DIARY FOR MAY.

1. Thursday .... Last day for notice to County of apportionment of Grammar School monies.
3. Saturday .... Articles, &c., to be left with Secretary of Law Society
4. SUNDAY .... *2nd Sunday after Easter.*
10. Saturday .... Chancery Hearing Term ends.
13. SUNDAY .... *3rd Sunday after Easter.*
14. Wednesday .... Last day for service of Writ County Court.
18. SUNDAY .... *4th Sunday after Easter.*
19. Monday .... Easter Term begins.
23. Friday .... Paper Day, Q. B.
24. Saturday .... Queen's Birthday. Paper Day, C. P. Declare for Co. Court.
25. SUNDAY .... *Rogation.*
26. Monday .... Paper Day, Q. B.
27. Tuesday .... Paper Day, C. P.
28. Wednesday ..... Paper Day, Q. B.
29. Thursday .... Paper Day. C. P.
31. Saturday......... Easter Term ends. Last day for Court of Revision finally to revise Ass't Roll, and for Co. Court to revise Tp. Roll.

IMPORTANT BUSINESS NOTICE.

Persons indebted to the Proprietors of this Journal are requested to remember that all our past due accounts have been placed in the hands of Messrs. Patton & Ardagh, Attorneys, Barrie, for collection; and that only a prompt remittance to them will save costs.

It is with great reluctance that the Proprietors have adopted this course; but they have been compelled to do so in order to enable them to meet their current expenses which are very heavy.

Now that the usefulness of the Journal is so generally admitted, it would not be unreasonable to expect that the Profession and Officers of the Courts would accord it a liberal support, instead of allowing themselves to be sued for their subscriptions.

The Upper Canada Law Journal.

MAY, 1862.

PROCEDURE AT NISI PRIUS.

In the trial of every cause by jury there are functions appertaining to judge, counsel and jury, which functions are quite independent of each other, but the proper discharge of which are essential to the due administration of justice.

In common parlance, the jurors are the judges of the fact as the judge is of the law. Each counsel advocates the right of his client to a verdict on the law and facts, under the direction of the judge.

There are two sides to every cause brought before a jury. One must prevail. It is for the jury, taking the law from the judge, to decide between the parties and a true verdict give according to the evidence.

It is the duty of the judge to decide all questions as to the admissibility of evidence, to instruct the jury in the rules of law by which the evidence admitted is to be weighed, and generally to explain the principles of law governing the questions at issue.

The trial is as it were a legal combat—the counsel the combatants, the judge the moderator, and the jury the arbiters upon whose decision rests the result of the conflict.

In order to the economy of time and the decent administration of justice, law givers have found it necessary to make regulations for the conduct of counsel in their addresses to the jury.

It is as necessary that one party should begin as that the other should end. There is often a struggle for the right to begin, where it carries with it the right to reply. The "last word" with the jury by many is looked upon as an object of importance.

It is provided by the Common Law Procedure Act that the addresses of counsel to the jury shall be regulated as follows:—"The party who begins is allowed (in the event of his opponent *not* announcing, at the close of the case of the party who begins, his intention to adduce evidence) to address the jury a second time, at the close of such case, for the purpose of summing up the evidence; and the party on the other side is allowed to open the case and also to sum up the evidence if any, and the right of reply shall be the same as at present." Con. Stat. U. C. cap. 22, s. 209.

It will be observed that this enactment in no respect alters the previously existing law as to the right to begin and right to reply. It merely provides for intermediate speeches under a given state of circumstances.

First, let us consider what was the law as to right to begin and right to reply before the Common Law Procedure Act; and then, secondly, let us consider the meaning of the clause of the Common Law Procedure Act which we have quoted.

The issue or question to be tried is eliminated by pleadings. That issue has an affirmative and a negative. It is in general the duty of the party who affirms to make out his case. The burden of proof rests upon him. One test is this—what would be the consequence if no evidence were offered at all? If in such case the verdict ought to be given for one party, it is manifest that something must be done by the other to prevent that consequence. He who must give the evidence to prevent that result is the party to begin (per Alderson, B., in *Geach* v. *Ingall*, 14 M.&W. 100). Another test is to consider—what would be the effect of striking out of the record the allegation to be proved, bearing in mind that the right to begin lies on whichever party would fail if this step were taken (per Alderson, B., in *Millis* v. *Barber*, 1 M. & W. 427).

To the rule as just stated there are a few exceptions, as in actions for libel, slander, and injuries to the person, in which cases plaintiff has the right to begin though the affirmative of the issue be on the defendant (per Parke, B., in *Cannam et al.* v. *Farnier*, 3 Ex. 698). We cannot at present enter into any examination of the exceptions. We must content ourselves with referring to Taylor on Evidence, 2 Edn. p. 319.

It is the practice of skilled counsel, conscious of a right to reply when beginning or opening a case, to confine themselves to a brief statement of the facts, and then to call the witnesses in proof of the facts stated. A party is not bound by an inadvertent statement made by counsel in opening a case, where such statement is promptly retracted. (*Jannette* v. *Great Western Railway Co.*, 4 U.C.C.P. 488.)