court is correct. . . . On the part of him who sets up a deed and seeks to give it effect in a court of law, such court cannot upon his averment of fraud or mistake, correct the deed and give to it effect, as corrected. To achieve such a purpose, he must resort to a court of Chancery. Let the judgment be affirmed.' (pp. 266-7)

So, in this respect, the position in England prior to 1873 was also the position in Tennessee, as in other parts of the world (including Manitoba from 1870 until 1895) into which the jurisprudence of England had been imported.

"The Court Erred"

The judgment or decree below was of course in some cases not affirmed, as in the just mentioned action for debt, but respectfully reversed. Among the more interesting parts of many appellate reasons are the terms — usually tender but sometimes not so — in which the opinion below is held to be erroneous. Thus:

> Highly as we estimate the ability of the judge who delivered the opinion, we are constrained to dissent therefrom, for the reasons which we have assigned. (p. 29)
>
> Entertaining much respect for the opinion of this able and enlightened judge, we think that the reason given in the conclusion of these remarks above noted, is not called for by the character of the case before him, and is sustained, neither, we think, by the authority of the cases we have passed in review, nor indeed upon principle. (p. 41)
>
> Three distinct grounds have been taken by the plaintiff in error, upon which a reversal of the judgment of the circuit court is claimed. First, that the verdict of the jury which affirmed the contested paper, to be the last will and testament of John Gibson deceased, is not sustained by the testimony heard on the trial, but that the weight of the testimony was in opposition to the verdict, and that the circuit court ought on that ground to have granted a new trial. We have repeatedly determined during the present term, and such is the uniform course of this court, that the judgment of the circuit court will not, in a civil case where there is conflicting evidence be reversed upon this ground, unless the preponderance of proof against the verdict be great. This rule, founded as it is in the difference which exists in the very constitution of the circuit court, and of this court, in the mode of ascertaining and investigating facts, stands at this time of day, in no need of elaborate vindication. It commends itself readily and at once, to the approval of every enlightened judgment. It is enough to say that in this case great preponderance does not exist. . . .
>
> The third ground is, 'that the court erred in not permitting the witnesses, other than the subscribing witnesses or the physicians, to give their opinions as to the testator's sanity'. . . . We think the following propositions correct. First, attesting witnesses and they only, are trusted to give their opinion merely, and without cause or reason assigned, of testator's sanity. Secondly, physicians may state their opinion of the soundness of a testator's mind, but they must state the circumstances or symptoms from which they draw their conclusions. As to all others, their opinions, considered merely as opinions, are not evidence. But having stated the appearance, conduct or conversation of testator, or other particular fact, from which his state of mind may be inferred, they are at liberty to state their inference, conclusion or opinion, as the result of those facts. The propriety of doing this arises from the delicate nature of all investigations into the state of the human mind. How can a witness describe the dissociated and flighty conversation of a lunatic, the fear, the horror, the frenzy of his eye, how communicate the influences which mind practises upon mind, if he must not speak of inferences,

impressions or conclusions? After all, it is the facts which a witness details, the conduct which he describes, which chiefly and primarily constitute the testimony to be relied on. This places, it is true, the error of the circuit court upon narrow grounds; but as we cannot tell what effect might have been properly produced if the circuit court had acted on the opinion herein indicated, we are reluctantly constrained to grant a new trial. (pp. 330-333)

Let this judgment be reversed, and this court, proceeding to give such judgment as the circuit court ought to have given, sustain the demurrer of the defendant. (p. 55)

Champerty

A further instance of reversal has to do with the question of champerty. Ejectment suits against the trustees of Campbell Academy had been brought in the circuit court of Wilson county and, during their pendency, a bill was filed against the plaintiff, her attorney and counsel, and others, complaining that champerty existed in the institution and prosecution of the suits. The following is from the opinion of the court, delivered by Reese J.:

The question in this case is, whether the answer [of the attorney employed], under the construction and operation of our statute, . . . make out a case of champerty. A highly respectable judge, sitting in the circuit court, has determined the question in the affirmative. . . .

1. As to the answer, it makes out a case of a very poor female living in another state, and at a great distance, claiming a considerable estate in lands, held so long in the adverse possession of others, as that, by the operation of the statute of limitations her title is about to be divested; who, proposing to institute an action, writes to an attorney here, that if he will commence suit for her and successfully prosecute it, she will give him a liberal, perhaps a large fee. He replies that the law of his community does not permit that the compensation to be received by him shall be contingent upon the event of the suit, but that her interest shall be attended to. He brings suit, takes an obligation which he says is unconditional, and to the payment of which he would be entitled, let the recovery eventuate as it may. But such, in his estimate of them, are the circumstances of the plaintiff, that he deems the security for his fee utterly worthless if the termination of the suit should be unfavorable. What does this amount to? . . . The contingency in the character of his compensation proceeds, not from the terms of the agreement, but from existing inability to pay, which nothing is likely to obviate but success in the suit.

2. Does the statute make a contingency of this sort champerty? . . . The cases at bar were ordered to be stricken from the docket at the costs of the plaintiff, and the attorney was ordered to pay the costs in chancery; and to that, by the provisions of the act, might have been annexed, that he be stricken from the roll, and deprived of his privileges of attorney and counsellor.

> The statute therefore, is not only summary in its course of procedure, but highly penal in its sanction. It cannot therefore, on obvious and long settled principles, have the liberal and extended construction claimed for it.
>
> It is true, that nothing is more pernicious to the security of the community, nor any thing more injurious to that character, for dignity, integrity, and purity, so indispensable in members of the bar, than the indulgence of a gambling spirit which would lead them, for contingent and possible advantage, to agitate society in the prosecution of doubtful, pretended or obsolete claims. And, therefore, champerty where it exists, and is distinctly made out, deserves severe reprobation.

On reading this there comes to mind the following portion of an address delivered at Montreal in March 1915, at the first annual meeting of the Canadian Bar Association, by the late E. F. B. Johnston, K.C., "And so with speculative litigation. Nothing is so destructive to the reputation of the solicitor, or to the legal profession generally, as the promoting and carrying on of cases on a purely speculative basis. It is unjust to the client, most dangerous to the community and absolutely demoralizing to our whole system of jurisprudence". The Tennessee opinion continues:

> On the other hand, to investigate the claims or redress the wrongs of the indigent and the injured, is no quixotism, but a grave and highly honorable duty of the profession, the performance of which, if not voluntarily assumed, may be enforced by the court. And we are not prepared to say, that if an indigent man, who in the opinion of the attorney has probable cause of action, employ him, instead of applying to the court to have him assigned as counsel, by himself suing as a pauper, that such employment, although the ability of the party to pay will depend upon his success, shall be construed to amount to champerty.
>
> Let the decree rendered in this case be reversed, and the bill be dismissed. . . . (pp. 117-118)

Compare *Carlson* v. *Chambers*, [1947] 1 W.W.R. 353 (Sask.). Section 74(1) of the Law Society Act of Manitoba expressly permits attorneys or barristers to contract to receive a commission on, or percentage or other portion of, any money or property that may be recovered in the suit.[2] Under section 74(2) the client may have the contract referred to a taxing officer, and the latter is empowered to inquire into all the facts and to cancel the contract or to reduce the amount to a sum not less than the solicitor and client costs allowed by the tariff in force.

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[2] This provision has been held *intra vires* and valid by the courts of Manitoba: see *Thomas* v. *Wishart*, 19 Man. R. 340, and *In re Solicitors*, 2 W.W.R. 195; but a similar British Columbia provision has been held *ultra vires:* see [1927] 2 W.W.R. 808.

Faro

Another case in which judgment of the circuit court was reversed and a new trial directed was the indictment and prosecution of a gambler, in 1832, on a charge of dealing faro (page 184). Legislation of 1827 had made those guilty of dealing faro, playing at thimbles and exhibiting the grandmother's trick subject to pillory and infamy, and a statute of 1829 had made faro a felony. To elude the 1827 Act gamblers abandoned the old game of faro with fifty-two cards and substituted a game which they called forty-eight, in which the four sevens were not used and there was no pot nor hockley nor splits. But the public generally called the new game faro and in an Act of 1824 it had been declared that legislation against gambling should be construed remedially and not strictly. The trial judge told the jury:

> If the game of forty-eight was substantially a different game from old faro, but was commonly called and well known by the name of faro, in this State, and at Nashville, at and before the finding the bill of indictment against McGowan, it would be faro, within the meaning of the law, if it was within the mischief to remedy which the act was made.

The jury returned a verdict of guilty. But Reece J., in delivering the judgment of reversal, said:

> That a statute creating a felony shall have a remedial construction is a principle nowhere established. An act of Assembly in 1824 directed that all statutes made for the suppression of gaming should be remedially construed. Every species of gaming then punished by law was considered and treated as a misdemeanor. But when faro, in 1827, was rendered infamous, and in 1829 a felony, will it be proper to apply to it the rule of construction created by the act of 1824, and applicable only to misdemeanors? We think not clearly. For the reasons herein stated, the judgment of the circuit court will be reversed, and the cause be remanded to the circuit court to be there tried again.

Rule in Shelley's Case[3]

At the foot of the last page (243) of the decision on the Rule in Shelley's Case there are pencilled notations as follows:

> Read June 3d 1854. Very interesting! B.C. Do. June 1855 Alston.

Conceivably B.C. and Alston were newly students-at-law when nearly a century ago they read this Tennessee judgment; if so they must have found it very strikingly helpful toward a good understanding of the difficult rule referred to. A bill had been filed against the defendant by twelve complainants — four of

[3] A Canadian case on this rule is *Re Woodward Estate*, [1945] 2 D.L.R. 497, 1 W.W.R. 722, 61 B.C.R. 298.

them minors suing by their next friend. It was based on a deed of gift as follows:

> This indenture made this 2nd January, 1786, between Elizabeth Strain, of the State of South Carolina, of the one part, and Agnes Brown, natural daughter of said Elizabeth, of the other part, Witnesseth: That the said Elizabeth Strain, for and in consideration of the natural love and affection which she hath and beareth unto the said Agnes Brown, hath given, granted and confirmed, and doth give, grant and confirm unto the said Agnes Brown, one negro wench about eleven years of age, named Phillis; likewise a cow and calf, together with all the issue of the said negro wench, and the increase of the cattle aforesaid. To have and to hold, and to enjoy all and singular the premises aforesaid to the said Agnes Brown, her executors, administrators and assigns, for and during, and until the full end and term of her natural life; and after the determination of 'that estate', then to the heirs of the body of the said Agnes Brown, lawfully issuing, and for default of such issue, lawfully begotten, then the said negro wench and her issue, and the cattle and their increase to return to me and my heirs forever . . .

The complainants were the said Agnes, her husband John Polk, and their children and sons-in-law; while Alexander Faris, the defendant, was the husband of the said Elizabeth, whom she had married after the date of the deed and before the marriage of Agnes. The bill alleged that the defendant and his wife, taking advantage of the circumstances surrounding Agnes, required and induced her, while she was still a minor and as a condition of assenting to her marriage to John Polk, to execute a deed by which she conveyed her interest in Phillis to the defendant, and that this deed was obtained by duress and oppression and could be set aside. It further alleged that the defendant had sold some of the slaves, the increase of Phillis, but was in possession of Dinah, one of Phillis's children, and also four children of Dinah, to wit: Rhody, Harriet, Mary and Austin. The bill prayed that the deed and John Polk's assent thereto might be cancelled. The defendant answered the bill, but the answer was subsequently withdrawn and the parties made an agreement that the facts as set forth in the bill were true, but that adverse possession and the statute of limitations were relied on by the defendant and that the court should decree upon the bill and this agreement.

Chancellor Cooke was of opinion that the statute of limitations barred a recovery by the complainants. He dismissed the bill and the complainants appealed.

The opinion of the court, delivered by Reese J., occupies thirteen pages. The following are excerpts from it:

> The complainants contend that the above deed vests a life estate

only in Agnes Brown, and a remainder in the other complainants, her children, as purchasers; that the words 'heirs of the body' in the deed, are to be considered and taken, not as words of limitation, but of purchase. On the other hand, the defendant contends that the words used in the deed fall within the extent of the rule in Shelley's case; that if the conveyance had been of real estate, the legal effect of the words under the operation of the rule in Shelley's case, would have been to vest Agnes Brown, the first taker, with the inheritance in fee tail, which the statute of 1784, ch. 22, sec. 5, would have converted into a fee simple absolute; but that the deed being for personalty, of which an estate tail cannot by law, be limited, the whole interest vested absolutely in Agnes Brown.

Two questions have been discussed, 1st. Will full effect be given to the rule in Shelley's case in the Courts of Tennessee? 2nd. Does the rule extend to and embrace the present case? . . .

Mr. Preston gives [Preston on Estates, vol. 1 p. 263] a description or definition of the rule, which Chancellor Kent, a very competent judge of the matter, pronounces to be full and accurate. 'When any person takes an estate of freehold, legally or equitably, under a deed, will, or other writing, and in the same instrument there is a limitation by way of remainder, either with or without the interposition of an intervening estate, of a right of the same legal or equitable character, to his heirs or heirs of his body, as a class of persons to take in succession, the limitation to the heirs entitles the ancestor to the whole estate.'

(It is of incidental interest that the 1824 edition of Preston on Estates, in two volumes, is to be found, dusty and forgotten, on the upstairs shelves of the Great Library of the Law Society of Manitoba at the Court House in Winnipeg.) The foregoing passages are followed by an examination of the question of the origin of the rule, with references to the apparent current of professional opinion thereon in England and to Blackstone's conclusions on the subject; and then comes this:

Whatever may have been the origin of the rule, or how wellsoever it may seem adapted to attain the selfish objects, or gratify the grasping cupidity of the feodal lord, it happens to have been obviously based also upon principles of public policy and commercial convenience, sufficiently broad and deep to cause it to survive for the period of near five hundred years, the rage of legislative innovation, and all the changes and fluctuations of the most eventful era of the world, and still to challenge the willing obedience and enlightened support of the most learned and able minds of Great Britain and the United States. It is a rule or canon of property, which so far from being at war with the genius of our institutions, or with the liberal and commercial spirit of the age, which alike abhor the locking up and rendering inalienable real estate and other property, seems to be in perfect harmony with both. It is owing perhaps to this circumstance that the rule, a gothic column found among the remains of feodality, has been preserved in all its strength to aid in sustaining the fabric of the modern social system.

This is followed by a reference to the statute of entailments

passed in 1285, commonly called the statute *de donis*, and then the opinion proceeds thus:

> This statute would have locked up all lands in the Kingdom from creditors, from commerce, and from all the purposes of society. But the fictitious action of common recoveries, and the rule in Shelley's case afterwards adopted, had some tendency to knock off the fetters created by this statute. And finally, our statute of 1784, c. 22, s. 5, coming in aid of the policy of those fictitious actions and of the rule in Shelley's case, put an end to the effect and operation of the statute *de donis*. . . . This [Tennessee] statute, like the rule in Shelley's case, is a rule, not of intention or construction, but of property, and like it has relation not to the wishes of the donor, but to the interests of the community; both alike tend to control individual purpose for the attainment of a public object, namely, the unlocking of property and the subjecting it to the uses of society. . . .
>
> As our ancestors brought the rule with them across the Atlantic, and it formed an element of our colonial law, it must continue until abrogated by statutory enactment to constitute a portion of our general body of laws, and as much exacts obedience, and must be carried as fully into effect as any other principle of the common law which we have adopted. . . .
>
> We proceed now to enquire whether the terms and limitations of the deed from Elizabeth Strain to Agnes Brown, fall within the extent and operation of the rule in Shelley's case. If this deed were a conveyance of real estate, the question would be too plain to admit of debate. . . In its terms it falls literally within the rule. It contains a distinct limitation to Agnes Brown for life, with remainder to the heirs of her body lawfully issuing, and in default of such issue, to the grantor or her heirs. . . .
>
> We have already indicated our opinion that the rule in question is a rule of property and of public policy, not of intention merely, or construction. . . . It matters not how distinctly in point of intention it may appear, that the grantor meant that the first taker should have a life estate only; if it further appear, that by the use of the terms, heirs of the body, issue, sons, children, etc., he meant the descendants of the first taker should take, in their character of heirs, a descendible estate of inheritance, exhausting the lineal stock of the first taker; such purpose, by operation of the rule, vests the first taker with the inheritance. In other words, it matters not how strongly or how clearly the grantor may intend that the instrument should not be controlled by the rule of law, yet if the proper construction of the terms which he has used in the entire instrument bring it within the operation of the rule of law, the rule of law, and not his intention must have effect. So under our statute of 1784, c. 22, s. 5, it would matter not how clearly the grantor might intend to create an estate tail and not a fee simple, yet the statute which is a rule of property and public policy, would have effect against such intention of the grantor, and the estate, in the language of the statute, would be held and deemed, not a fee tail, but a fee simple absolute. . . .
>
> This case indeed, is so clear of all difficulty upon the words of the instrument, as not to have merited the attention which has been bestowed upon it, except for the reason that it is the first case in this State,

which has distinctly brought up the rule in Shelley's case for discussion, and the determination of which must necessarily be placed exclusively upon that rule. . . .

But it has been urged that however correct might be the view of the subject which has been taken, if the deed before the court were a conveyance of real estate, yet, as it is for personal property, the rule in Shelley's case will not apply to it. But by a well settled principle of the common law, the limitation of personal estate to one in tail vests the whole in him. . . .

Upon the whole, therefore, we feel very clear that the gift from Elizabeth Strain to Agnes Brown for life, with remainder to the heirs of her body, vested the entire interest in Agnes Brown; and therefore, that the statutes of limitation have barred the right of the complainants. The decree of the Chancellor, which dismissed the bill, must consequently be affirmed.

It would appear that in Tennessee the Rule in Shelley's Case is now abrogated;[4] in England it was abolished in 1927.[5]

Further as to Slaves

Several of the cases reported had to do with slaves. Most of the personal property in the country was under their actual control and care; but a slave could acquire no personal right to property — he himself and all he might have belonged to his master (page 206). The master was taxable in respect of his slaves and could sell or mortgage them or hire them out, and a slave could be sold at sheriff's or constable's sale to pay the master's debts. In one instance, a negro boy, Jeff, had been hired out for twelve months at $110 as a servant and common labourer, the bailees to furnish his necessary and comfortable clothing and medical attendance (page 276); in another, a negro girl was sold to the highest bidder to satisfy a judgment against her master (page 412); and in another, under a *fi. fa.* against their master, a negro woman and two children had been stood on the block with the sheriff and been struck off to the highest bidder — at $521 (page 97). Another case (page 45) was on a note, as follows:

On or before the 1st of January, 1835, we, or either of us, promise to pay John Thompson, guardian of Margaret and Sarah Buchanan, fifty dollars, for the hire of Daniel, until the 25th of December, 1834, and to furnish said negro with three suits of clothes, one pair of shoes, blanket and hat; as witness our hands and seals this 1st Jan. 1834.

In a further case, a negro had been bequeathed by the will of the plaintiff's grandfather to the plaintiff's mother and her

[4] See 25 American and English Encyclopedia of Law (2nd ed.), p. 657.
[5] See (1927), 5 Canadian Bar Review 468.

heirs forever. The defendant became the plaintiff's guardian, but neglected to collect hire for the slave. The supreme court, *per* Reese J., said:

> It was the duty, by law, of this guardian not only to have collected annually the hire of the negro for the whole nine years, but also each year to have lent out the proceeds, and annually to have collected the interest upon such loan, and to have reloaned it if not necessary for the education and support of his ward. This was his duty by law, and this duty he entirely omitted. . . . Will it not be readily perceived that in large estates such a course would be utterly ruinous for a ward? The guardianship might last twenty years; there might be much real estate, many negroes, etc.; upon his coming of age, the guardian addresses him thus: 'I have collected nothing, I have reported nothing, and I have taken no securities, but here are the tenants of your land, here are those who hired your negroes; they are all solvent, you are not barred by the statute of limitations, and can sue them and recover.' Would not such a cause be alike subversive of the purpose of guardianship and of the rights of the ward? (pp. 419-20)

But as to slavery, we might remind ourselves of Tennyson's lines,

> Nor blame too much the sons of men and barbarous laws;
> These were the rough ways of the world till now,

and in Tennessee, even in 1836 and earlier, there was machinery for the emancipation of slaves (pages 305-8). As an instance, a court of pleas and quarter sessions for Claiborne county, held in 1830 at the court house in Tazewell with nineteen magistrates present, considered the petition of Daniel Slavins, praying the emancipation of Fanny Moore and various other slaves, and granted it on the petitioner entering into bond in the penal sum of $10,000, conditioned as directed by law, to indemnify the county against the future maintenance of those so emancipated and admitted to the rights and privileges of free persons of colour in the State. In subsequent proceedings this emancipation was questioned, but at the June term 1836, at Knoxville, it was upheld by the supreme court, from whose opinion the following is quoted:

> The act of emancipation is a concurrent act by the owner of the slave and the government. The one has a property in the slave, the other a control over his social condition. The act of emancipation therefore, involves the consent and act of the master, and the consent of the government. His solemn petition in open court, his signing a bond to indemnify the county, give the most decisive evidence of his wish. The act is complete on his part. The presence of nine justices is not required for the guard and protection of the master's rights, they are individual, he can look to them himself. It was intended for the protection of the public, that improper persons might not intrude themselves or be intruded into a new social condition, hurtful to the common good.

The point in the case before the supreme court was that the statute required that a majority, or nine, of the acting justices should be present and that two-thirds of those present should concur in the act of emancipation, but that justices are in the habit of vacating their seats, and returning to them again, and that their number fluctuates during each hour; and those attacking the emancipation proceedings argued that the record left it doubtful whether the requisite number of justices were present at the act of emancipation.

Justice and the Law

Opinions of the supreme court were always unanimous; some of those delivered by Reese J. and by Turley J. have been noticed previously. Let us now quote briefly from another of them, delivered by Green J.:

> But it is insisted that it is a hard case upon the defendant, and that as he has the verdict of a jury in his favor, the court ought not to set it aside. In answer to this argument, the language of judge Crabb, in *Gregory* vs. *Allen*, Martin & Yer. 77, may be appropriately applied. He says, 'There are some cases where courts have refused to set aside verdicts on account of the justice of the case having been attained. But we do not believe this doctrine has ever been applied to endorsement cases, or cases founded on commercial law; nor do we think it ever ought. It is impossible to tell in this instance on which side lies the justice of the case.' In all such cases, the court knows no distinction between the justice of the case, and the law of the case.' So, here, it is impossible to tell whether the plaintiff may not have endorsed this note, entirely upon the responsibility of the defendant, whose name was placed upon the note before his. In the absence of proof to the contrary, that is the presumption of the law. In that event 'the law of the case is the justice of the case' . . . Reverse the judgment and remand the case for another trial. (p. 5)

It would be interesting to know whether Judge Crabb, mentioned in this quotation, is an ancestor of Dr. Alfred Leland Crabb, who has lately written a series of very delightful novels about the beautiful old city of Nashville: Lodging at the Saint Cloud, Dinner at Belmont, Supper at the Maxwell House, and Breakfast at the Hermitage — all published by The Bobbs-Merrill Company.

Latin

Each of the three learned members of the court was very creditably addicted to incorporating bits of law Latin in the opinions delivered, but Turley J. more so than either of his brothers. Their acquaintance with that great language — as

useful to English-speaking lawyers today as to those of bygone years — is to some extent indicative of the thoroughgoing legal education they must have had.

But, for the benefit of a lame duck as regards other languages, will somebody please translate into good plain English that strange expression "Uncore Prist" appearing in the index?

Recent Judicial Appointments

His Honour Robert Erie Nay, Judge of the District Court of the Judicial District of Kerrobert, in the Province of Saskatchewan, to be Judge of the District Court of the Judicial District of Battleford, Saskatchewan.

Hector MacKay, Esquire, K.C., of the Town of Melville, in the Province of Saskatchewan, to be Judge of the District Court of the Judicial District of Kerrobert, Saskatchewan.

His Honour John Murton Hanbidge, Judge of the District Court of the Judicial District of Humboldt, in the Province of Saskatchewan, to be Judge of the District Court of the Judicial District of Prince Albert, Saskatchewan.

W. L. Clink, Esquire, K.C., of the Town of Battleford, in the Province of Saskatchewan, to be Judge of the District Court of the Judicial District of Estevan, Saskatchewan.

Michael Stechishin, Esquire, K.C., of the City of Yorkton, in the Province of Saskatchewan, to be Judge of the District Court of the Judicial District of Wynyard, Saskatchewan.

Robert Forsyth, Esquire, K.C., of the City of Ottawa, in the Province of Ontario, to be Judge of the County Court for the County of York, Ontario, effective on March 1st, 1949.

Thomas J. Darby, Esquire, K.C., of the City of Welland, in the Province of Ontario, to be Judge of the County Court for the County of Lincoln, Ontario, and also a Local Judge of the High Court of Justice for Ontario.

The Honourable Sir Edward Emerson, to be Chief Justice of the Supreme Court of Newfoundland.

The Honourable Henry Anderson Winter, to be a Judge of the Supreme Court of Newfoundland.

The Honourable Brian Dunfield, to be a Judge of the Supreme Court of Newfoundland.