the whole they find this mode of dealing advantageous, even at the risk of occasional litigation. It is the business of courts reasonably so to shape their rules of evidence as to make them suitable to the habits of mankind, and such as are not likely to exclude the actual facts of the dealings between parties when they are to determine on the controversies which grow out of them. It cannot be doubted in the present case, that *in fact* this contract was made with the usage understood to be a term in it; to exclude the usage is to exclude a material term of the contract, and must lead to an unjust decision. Of course this could be no occasion for a decision contrary to authority, but we think any one who reads the judgment of the court in *Truman* vs. *Loder* with attention will perceive how much it was influenced by a feeling of the supposed inconvenience of receiving any parol evidence in the case of a written contract, and as it was not necessary to the decision of the case then before the court, we are not bound by it now, and we did not hold ourselves bound by it in the case of *Brown* vs. *Byrne*, where it was brought to our notice.

For the reasons we have given we are of opinion that the evidence was receivable, and that the rule to enter a nonsuit should be discharged.

Rule discharged.

SHORT NOTES OF RECENT ENGLISH CASES.

BEING A SELECTION OF ADJUDGED POINTS.[1]

In the Court of Chancery.

IN THE MATTER OF KELLERS, MINORS. 5 Ir. Ch. Rep., 328.

Guardian and Ward—Religious Education of Ward—Intention of Father.

As a general rule, the wishes of a father, either expressed or implied, as to the religious faith in which his children after his death are to be brought up, will be followed.—See *Talbot* vs. *Earl of Shrewsbury*, 4 My. & Cr. Re North, 11 Jur. 17. In the above-mentioned case of Kellers,

[1] From the London Law Magazine for May, 1857.

minors, this rule was acted upon under rather peculiar circumstances. The father was nominally a Roman Catholic, the mother a Protestant, and at the time of the marriage there was no agreement as to the religion in which the children of the marriage were to be educated. The children of the marriage were, it appeared, baptized by priests of the Roman Catholic persuasion, and entries of their births were made by the father in a Douay Bible. Ten of the persons who became sponsors for the children were Protestants, and three Roman Catholics. The children never, during the life of their father, attended Roman Catholic worship, except the eldest son, who upon one occasion only was taken by his father to see mass performed, on an occasion of great solemnity, and by way of spectacle. The father engaged a Protestant governess for the younger children, and placed his two eldest children, sons, at a Protestant school, where they received the usual elementary instruction in the Protestant religion, and with his knowledge and sanction attended a Protestant church. The father by his will appointed the mother testamentary guardian, who for several years after the father's death, until the two eldest children had attained the ages of eleven and ten, continued to bring them up in the faith of the Established Church. The mother having ceased to act as guardian, a guardian was appointed by the court to act in her place. It was held by the Master of the Rolls of Ireland, that the children ought to be brought up as Protestants. His Honor after referring to *in re* Brown, a minor 2 Ir. Ch. Rep., 151, and Talbot *vs.* the Earl of Shrewsbury, 4 M. & Cr., 672, and the principal facts of the case, made the following observations:—"No doubt a Roman Catholic father, appointing a Roman Catholic testamentary guardian, more distinctly indicates his wishes than a Roman Catholic father appointing a Protestant testamentary guardian; but where the children, as far as they could from their age be brought up in any religion, appear to have been brought up as Protestants in the lifetime of their father, and with his sanction, I think the *appointment of a Protestant guardian is, in conjunction with the other circumstances of the case, an indication of his wishes, which the court should attend to.*

"The mother, the testamentary guardian, states in her affidavit, that she verily believes that, if her husband had survived, he would himself have reared all the minors Protestants. And that she also believed that, in nominating in his will her whom he well knew to be a strict Protestant to be the guardian of the persons of his children, he did so in the expectation and with the object that they would be reared Protestants; and that she believed, that if the said minors should be now educated in the Roman

Catholic faith, upon the presumption of their deceased father's desire, it would, in fact be contrary to his real sentiments and wishes. No doubt there is difficulty in the case, from the fact that the children were baptized by clergymen of the Roman Catholic Church, and their births entered in the Douay Bible; and that of the thirteen sponsors three were Roman Catholics and ten were Protestants. But the question which I have to decide is, *has the father of the minors indicated a wish that his children should be brought up as Protestants?* On the best consideration I can give the case, I am of opinion that he has indicated such intention, and that the court is bound to carry it out. It has been contended, that *the circumstances of the children having been brought up Protestants since the death of the father in* 1850 (six years), *would in itself be a reason against having any alteration made as to the religious faith in which the minors have been brought up.* And such argument might have weight *in respect of the two elder minors,* on the authority of the case of Fallons minors not reported, decided by the Lord Chancellor, and referred to by counsel.

"On the other hand, it has been said that the testamentary guardian has not been in the habit of attending any place of public worship since her husband's death, and that none of the children are of an age, having regard to the want of religious instruction, to have formed opinions on the subject. I do not, however, think it necessary to express an opinion on the latter ground, and I decide the case on the ground that the weight of evidence is in favor of an intention on the part of the father of the minors that they should be brought up in the Protestant faith."

In a recent case, Stourton *vs.* Stourton, W. R. 1856-7 p. 418, the principle laid down in the above cited case, Follons minors, has been acted upon, and it has been conclusively decided, that where a child has been for a long time educated in a different faith from that of his deceased father, the Court of Chancery will not interfere.

CAMPBELL *vs.* HOOPER. 3 Sm. and Giff., 153.

Lunatic—Mortgage made by, to bona fide *Mortgagee, valid.*

A person executed a mortgage, being at the time a lunatic; the mortgagee, however, who advanced the money *bona fide,* was not aware, at the time he did so, of the state of the mortgagee's mind, and took no advantage of it. Sir John Stuart V. C., held that the mortgagee was entitled to a decree of foreclosure against the real and personal representative of the mortgagor. "Even at law," said his Honor, "the contract of a luna-

tic is not necessarily void. Even at law, the plaintiff in an action at law, seeking to recover, under the contract of a person whose lunacy is established, has been held entitled to relief. That was the case of Baxter *vs.* Lord Portsmouth, 5 B. and C. 170, where the lunacy was established beyond a doubt. The court of law gave relief on the footing of the contract.

The principal has been established at law in other cases, and by the Court of Exchequer Chamber in the case of Molton *vs.* Camrooux, 2 Exch. 487, which was decided after a laborious and accurate examination of all the authorities. Mr. Justice Patterson, in the case of Dane *vs.* Lady Kirkwall, 8 C. and P. 685, in directing the jury laid down the law thus :— 'It is not sufficient that Lady Kirkwall was of unsound mind, but you must be satisfied *that the plaintiff knew it,* and *took advantage of it.*' It would be a strange thing if a court of equity, in dealing with contracts, were to deal on a different principle. See, however, Jacob *vs.* Richards, 5 De G., M. and G. 55.

DEAN *vs.* THWAITE. 21 Beav., 621.

Mines—Working those of a Neighbor—Mode of directing an Account— Onus probandi.

In this case the defendant had, by underground working, taken the coal of his neighbor. It was held by Sir John Romilly, M. R., that the defendant could only be compelled to account for what he had taken six years before the filing of the bill, see 3 and 4 Will. IV, c. 27, s. 26, but the onus of proving what part had been taken during such six years, lay upon the defendant, who was a wrongdoer.

"The way," said his Honor, "I intend to deal with the account is this :— I shall see if the parties themselves can agree as to the amount and extent of these workings. If they cannot, then I shall probably appoint, under the powers intrusted to me by the Act of Parliament (which, I think extends to cases of this description,) some coal agent, who is perfectly well acquainted with matters of this description, to examine and make report as to the state of the works, and as to what coal has been taken from under certain plots of land of the plaintiff, which will be specified, and to take all proper measurements for that purpose. Suppose he finds that a certain quantity, suppose 1,000 tons, has been taken, I shall then call on the defendant to show what portion of that coal has been taken prior to the six years.

"I think the burden of proof ought to rest on the defendant, for this reason:—I assimilate this to the case, which I have frequently had occasion to refer to, of the chimney-sweep who found the diamond ring—Armory *vs.* Delamirie, 1 Stra. 505—and governed by the principle which I have constantly acted upon, that the case will be taken most strongly against a person who keeps back and destroys evidence. I apply that principle to a person whose duty it was to keep strict evidence of what workings there were in other persons' lands, and shall charge a person working the coal mines in the adjoining land with the full amount raised, unless he can prove it was not taken within the time during which the court directs the account. On the taking of that account, I shall certainly not treat this as a case of fraud, but shall act on any reasonable evidence I can get to ascertain at what time the coal was worked. This is the view I take with respect to the mode of taking the account of coal worked."

In the Courts of Common Law.

BRASS *vs.* MAITLAND. 6 Ell. & Bl., 470.

Ship—Liability of Shippers of Goods of a Dangerous Character.

The first count of the declaration complained that plaintiffs were owners of a general ship; that defendants caused a corrosive substance to be packed in casks, and delivered to plaintiffs as casks of bleaching powder, to be carried in the ship; that plaintiffs and their agents were ignorant that bleaching powder contained a corrosive substance, and the casks outwardly appeared to be sufficient. But that the casks were insufficient, and the contents so improperly packed, that the corrosive contents escaped and destroyed the cargo.

The second count complained that defendants shipped a dangerous article, knowing it to be such, without notice of its danger; and the plaintiffs, without knowledge of its dangerous nature, received it, and stowed it in the hold, where it did mischief. The defendant pleaded *inter alia* to so much of the first count as relates to the insufficiency of the packages: that defendants purchased the goods ready packed from third persons named, and were not themselves, or by their servants, guilty of negligence. Fourthly, to first count: that the persons employed on the ship knew, and had the means of judging, of the sufficiency of the casks. Tenthly, to the second count: that the master of the ship knew, or had the means of knowing, the dangerous nature of the goods. On demurrer to these pleas,

it was held in the Court of Queen's Bench, by Lord Campbell, C. J., and Wightman, J., that there is an implied undertaking on the part of shippers of goods on board of a general ship, that they will not deliver, to be carried on the voyage, packages of a dangerous nature, which those employed on behalf of the ship-owner may not, on inspection, be reasonably expected to know to be of a dangerous nature, without giving notice. That, consequently, both counts were good, and the third plea bad.

But that the fourth and tenth pleas, which they construed to amount to an allegation of facts equivalent to notice, were good. It was held by Crompton, J., that the implied undertaking of the shipper did not extend beyond an obligation to take proper care not to deliver dangerous goods without notice: and that on the first count and third plea, taken together, the defendants appeared to be innocent shippers of goods, dangerous in fact, but without any negligence on their part; and that, therefore, the defendants should have judgment on the third plea. He agreed with the rest of the court, that the fourth plea was good, and the second count good; but he construed the tenth plea as not amounting to an allegation of notice, and therefore held it bad.

RENTER *vs.* ELECTRIC TELEGRAPH CO. 6 Ell. & Bl., 341.

Corporation—Obligation of Parol Contracts on Trading Corporation.

The defendants were incorporated by royal charter for trading purposes. By the deed of settlement, the directors were to manage the business of the company; but all contracts above a certain value were to be signed by at least three individual directors, or sealed with the seal of the company, under the authority of a special meeting.

Plaintiff sued the company on an agreement above the prescribed value. It was within the scope of the company's business, and was made by parol with the chairman, who, with his own hand, entered a memorandum of it in the minute-book of the company. It was recognized in correspondence with the secretary: plaintiff did work under it, and received payments by checks for it. These payments passed into the accounts of the company, and were audited and allowed; but there never was any contract signed by three directors, or under the seal of the company.

On a case stating these facts, with power to draw inferences of fact, the Court of Exchequer held that the contract was ratified, if not authorized by the company, and binding.

SNEAD *vs.* WATKINS. 1 Com. Bench, N. S., 267.

Innkeeper—Lien—Goods brought by a Guest, but belonging to Third Person.

One Hulme, who had formerly been clerk to the plaintiff, an attorney, was subpœnaed as a witness in an action brought by the plaintiff to recover the amount of bill of costs. Hulme put up at a public house of entertainment at Westminster, kept by the defendant, bringing with him a bag containing, amongst other things, a letter-book belonging to the plaintiff. Whilst at the defendant's house, Hulme became indebted to the defendant for lodging and refreshments, and quitted without paying his bill, leaving behind him the bag with the letter-book, which the defendant refused to deliver up to the plaintiff on demand, claiming a lien on the bill against Hulme.

The Court of Exchequer held that the claim of lien was valid.

DUTTON *vs.* GUARDIANS OF CLUTTON UNION. 1 H. & N., 627.

Watercourse—Right to Flow of Water from Spring Head.

The plaintiff's mill was situated on a stream partly supplied through a natural channel from "The Red House Spring," rising in a field belonging to Captain Scobell. The defendants, in order to obtain a supply of water for the Union Workhouse, which was about a mile from this field, took from Captain Scobell a grant of the use of the spring, and constructed works in the field so as to cut off the water at its source before it came to the surface, and receive it into a deep tank for supplying the workhouse water-pipes. The stream that served the plaintiff's mill was by this means greatly diminished in force, and the Court of Exchequer unanimously held that this was a wrongful act on the defendants' part, and that the plaintiff was entitled to recover damages. Baron Martin observed, "the owners of lands adjoining a stream have a natural right to the use of the water of it. A river begins at its source—when it comes to the surface; and the owner of the land on which it rises cannot monopolize all the water at the source, so as to prevent it reaching the lands of other proprietors lower down."

KINGSFORD *vs.* MERRY. 1 H. & N., 503.

Delivery Order—Title of Pledgee from Holder obtaining Possession by Fraudulent Representation.

This was an action of trover for three tons of tartaric acid. The plaintiffs were manufacturing chemists, and in April, 1853, Jones & Co., as brokers, sold for them two tons of the acid, to be delivered in November. In October Gray & Co., as brokers, sold for the plaintiffs two tons more of the acid, to be delivered also in November. The brokers respectively sent to the plaintiffs sold notes, not disclosing the principal. In November the invoices were sent to the brokers in the usual course, and soon afterwards delivery orders for three tons of the acid were left with the plaintiffs by the clerk of one Anderson, viz: the first signed Jones & Co., for delivery of one ton to Mr. Thomas Broomhall, and endorsed by Broomhall, "Deliver to my order;" the other signed by Gray & Co., for delivery of two tons to Broomhall, endorsed by Broomhall, "Deliver to W. Leask. John Ellis." "Deliver at Custom-house Quay to my sub-order. W. Leask."

Leask was a broker, and Anderson induced him to purchase the acid for him on a false representation that he was acting for Van Notten & Co., and subsequently obtained from Leask the delivery orders, endorsed as above, on the pretence of inspecting the acid. Anderson was never authorized to take possession of the acid, but stated to the plaintiffs that he had purchased the acid of Leask, and requested them to deliver it to him. The plaintiffs, deceived by Anderson's representations, gave him a delivery order, and the acid was transferred into his own name, and he thus obtained warrants, and pledged the acid with the defendant for a *bona fide* advance.

The Court of Exchequer Chamber held (reversing the judgment of the Court of Exchequer) that under these circumstances the relation of vendor and vendee did not subsist between the plaintiffs and Anderson, and that the property in the acid did not pass to Anderson, and that mere possession, with no further *indicia* of title than the delivery order, was not sufficient to entitle the defendant, though a *bona fide* pawnee, to resist the plaintiff's claim in an action of trover.