DIARY FOR DECEMBER.

1. Sat...Last day for delivering appeal books.
2. SUN..*Advent Sunday.*
6. Thur..Rehearing term in Chancery.
7. Fri....Law Society Convocation meets. Rebels defeated at Toronto, 1837.
8. Sat...Michaelmas Term ends.
9. SUN..*2nd Sunday in Advent.*
11. Tues..General Sessions and County Court Sittings.
15. Sat....Court of Appeal sits. Prince Albert died, 1871.
16. SUN..*3d Sunday in Advent.*
17. Mo:....First Lower Canada Parliament met, 1792.
21. Fri...St. Thomas. Shortest day.
23. SUN..*4th Sunday in Advent.*
24. Mon...Christmas vacation in Chancery, and vacation for Judges Q.B. and C.P. sitting singly.
25. Tues..Christmas Day.
26. Wed..Upper Canada made a Province, 1791.
27. Thur St. John's Day, (the Evangelist.)
30. SUN..*1st Sunday after Christmas.*

CONTENTS.

THE
Canada Law Journal.

Toronto, December, 1877.

"Lex," in the last number, drew our attention to the real decision of the Court in *Hutchinson* v. *Beatty*, 40 U.C.R., 135. Upon further consideration of the case, we admit that our correspondent is right, and that we misconstrued the observations of the Court upon an argument advanced by the counsel, that a limitation of time for the removal of timber sold must be implied from the language of the statutes.

SUPREME COURT REPORTS.

We have just received the first two numbers of the reports of the Supreme Court of Canada. The first number contains the cases of *Kelly* v. *Sulivan*, and *The Queen* v. *Taylor*, heard in June, 1876, and judgment given on January 15th, 1877. The second number contains four cases, in the last of which judgment was delivered on 27th February, 1877. There is no explanation given as to the delay in producing these reports. The reporter has not therefore the merit of promptitude; in other respects his work, we regret to say, cannot be commended.

It was hoped that the large remuneration given would have secured the services of some professional man, of general information and experience, and, if possible, not only familiar with the laws of the Province of Quebec, but also with those of the other provinces, who could well and intelligently report the decisions of the Court of final resort in this Dominion. Mr. Duval may be a good French Lawyer, but of the laws of the English speaking Provinces, of vastly more importance in wealth and population, he is profoundly ignorant. An earnest study for a few days of the excellent reports published in England would at least have enabled him to present the result of his labours to the profession in a style somewhat resembling those excellent models. It is manifest, however, that he has made no effort to fit himself for his sufficiently easy, but, as far as it goes, somewhat important position. We must hope that in time, when he has gained experience, and has seen the necessity for improvement, he will be found more equal to the occasion.

Let us now examine these reports and see whether our introductory observations are not fully warranted. The first case is *Kelly* v. *Sulivan*. We

are here given a very short and very imperfect introduction, which concludes by saying that "The nature of the questions decided, and the manner in which they arose, are fully set forth in the judgments given by their Lordships." Then comes the argument, which, it is not using too strong language to say, is, without first reading the judgments, absolutely unintelligible and meaningless. When the judgment of the Chief Justice has been carefully read, it is possible to ascertain to a certain extent what counsel were driving at. This case concludes with the judgment of Fournier, J., given, as we presume it was pronounced, in French; and this remark also applies to *The Queen* v. *Taylor*. Though, of course, *we* are excellent French scholars, and familiar with all other languages, and full of all learning, it may happen that some of our brethren in the various Provinces of the Dominion, except one are not quite as familiar with Lower Canada Law French as they might be. If some of the judgments of the Supreme Court are to be published in a foreign tongue, it will be necessary for those who are in charge of the education of law students in the English speaking Provinces to insist upon the French language being added to the curriculum. The learned reporter forgets that the major part of his readers do not know French, and are not likely to learn it simply for the pleasure of reading an occasional judgment in that language. We notice, however, in the second number that the English version is given. So possibly our remarks on this point may now not be necessary.

In the case of *The Queen* v. *Taylor*, the statement shews that the reporter does not know the difference between an action and an information. He states also that the "Attorney-General joined in demurrer," (p. 66) without having stated previously that there was a demurrer. The English language is played tricks with a few lines further on. The last paragraph on the same page is worded so clumsily as to require the reader to "take time to consider."

The cases are cited with about the same uniformity and exactness as they appear in the report of an argument in a country newspaper, *ex. gr.*—we see "M. and W." and "M. & W." beside each other. On another page, "U. C. R." and "U.C. Q.B." The names of cases, of text books and of reporters, are sometimes printed in "Roman" and sometimes in italics. In fact there is a super-abundance of the latter type to be found throughout. "*Earl*, C. J." is given for *Erle*, (p. 89;) "Lord St. Leonard," for *Leonards*, (p. 95;) "Patterson, J." for *Patteson*. The authorities cited by counsel have not been properly verified, ex. gr.—the case of *Holmes the Spiritualist* is referred to, but no citation is given of the report where the case may be found. So, a reference to 14 Ves. should have been given in connection with *Huguenin* v. *Baseley*, not *Huguessin* v. *Basely*, as printed. There is, also, a pleasing variety in the style of the type used in these references (compare pp. 109 and 116).

In *The Queen* v. *Taylor*, the reporter, amongst many minor inaccuracies, has not taken the trouble even to spell correctly the names of the attorneys for the respondent.

The second number begins with the case of *Boak et al.* v. *The Merchants' Marine Insurance Co.* There is no caption or short heading to the digest of this case. In another case may be noticed such pure carelessness and want of uniformity as this—"Ritchie J." and "Mr. Justice Henry," (see pp. 214, 230,) and other minor matters without end. It may be said that these things are of little consequence, and if the matter of the reporting were well done one might excuse

them in a beginner. But unfortunately the whole thing is bad.

We have not referred to a tithe of the mistakes and omissions in various places, nor to the evidences either of carelessness or lamentable ignorance on the part of the reporter. We have referred to enough to make it apparent that some change is necessary. The usefulness of the Supreme Court will be much impaired if reports such as the numbers before us are allowed to be published.

THE LEGAL EFFECT OF A CHEQUE.

In *Keene* v. *Beard*, 8 C.B.N.S. 372, Mr. Justice Byles says a cheque is an appropriation of so much money of the drawer in the hands of the banker upon whom it is drawn, for the purpose of discharging a debt or liability of the drawer to a third person. If this is to be taken without any qualification it would lead to this result: that a cheque *per se* amounts to an equitable assignment of so much money as it calls for in favour of the payee. After this manner Judge Story, in *In the matter of Brown*, 2 Story, 516, speaks of a cheque as an absolute appropriation of the sum named therein, in the hands of the bank for the benefit of the cheque-holder. But it is submitted that this is not the case in law, so far as the bank is concerned, until at least there has been a presentment and demand for payment. In the case of *Schroeder* v. *Central Bank of London*, 24 W.R,, 710, Archibald, J., says: "A cheque is simply a request to pay so much money; and it is a revocable request. It does not purport to be an assignment at all." And in the same case the like views were expressed by Brett, J., that the cheque is but an order to pay, and not an absolute assignment of anything, To the same effect as this is the decision of the Master of the Rolls in *Hopkinson* v. *Forster*, L. R. 19 Eq. 74, where he holds that in equity a cheque is not an assignment by the drawer *pro tanto* of his balance at his bankers. And in *Caldwell* v. *The Merchants' Bank*, 26 C.P., 294, it was held upon demurrer that the holder of a cheque, by the mere fact of its being drawn in his favour, acquires no right of action in equity, as upon an equitable assignment, against the person upon whom it is drawn. There is an important case of *Lamb* v *Sutherland*, 37 U.C.R., 143, where most of the authorities bearing on this question are collected.

It is very clearly decided that the death of the drawer before presentment, operates as a revocation of the request to pay, because upon a man's death his assets go to his personal representatives: *Tate* v. *Hibbert*, 2 Ves. Jr. 111; *Cumming* v. *Prescott*, 2 Y. & C., Ex., 492. It is very commonly laid down in the text-books that if the bank honours the cheque by payment, in ignorance of the death of the drawer, it will be absolved in a court of Equity. Nevertheless this view may be perhaps relegated to that region of law which is spoken of as "law taken for granted." Recent decisions are at variance with this proposition, though we are not aware that the point has been expressly decided. In *Hewitt* v. *Kaye*, L.R. 6 Eq., 198, it was held that the delivery of the donor's cheque on his banker, which was not presented before his death, did not amount to a *donatio mortis causâ*. Lord Romilly, M.R., said: A cheque is nothing more than an order to obtain a certain sum of money. It is an order to deliver the money; and if the order is not acted upon in the lifetime of the person who gives it, it is worth nothing. It is worth nothing until acted upon, and the authority to act upon it is withdrawn by the donor's death. A similar decision was given by Vice-Chancellor Bacon in *Beak* v. *Beak*, L. R. 13 Eq. 489, where he is reported thus: "If

the cheque is not presented till after the donor's death, for the amount of that cheque his estate is not liable." *When the cheque is presented*, the distinction in such a case is marked in *Bromley* v. *Brunton*, L. R. 6 Eq. 275, where it was held that this was a good gift *inter vivos*, though the payment of the check was refused because the signature was doubted, and the drawer of the cheque died the day after. Sir John Stuart, V. C., said: "The effect of the cheque was to appropriate so much of the donor's money, and the funds are in the hands of the executors just as much liable to the payment of the cheque as they were in the hands of the banker."

HON. WILLIAM HENRY DRAPER, C.B.

Last month we chronicled the death of this distinguished man and eminent jurist, the last of the Judges of the old Court of Queen's Bench. It needs not that we should again state how great the loss has been. It has not, however, come as a sudden blow, for his failing health had gradually taught us that very soon the brilliant lawyer, and the courteous, honorable gentleman must leave the scene of his labours and his triumph. The loss indeed occurred before he went to England on leave, for it was then becoming evident that his time for work was rapidly passing away, and that the end was comparatively near. Such, however, was the strength of his constitution, that for months, weakened as it was by constant and often intense pain, it resisted the last enemy. How bravely and patiently he bore his sufferings, without a murmur, calm, kind and thoughtful to the last, is known only to those few who were constantly with him.

Some years ago when speaking of the address presented to Chief Justice Draper, on his leaving the Court of Queen's Bench for the Court of Appeal, we briefly referred (ante vol. 5, p. 29) to the main incidents of his life. It will, however, be interesting to those who may not have that volume at hand to recapitulate them here, with a few additional particulars.

Chief Justice Draper was born in the County of Surrey, in England, on the 11th of March, 1801. His father was the Rev. Henry Draper, D.D., Rector of St. Antholin, Watling street, London, and afterwards of South Brent in Devonshire. He at first chose the sea as a profession, and had he chosen to remain there, though Canada would have lost one of her brightest ornaments, another famous name might have enriched the proudest roll of England's worthies. His cool head, fearless courage, powers of command and endurance would have made him a sea captain second to few. On the deck of an East Indiaman he shewed the stuff he was made of, when, alone at his post a young cadet, he defended it from mutineers till assistance came, felling one of his assailants dead at his feet with a blow from a handspike, his only weapon. But he had other gifts which fitted him for a still higher position in the service of his country—a keen intellect, sound judgment, a ready tongue, and a polished eloquence were combined with a retentive memory and great industry. It was well therefore that young Draper left his first love, (though he never forgot it), and came to this country to seek his fortune.

He arrived at Cobourg on the 4th June, 1820, and three years afterwards commenced the study of law in the office of Thomas Ward, Esq., of Port Hope. He subsequently went into the office of Hon. G. S. Boulton, and for some years added to his slender income by acting as Deputy Registrar of Northumberland and Durham. Like many other men known to fame he married early in life, while yet a student, in the year 1826. His choice was Miss White, daughter of Capt.

George White, R.N., who survives him. At this time he lived some seven miles from his office, but he always walked there and back. Those that know this will not so much wonder at the regularity with which, in storm or sunshine, up to the time of his last illness, he walked every Sunday to and from St. James Cathedral, where he was a constant worshipper.

After he was called to the Bar he came to Toronto, and took charge of the business of Sir John B. Robinson, then Attorney-General, and at his suggestion, he having been much struck with the manner Mr. Draper had prepared for trial an intricate case on real property law.

Mr. Draper was called to the Bar 16th June, 1828, at the same term as Peter Rapelje and David Lockwood Fairfield, and the term previous to the calling of Henry Sherwood, Judge Hagerman, Judge Sullivan and Chancellor Spragge, and soon took a foremost place amongst the many eminent men of that day. On 18th November, 1829, he was appointed Reporter to the Court of Queen's Bench, which office he held until he became Solicitor-General. In 1842 he was given his silk in conjunction with Henry John Boulton, Robert Baldwin, Henry Sherwood, and James E. Small.

The story of Mr. Draper's life from the time that he went to Parliament until he was appointed to the Bench is the history of Canada; and we do not propose to speak at any length of this most eventful period of our country's history. Suffice it to say that early in 1836 he was elected to the Legislative Assembly as member for Toronto, and in December he was called to the Executive Council without a portfolio. On the 23rd March, 1837, he became Solicitor-General, which position he held until the Union of the Provinces, under Lord Sydenham. On the 13th February, 1841, he became the first Attorney-General and Premier of United Canada, Robert Baldwin being Solicitor-General. On 10th April, 1843, he was made a Legislative Councillor; but at the request of his friend, Sir Charles Metcalfe, the then Governor-General, whom he much esteemed and supported manfully, he resigned his seat in the Upper House and again became Attorney-General, sitting in the Legislative Assembly as member for London. On 12th June, 1847, he was appointed a Puisne Judge of the Court of Queen's Bench, then composed of five judges, in the place of Mr. Justice Hagerman, deceased. How faithfully he served the successive Governors of the Province, and how eloquently he upheld and fought for what was then a falling cause, turning defeats into apparent victories by his marvellous persuasiveness and skill as a debater, and how gladly he left the turbid sea of politics for a profession that he loved—are all recorded in the pages of history. He did not escape, as of course he could not, the sneers and jealousy of pretended friends nor the abuse of malignant partizan opponents at a time when political parties were at daggers drawn, when old things were passing away, and when all things were becoming new. Bookmakers even of the present day unfamiliar with the true position of matters which transpired but thirty years ago, may still reproduce the silly sneer or the worn out story of an hour. But the time will come when full justice will be done to the memory of the most subtle legal intellect, the most able lawyer, the most accomplished speaker, and one of the most courteous gentlemen that Canada has as yet seen—one also whose name has not in a long life-time been tarnished by any dishonourable act; and when his faults, for faults of course he had, will be weighed with a true balance, and he will be judged in relation to the times wherein he lived and the circumstances surrounding a most trying political situation.

Mr. Draper's talents as an advocate

were of a high order, but he was not as successful as many men far inferior to him in learning and intellect. His language was most elegant, and it might have been said of him as was said of Wilberforce, "How the English trickles on his tongue." But his speeches, though perfect in their way, did not go to the hearts of men as did the burning words and eloquent, soul-stirring utterances of his friend and cotemporary, Mr. Hagerman, who is said by those who have had a good opportunity of judging to have excelled all men of his day in Canada in public speaking, and to have been probably the best Nisi Prius advocate that has as yet appeared at our Bar. Mr. Draper spoke "over the heads" of the jurymen it has been said; they were in fact unable to appreciate the beauties which a more educated class so much admired. There was also probably a want of that mesmeric sympathy without which the most faultless speaker fails to convince those hearers who must be reached through their hearts rather than their heads. But when Mr. Draper spoke to an audience of a higher stamp, as when addressing the House of Parliament, or the Bench, or the Bar, or some gathering of educated men, his words charmed like the sound of evening bells. His arguments were arranged with a crushing, logical sequence, whilst his thoughts (the thoughts of a man of intellect and high mental culture), clothed with the most appropriate words and elegant language flowed like a river, without hesitation and without apparent effort.

It will be as a judge, however, that Mr. Draper will be best known to posterity. His career on the Bench occupied a period of over thirty years. He was first appointed, as we have seen, in June, 1847. On 5th February, 1856, he succeeded Sir James Macaulay as Chief Justice of the Common Pleas, and many practitioners will remember how the business flowed into that Court during his presidency. He remained there until he was transferred to the Court of Queen's Bench, becoming Chief Justice of Upper Canada in place of Chief Justice McLean, who was made President of the Court of Appeal on the 22nd July, 1863, which office was rendered vacant by the death of Sir John Beverley Robinson.

After spending twenty-one years in the unremitting discharge of his judicial duties, Chief Justice Draper, in March, 1868, was induced by his friends to ask for, and of course obtained, six months' leave of absence, which he spent in a visit to the Southern States. His next and only other leave was when he went to England in September, 1876. If ever holidays were earned these were. He was one of the old-fashioned men who knew no call but that of duty. His own ease and comfort had no place in his vocabulary. It is well to keep in remembrance the brave, devoted, old-time names of Robinson, McLean, Macaulay, and Draper, as beacons to encourage those who, coming after them, would fain build up such a worthy, undying record as these have left behind them.

Mr. Draper's excellence in his judicial capacity was not only that he was a deep read, sound lawyer, expressing himself with remarkable clearness (and, of course, did justice between the parties without fear, favour or affection—the judges of Upper Canada have ever done that). But it was that, in looking upon law as he did as a science, he became its expounder and teacher, and was not merely an arbitrator to settle a disputed point between two litigants. His judgments were not addressed to the parties to the suit; these persons were subsidiary to and only appeared to have been introduced as illustrations of the point of law under discussion. In this respect there was a marked difference between Mr. Draper and his

great predecessor, Sir John B. Robinson. The latter evinced a desire in his judgments to convince the parties of the correctness of the conclusions at which his mind had arrived, a kindly endeavour from out the large-hearted sympathy of his nature, to prove even to the disappointed suitor that the law was right and he was wrong. Although this feature prevented the former from winning the hearts of the people to the extent that the latter did, it nevertheless makes his judgments possibly of greater value to the profession as purely legal problems.

No judge on the Canadian bench, with the exception of Chief Justice Robinson, whose judgments must be looked at from a somewhat different standpoint, has left his mark so distinctly on the jurisprudence of this country. His law is clean cut, no jagged edges; no ends to pick up at the end of a judgment. He never deviated from the point at issue. He gave the law, the whole law, and nothing but the law on the particular subject in question at the time. No *obiter dicta* were dropped, as they too often are, to obscure the legal proposition before him, or to give rise thereafter to the endless perplexity of case lawyers or diffusive judges. It has been said that Sir John Robinson resembled Lord Mansfield in his desire to soften the rigour of the Common law. The tendency of Mr. Draper's mind was rather to uphold the law and its practice in their strictness; but this even had its advantages, as expressed in what has been said of Mr. Draper's rulings, "that one knew always where to find him."

As a judge at Nisi Prius he was preeminently satisfactory to the Bar and to the public. His demeanor was dignified and courteous; and he brooked no interference with or derogation of the majesty of the law. His decisions were given in his own peculiarly clear, unhesitating manner, carrying conviction with them, and rarely reversed in Term. Juries, as a rule, paid great deference to views expressed by him in charging them, but he was as careful to leave them to perform their proper functions without interference, as he was to reserve to the Court its duty in laying down the law regardless of consequences. But though his charges were admirable, they were not always sufficiently down-right and plain spoken for the average juryman. We remember hearing an old friend of his, who held a brief in the case, a heavy commercial suit with a special jury, speaking of an incident illustrative to this. The Chief took great pains to explain the matter, and delivered what the Bar spoke of as a faultless charge. At its conclusion to his great mortification, as he afterwards stated, one of the jury asked him a question which shewed that he had utterly misunderstood the real nature of the dispute. In his sentences in criminal cases he was said to have been somewhat severe, having a strong opinion that this was necessary for the protection of the public.

We have before us an address presented to him on 10th October, 1868, by the grand jury of the city of Toronto. His reply exemplifies traits in his character which were well understood by those who knew him well. In one part of the address the grand jury, after speaking of the urgent necessity for the establishment of a reformatory for girls, spoke of the propriety of inflicting corporal punishment in certain cases. The Chief Justice in his reply is reported to have said:

"The allusion to the reformatory for boys and girls, the propriety of establishing which had been so frequently discussed by the public press, afforded him an opportunity of expressing as he had always done when the subject was mentioned, the hope that the government would consider it their duty to prepare for the erection of such institutions, and he had no doubt that the beneficial effect would soon evi-

dence itself in the improved condition of the class of criminals who might be sent for a limited time beyond harm's reach instead of being confined in jails. Another subject was alluded to in the presentment, namely, the infliction of corporal punishment upon the incorrigible class of juveniles and hardened adults, for whom no term of jail confinement could be considered an adequate punishment for the crimes they committed. He himself had always expressed from the bench whenever he had occasion to refer to the subject, the opinion he entertained of the propriety of restoring to this species of punishment in the cases referred to, and he had no hesitation in now declaring his cordial concurrence in the recommendation on this point by the grand jury, nor had he any hesitation in declaring that the class of men, calling themselves human beings, whose brutal and ruffianly conduct, frequently towards women, inflicting upon them serious bodily harm, and many of them their own wives, whom they were bound to protect, should be the first on whom this corporal punishment should be inflicted. He never had any of the mawkish sympathy which unfortunately but too often exhibited itself in behalf of this brutal portion of the community, sanctioning as it were ferocious attacks on the unprotected of the other sex, and whom every effort known to the existing laws had hitherto been of no avail in restraining such lawless propensities."

The grand jury on the same occasion alluded to the rumored retirement of the Chief Justice from the Queen's Bench in the following words:

"In thanking your Lordship for the able and lucid remarks that you were pleased to address to us at the opening of this court, the grand jurors cannot avoid referring, with great regret to the current rumor, which points to the probable retirement of your Lordship from the Bench, which, first as Puisne Judge, and subsequently as Chief Justice, you have occupied for about a quarter of a century. They would fain hope that the rumor is unfounded, as the loss to the public by your retirement would be deeply deplored by the community at large. If, however, from ill-health or other causes, you should feel constrained to resign, your Lordship may feel assured that your long and laborious services in the administration of justice, which you have discharged with eminent impartiality and ability, will ever be appreciated by the people of Ontario."

The grand jurors concluded with an expression of their sincere desire that, on his retirement, he might enjoy that peace and quiet of mind which are inseparable from a conscientious discharge of the arduous duties to which they had referred. His Lordship replied in feeling terms, thanking the grand jury for their good wishes, and intimating his willingness still to serve his country should his services be required in some position where his energies might not be taxed to the same extent as they were in his then present position. He concluded his remarks by indulging the fond hope that when it was God's wish to remove him from the world, that the services which he was prepared thereafter to do for his adopted country would secure for his memory the kind appreciation which the grand jury had so feelingly expressed in regard to his past judicial conduct.

The address presented to Mr. Draper by the Bar of Ontario when he took his seat as President of the Court of Appeal, and his reply thereto, were published in our columns in February, 1869; but, for the sake of completeness, we repeat it:

"Her Majesty having been graciously pleased to accept your resignation as Chief Justice of Upper Canada and subsequently to appoint you as President of the Court of Error and Appeal, we, the Law Society of Upper Canada, beg leave respectfully to address you, and to convey to you our sincere thanks for the unvaried courtesy and kindness which, in the exercise of your judicial office, the members of the legal profession have received at your hands, for a period extending over more than twenty years. It is to us a subject of unfeigned satisfaction that your talents and learning are not to be lost to the country, but that you will hereafter preside in the Court of ultimate resort in this province. We trust that on an occasion like the present you will excuse our calling attention to the course of your professional life as an example and encouragement to those who devote themselves to the study of law, as showing that, without any adventitious aid, but solely by the exercise of your own ability and industry, you have successfully, with satisfaction and applause, discharged the duties of Solicitor-Gen-

eral, Attorney-General, Puisne Judge and Chief Justice.

"That you may long continue to fill the dignified position which you now hold, is the sincere prayer of the members of the Law Society."

The reply was as follows:

"I thank you very sincerely for this address. Since my first appointment to the bench, it has been my constant effort to cultivate the most friendly relations with the bar, and I feel no slight gratification at my success, as testified by this mark of your approval, in which you mingle the expression of your satisfaction at my past career with a kind wish that I may yet awhile continue to discharge judicial duties. I have, in my turn, to express my warm acknowledgments to the bar, generally, for their universal attention and respect to me in my intercourse with them as a judge, as well as for unnumbered marks of kindness and regard to me individually. If I have attained any success in my efforts to maintain that confidence in the purity of the administration of justice in this Province, which existed in the days of my eminent predecessors, I owe it, first, to the co-operation of those learned judges who shared my labors, and next to the ability and assiduity of the members of the profession whom you represent. Upwards of forty-five years ago I first entered my name on the books of the Law Society, of which I believe I have still the honor to be a bencher; and though I passed some years in the active duties of public life, I never severed myself from the diligent practice of my profession. I rejoice that while sinking into the vale of declining years, I am still thought able to be of use, and that I can maintain the connection which has existed during the best part of my life. I trust that I shall be enabled to pursue the same course which has procured for me this flattering mark of your esteem, and I look forward with a hopeful confidence to a continuance of that support and assistence to which I have been so deeply indebted in my past career."

The name of Chief Justice Draper will appear in the history of Canada, not merely however as a lawyer. He took an intelligent and large interest in the welfare of his adopted country. In his answer to an address presented to him on the occasion of the opening of the new court-house for the county of Norfolk, in the year 1864 (see 10 U. C. L. J. 313) he said it was not the least proud one of his recollections, that when in political life thirty-three years previously, it was his pleasurable duty to introduce into the Legislature of Canada, at the instance of its originator, and framed by him, the bill which was the foundation of that great code of common school education, which, in the annals of history, would render Dr. Ryerson's name immortal.

In 1857, Mr. Draper, then Chief Justice of the Common Pleas, was appointed by the Canadian Government as a special envoy to England to lay before the Home authorities Canada's rights in connection with the Northwest territories. This appointment was much spoken against by some of the party organs of that day, and Mr. Draper, of course, came in for his share of hard words. It is now, however, we believe, universally admitted not only that the selection was itself the best that could have been made, but that it was also a position which the Chief Justice could honorably accept. That he did accept it was always to us the best proof of this, and time has justified it.

In the year 1854 he received the ribbon of a Companion of the Bath, as a mark of special favor for his services. He was offered knighthood more than once, but declined it.

Mr. Draper was the first President of St. George's Society in Toronto, and also first President of the Toronto Cricket Club, (of which, in subsequent years, his youngest son was a distinguished player.) He was at one time President of the Philharmonic Society. We learn from Mr. Scadding's Toronto of Old, that Mr. Draper presented to the inhabitants of Toronto, on his ceasing to be one of its representatives, a public clock which was placed in the belfry of St. James' Cathedral. This gift, however, was unfortunately destroyed when the church was burned in 1849. He took great interest in later years in the proceedings of the

Church Association, of which he was President. No important step was taken without consulting him, and their tracts and papers were, we understand, always submitted to him for his advice and concurrence.

Mr. Draper was a man of great literary taste, and kept up his general reading to the last. His favorite out-door recreation was the cultivation of his garden. Many a pleasant walk has the writer had with him there. Whatever he did was done well, and done thoroughly, and his garden was no exception, his own hands doing much of the work; his taste and intelligence making the whole a success.

Though the Chief Justice had a keen zest for the amenities and enjoyments of life, in later years he appeared but little in public, and seldom left his own fireside. Few, however, could make themselves more agreeable, and to those who had the privilege of his friendship, his conversation was peculiarly charming. Few men remembered more clearly the history of the past, and few knew more of what was going on in the world around him, or could so shrewdly and learnedly discuss men and things of the present. The charm of his courtly manner was always great, but the softening influence of age and his many trials made it irresistibly so. Those who had only seen him on the bench could faintly understand this, but his intimate friends thoroughly appreciated its truth. Though never harsh in speech, and never allowing his temper to get the better of him, his rebuke cut like a knife when called upon to notice any dishonorable act or any injustice or impropriety, or when any unprofessional conduct was brought to his notice.

A learned, clear-headed man himself, with a wonderfully keen and quick perception, and with a power of sarcasm seldom equalled, he may sometimes have seemed impatient with those whose density he could not readily enlighten. This, however, was not the case with those who honestly tried to do their best. What he abhorred was *pretentious* ignorance, and stupidity bred of indolence. Woe betide the counsel that "threw his case" at the Chief Justice, but the youngest and rawest student who had made a faithful endeavour to work up the simplest point of practice in chambers was sure to receive full meed of consideration at his hands. He was not popular with the Bar in the sense that some judges have been, but what was better, he had the unqualified respect and admiration of every barrister whose good opinion was worth having.

No one was ever more ready to give to others the benefit of his knowledge and experience, on all matters on which his opinion might be asked. His brother judges have time without number gone to him for his advice on difficult points, and the wonderful stores of his mind and his memory were opened to them in no niggard fashion. His public duties were onerous and devotedly performed. In private life, he had his full share of sorrows and trials, but he had a brave, self-contained and enduring nature that sought not sympathy, and he was too strong a man "to wear his sorrows on his sleeve for daws to peck at." In his own house he was kindness and forbearance itself, a loving father adored by his children.

His family was large, five sons and four daughters. He followed seven of them to the grave. Only two survive him, Mrs. Hamilton, the wife of John Hamilton, Esq., County Attorney at Sault Ste. Marie, and Major Draper, also a barrister, but now chief of the police in Toronto. His eldest son, William George Draper, was for some time County Judge at Kingston, a lawyer of ability, and author of an edition of the Rules of Court,

and a handy book on the Law of Dower.

Chief Justice Draper has left behind him a name which will never be forgotten as long as Canada is a country. His fame is in the enduring monument of its laws, and recorded in the pages of the legal records that are adorned and illuminated by the depth of his learning and the brightness of his intellect. The remembrance of the eloquent speaker, of the tall, courtly figure, and courteous manner of the amiable, accomplished and high bred gentleman, whose name was synonymous with honor, will in time fade away, but the name of Chief Justice Draper, the learned, able and upright judge, will remain, until Canada itself is forgotten.

His end was perfect peace, though he of most men (in this country at least) might have succumbed to the pride of intellect, and might have boasted that himself had placed him in the high position he occupied. His humility at the last, and his simple confiding trust in the Redeemer's promise, was that of a child reposing in the utter, unquestioning love of an indulgent father. Like his great predecessors, whose names he delighted to honor, he lived an example to our profession for all time to come; and like them he died a witness of the great truths which less gifted men sometimes affect to despise.

CONSTITUTION OF APPELLATE COURTS.

Lord Beaconsfield has called down upon his head an amount of adverse criticism that would have appalled a weaker or less-experienced man. With scarcely an exception, the English papers both legal and lay, have called in question, and some have commented most severely upon the appointment of Mr. Thesiger as a Lord Justice of Appeal. Let us take an example from each class. The *Law Journal* says:

"The Earl of Beaconsfield loves to illustrate his own famous aphorism—'Nothing happens except the unexpected.' Who would have imagined that the choice of the noble Premier in the matter of the vacant judgeship in the Court of Appeal would have fallen on a gentleman who is only thirty-nine years of age, and who became qualified for the office but four months ago? * * * * * *

"Let us assume that the Hon. Alfred Henry Thesiger will do his work thoroughly well; and when we so assume we desire to add that for our own part we believe in the justice of the assumption. Is the appointment for all that, a satisfactory one? We freely admit the advantage of having judges in the prime of manhood, and we certainly are not in favour of promotion by seniority. But it is a bold enterprise to set Mr. Thesiger in an office where he may have to overrule the opinions of men like Lord Chief Justice Cockburn, Lord Chief Justice Coleridge, Mr. Justice Lush, Mr. Justice Lindley, possibly even the opinion of the Master of the Rolls or of Vice-Chancellor Hall. Is it wise, moreover, to pass over the whole body of judges of the High Court, and to resort to the ranks of the bar for an appellate judge? We know that Lord Chancellors have generally been chosen directly from the bar, and we know that the law officers of the Crown have frequently been elevated to the highest judicial posts. But Mr. Thesiger is not Attorney-General, and so cannot have the prestige or experience of an Attorney-General. These imaginary precedents do not really apply to the case. The Prime Minister has, in effect said to each of the judges of the High Court: 'Do not think that the Court of Appeal is to be recruited from your ranks, or that proof of justice talent, discretion, and industry will bring you promotion. You have got as high as you can in the judicial scale. Like County Court Judges, you will have to stop where you are.' Unfortunately, the effect of such an appointment is not limited to the existing bench. Counsel of first-rate position and practice might hesitate to accept a judgeship of the High Court, but might resolve to accept it in the expectation of promotion to the Court of Appeal. That incentive is now gone; not without prejudice, in our opinion, to the future excellence of the bench."

The *Pall Mall Gazette* at first declined to credit the then rumoured appointment. After it had become certain, that influential journal thus commented:

"The surprise at Mr. Thesiger's appointment

but little exceeded the astonishment at the appointment being made from the bar at all. Scarcely any one had doubted that Lord Justice Amphlett's successor would be one or other of the judges of the High Court; and unless the new Lord Justice were to be chosen—which, perhaps, he should have been—from the Chancery Division, it was Mr. Justice Lush who was generally supposed to possess the highest claim to promotion. But there are several others who could be named as fitting successors to Lord Justice Amphlett, and whose appointment would fully have satisfied professional and public opinion. If, however, the Lord Chancellor intended to go further afield, if he intended to dispense with judicial experience and proved judicial capacity, it was at least expected that he would make an appointment which he could justify by the traditions reserving certain judicial prizes for important political service or distinguished forensic success. But these expectations have been altogether disappointed in the selection of a nominee who is neither fitted for the post by judicial experience, by reputed learning, or even by length of years; while he can put forward no compensating claim whatever on the ground of political service or professional distinction. A Queen's Counsel whose silk gown is four year's old, and its wearer only thirty-nine, and who has never in any way distinguished himself above his fellows, has been passed over the heads of twenty judges into one of the most important judicial offices in the State. Such an appointment appears inexplicable."

These views, so far as the cases are parallel, so exactly coincide with the opinions we have expressed in relation to the Constitution of our own Court of Appeal that we make no apology for calling attention to them. We are more and more satisfied that the system practically inaugurated when the Court was recently re-organised was a mistaken one and fraught with many perils to the efficiency of the Bench and to the maintenance of public confidence, though we admit there were then some difficulties to contend with.

SELECTIONS.

NEW TRIALS FOR FELONY.

Amongst many anomalies in our law, that of granting new trials is perhaps least capable of being upheld by logical reasoning, and yet is firmly supported by a powerful argument derived from the national love of justice. We have little doubt that our system of jurisprudence was once reproached for not permitting new trials, and the frequency of them now in turn sometimes becomes a subject-matter of complaint. The earliest reported case of a new trial is not of older date than 1648, although there is evidence of their having occurred in civil causes at a more remote period. In 1757 Lord Mansfield explained that the reason why they could not be traced further back was "that the old report-books do not give any account of determinations made by the Court upon *motions*;" and commenced his judgment on *Bright* v. *Eynon*, 1 Burr. 393, by saying: "Trials by jury in civil causes would not subsist now without a power *somewhere* to grant new trials. If an erroneous judgment be given in point of *law*, there are *many* ways to review and set it right. Where a Court judges of fact upon *depositions in writing*, their sentence or decree may, *many* ways, be reviewed and set right. But a general verdict can *only* be set right by a *new trial*, which is no more than having the cause more deliberately considered by *another* jury, where there is a reasonable doubt, or perhaps a certainty, that *justice has not been done*." Now, as Mr. Patterson has recently pointed out in his elaborate work on the "Liberty of the Subject," vol. i. p. 462, "the only legal mode of reversing the verdict of a jury known to the common law was by attaint, granted by the statutes of Edward II. and Edward III., the object of which was to rehear the case by means of a jury of twenty-four persons; the law considering that the oath of one jury should not be set aside by an equal number, nor by less than double the former. If the second jury agreed, the verdict was confirmed; if otherwise, the former verdict was annulled, and the first jury were convicted of perjury and false verdict." But, continuing the judgment above cited, Lord

Mansfield says: "The writ of attaint is now a mere *sound* in every case; in *many* it does not pretend to be a remedy. There are numberless *causes* of false verdicts, *without* corruption or bad intention of the jurors. They may have heard too much of the matter before the trial, and imbibed prejudices without knowing it. The cause may be intricate; the examination may be so long as to distract and confound their attention. Most general verdicts include *legal consequences* as well as propositions of fact; in drawing these consequences the jury may mistake, and infer directly contrary to law. The parties may be surprised by a case falsely made at the trial, which they had no reason to expect, and therefore could not come prepared to answer. If *unjust* verdicts, obtained under these and a thousand like circumstances, were to be conclusive for ever, the determination of civil property, on this method of trial, would be very precarious and unsatisfactory. It is absolutely *necessary to justice* that there should upon many occasions be opportunities for *reconsidering* the cause by a new trial."

These observations seem equally applicable to *all* trials by jury. Some forty years after the decision above referred to, we find Lord Kenyon, C. J., declaring judicially from the Queen's Bench that "in *misdemeanours* there is no authority to show that we cannot grant a new trial in order that the guilt or innocence of those who have been convicted may be again examined into." But "in one class of offences, indeed," said his lordship, "those greater than misdemeanours, no new trial can be granted at all" (*Rex* v. *Mawbrey and others*, 6 T. R. 638); and up to the year 1851 no single case is reported in which even an application for a new trial in *felony* had been made. Yet, strange as it may seem, the Court of Queen's Bench at that date actually granted a new trial in a case where an indictment for felony had been removed from sessions by *certiorari* and tried at York Assizes (*Regina* v. *Scaife*, 17 Q.B. 238). Of three prisoners the jury convicted two apparently guilty, and acquitted one against whom the evidence would seem to have been more conclusive. "In the following term a rule *nisi* was obtained for a new trial, on the grounds of improper reception of evidence and misdirection. The case was argued at some length; and neither in the course of the argument, nor in the judgments which followed, was a syllable uttered on the point now in question; the attention both of the counsel and the judges seems to have been exclusively confined to the questions of evidence and misdirection; but after the judgments pronounced making the rule absolute this occurred: The counsel for the rule suggested that there was a difficulty in ascertaining what rule should be drawn up, 'no precedent having been found for a new trial in felony.' Upon which Lord Campbell is reported to have said: 'That might have been an argument against our hearing the motion.' Still, however, the rule was made absolute, and a new trial, in fact, took place." This account of the proceedings is extracted from the judgment delivered by Sir John T. Coleridge in the case of *Regina* v. *Bertrand*, before the Privy Council (1867), where they were carefully considered, after which the learned judge continued: "It appears, then, from this examination of the case that a most important innovation in the practice of our criminal law was here made without a word of argument at the bar upon it, or the attention of the Court having been for a moment addressed to it, until after the opinions of all the judges had been expressed on the point really debated. And the decision has taken no root in our law, and borne no fruit in our practice." Sir John Coleridge intimated that the Lords of the Privy Council felt at liberty to disregard it; and then reviewed the arguments adduced in favour of the principle of extending the practice of new trials, viz., the improvement of justice, "that new trials had commenced in civil matters, and advanced in them gradually, and upon consideration, from one class of cases to another; that thence they had passed to criminal proceedings, first where the substance was civil, though the form was criminal; and thence to misdemeanours, such as perjury, bribery, and the like, where both form and substance were criminal. Hitherto it was admitted that they had, except in the instance of *Regina* v. *Scaife*, stopped short of felonies, but that the principle in all was the same; and that, where there was the same reason, the same course ought to be permitted. There may be much of truth in

this historical account," said the venerable member of the Privy Council; "and, if their lordships were to pursue it into details, it might not be difficult to show how irregular the course has been, and what anomalies, and even imperfections perhaps, still remain. But they need not do this; it is enough to say they cannot accept the conclusion; what long usage has gradually established, however first introduced, becomes law; and no Court, nor any more this committee, has jurisdiction to alter it; but, on the same principle, neither the one nor the other can, in the first instance, make that to be law which neither the Legislature nor usage has made to be so, however reasonable, or expedient, or just, or in analogy with the existing law it may seem to be."

Rejecting many suggestions which present themselves to our mind in favour of new trials in felonies, and as many or more opposed to an extension of the law in this direction, let us rather, as we have heretofore sought to do, cite authorities on the subject. Of scarcely less weight than a judicial opinion is that expressed by so able a writer on jurisprudence as Sir J. Fitzjames Stephen, who fully considered the present subject at the time of the celebrated case of Thomas Smethurst, of which he says, with pointed truth: "The trial at any time would have excited great public attention; and, as it took place in the latter part of August, after Parliament had risen, it excited a degree of attention altogether unexampled. The newspapers were filled with letters upon the subject, and one or two papers constituted themselves amateur champions of the convict, claiming openly the right of what they called popular instinct to overrule the verdict of the jury" ("General view of the Criminal Law of England," p. 425). The charge was murder by poison. There was reason to think that the scientific evidence on two important points was left in an unsatisfactory condition at the trial. Sir George Lewis, the then Secretary of State, referred the whole matter to the most eminent surgeon of the day—Sir Benjamin Brodie—who stated his opinion, founded by no means exclusively on medical or scientific reasons, that 'there was not absolute proof of the convict's guilt.' This opinion was submitted to the Lord Chief Baron Pollock, who had tried the case, and Smethurst received a free pardon." Deeming this result unsatisfactory for reasons given, Sir Fitzjames Stephen attributes it to defects in the law, and discusses what they are, and how they may be remedied. "Criminal and civil procedure," he says, "would be placed on the same footing by giving the Superior Courts the right to hear motions for new trials on the same terms in criminal as in civil cases. There are several strong reasons for not taking such a course. Important and true as it is that criminal trials are thrown into the shape of private litigations, it is equally true and important that they are in substance public inquiries." He asserts that a higher degree of evidence is required to warrant a verdict of guilty than (in general) to warrant a verdict for the plaintiff, asks, "How could a Court of law say in what cases the jury ought to have doubted?" and points out the "essential distinction between civil and criminal proceedings, strong as the outward resemblance between them may be. The object of the one is to give fair play to litigants in the attack and defence of their existing condition. The object of the other is to ascertain the truth. Granting new trials is well adapted to secure the first object, but has no tendency to secure the second." A more powerful argument, which we think discloses the cause why new trials for felonies have not been clamoured for centuries ago, is that, "in criminal cases, the Crown is bound by an acquittal as much as the prisoner by a conviction. After a verdict of not guilty, a man might leave the dock with impunity, boasting openly of having committed the foulest murder. After a verdict of guilty, he might be condemned and executed, though others might confess their guilt and be condemned and executed on that confession. This shows that, if the prisoner is to be allowed to move for a new trial, the same right ought, for the sake of consistency, to be given to the prosecutor; but there would be great objections to this. It would shock the sentiment which dictated the maxim *non bis in idem*, and on which, by our own law, the right to plead *autrefois acquit* is founded. Considering the suspense and distress of mind which a criminal prosecution causes, this sentiment is probably rational, though the rule which is founded

on it is a rough expedient. These reasons appear to me to show that the right to move for a new trial in criminal cases would not supply the defects of the present state of things, and would probably introduce new evils. It would extend too far the litigious theory of criminal justice which already exercises quite influence enough on our law." The learned writer next asks: "Ought we, then, to institute a Court of Appeal?" and pointing out that criminals would exercise the right of appeal in almost every serious case if it were only to delay the execution of their sentences, and that the effect would be the practical abolition of trial by jury, and that jurymen's sense of responsibility would be greatly diminished, he answers the question in the negative, and says that "what is really required is a check upon the miscarriages which, in very peculiar and intricate cases, are produced by the application of that mode of inquiry which is found to be most efficient in common cases. The necessity for this check is admitted by the supervision actually exercised over the verdicts of juries by the Home Secretary. Indeed, the existing practice not only admits the evil, but provides a remedy, right in principle, though administered in an inconvenient and objectionable manner. The principle is right, because it leaves the discretion of permitting an appeal in the hands of the Government. The mode of administration is wrong, because under it a function which is really judical is discharged by an irregular, irresponsible, and secret tribunal, consisting of a single statesman who has no special acquaintance with law and no judicial experience, who can neither examine witnesses nor administer oaths, and who consummates an irregular procedure by pardoning a man for guilt on the ground of his innocence." Sir Fitzjames Stephen then proposes that the Legislature should establish a Court and procedure much resembling that improvised the other day by the present Home Secretary, with the addition only of argument and publicity. "In order to protect the constitutional authority of the jury, it would be necessary to provide expressly, as a condition precedent to the summoning of the Court, that the Secretary of State should certify that new evidence had been discovered, or that the judge should certify that he was dissatisfied with the verdict." . . . "This improvement," the author adds, "would leave one considerable abuse unaffected; it would provide security against wrong convictions but not against wrong acquittals;" and he suggests that the judge at the trial ought to have the power of requiring material witnesses, not placed in the box by counsel, to be called, and, if necessary, of adjourning the case till they were produced, and discharging the jury from giving a verdict on insufficient evidence.

To solve the problem as to the expediency of new trials for felony, it seems to us necessary only to reconcile the following propositions: Fiat justitia, ruat cælum; Interest reipublicæ ut sit finis litium; Nemo debet bis vexari pro unâ et eadem causâ; and "an Englishman should be tried by his peers."*—*Law Journal.*

REHEARINGS IN CRIMINAL CASES.

The Home Secretary has advised the Crown that Louis Staunton, Patrick Staunton, and Elizabeth Staunton should undergo penal servitude for life, and that a free pardon should be granted to Alice Rhodes. So ends the famous Penge case, which perhaps has proved of some practical utility, directing attention to the question of rehearings, appeals, or new trials in criminal cases. It is remarkable that, often as the subject has been discussed, it has never been more fully comprehended; and therefore the evils which arise and the difficulties which beset it have never been understood. One proof of

* It is announced in the English newspapers that a bill will be brought before the British Parliament next session for the formation of a Court of Criminal Appeal. Sir Eardley Wilmot, M. P., formerly a County Court Judge, at Bristol, proposes in this bill that appeals shall be permissible only in cases of capital sentence, and that a prisoner condemned to death may appeal by himself or through his solicitor for a remission of his sentence, the court to consist of the three chiefs of the High Court of Justice, the three senior judges, and the Home Secretary, five to form a quorum. The Court may hear counsel for the prisoner and for the Crown, the expense of both counsel to be defrayed by the State, and the judgment of the court shall not be valid unless arrived at by at least two-thirds of its members. We much doubt the wisdom of this move.—Eds. L. J.]

this is that the phrases 'appeal,' 'new trial,' and 're-hearing' are used indiscriminately; as if they indicated the same or or similar things, whereas they all indicate things essentially distinct. The distinction between an appeal and a rehearing, as Lord Langdale once had occasion to explain, is that an appeal is on the *same evidence* to a *different tribunal*; while a rehearing, as often happened in Chancery, may be before the same judge on different or additional evidence. Again, a new trial is, of course, applicable to trial by jury, and means a trial by a different jury; of course, on oral evidence, whether of the same or different witnesses. And here arises the great difficulty as to rehearings of criminal cases, that trials must be by oral evidence, before a jury, on the ground that evidence is not reliable unless given openly, and tested by cross-examination; and that new trials would cause such delay as to interfere with the due administration of criminal justice; while, on the other hand, the mere reconsideration of the evidence, or rather of the notes of the evidence, by a judge or any other authority, is reviewing the decision of a tribunal which had all the advantages of seeing and hearing the witnesses, by the opinion of persons *without* those advantages. On questions of *law* this is not material, as the facts are not in doubt; and, accordingly, many years ago, judges at criminal trials were allowed to reserve cases, on points of law, for the decision of the judges in the Court for Crown Cases Reserved. And, by a very anomalous and unobserved usurpation of the judges, the question whether there was any evidence to sustain a conviction—though this must depend on the weight and effect of the evidence given—and that is avowedly for the jury—is regarded as a question of law which may thus be reserved; so that if the counsel for the accused in the Penge case had thought that any judge could have doubted that there was sufficient evidence to sustain a verdict of guilty, they might have asked the judge to reserve that question. But the difficulty is as to the *facts*; as to which it has always been considered a general principle that the evidence of persons who might have been called as witnesses at the trial, and were not called, is not to be regarded. Hence, in civil cases—in which new trials are allowed—it has long been established as a rule that a new trial is not to be granted on account of evidence of persons who might have been called at the trial. The reason of this rule is that it would be dangerous to allow parties to keep back evidence, and then bring it forward as a reason for a new trial. On a new trial all is left at large again; everything has to be re-proved by legal evidence; and there may be a failure of justice on the second trial through a failure of proof—by the death or absence of a witness, or loss of a document—on points not at all in dispute at the first. Consequently, as every additional trial involves a fresh risk of failure of justice, a party is not allowed to have a new trial in order to give evidence which he might have given at the first trial. Therefore, if new trials were allowed in criminal as in civil trials, no new trial could be allowed in the Penge case, for no evidence is suggested which might not have been given at the former trial. A medical witness was present for the defence at the inquest, and was not called at the trial. Any number of medical witnesses might—in accordance with a well-known rule—have been qualified as witnesses, and called as witnesses, simply by having them in Court to hear the evidence. Clara Brown was called for the prosecution, and might have been cross-examined to show that food was supplied to the deceased, or that she was not secluded. Neither the prosecution nor the prisoners, therefore, could be entitled to a new trial. And then the great difficulty arises, that it is unsatisfactory to review and reverse the verdict at an open trial by the opinion of any parsons, either on the same evidence or on additional evidence, given secretly, and such as might have been given openly at the trial. The difficulty was illustrated a few years ago in an appeal to the Judicial Committee from a decision of the Court of Arches against a clergyman, for immorality. The judge, who saw and heard the witnesses, decided against him. The Court of Appeal, who only had written notes of the evidence, reversed his judgment. In another and similar case, in which, also the clergyman had been convicted, the Judicial Committee, very properly, had the witnesses before them, and *confirmed* the conviction. On an appeal to quarter sessions—which partakes of the character

of a rehearing and new trial, the magistrates acting as a jury—additional evidence on either side may be adduced; but the witnesses are examined openly and orally in Court as before a jury, and the whole case is reconsidered, and reconsidered as a whole. This is most essential in criminal cases, especially in such as turn at all on medical evidence. For such evidence is never in itself conclusive either way; unless, indeed, it shows that the person died a natural death or a death from disease unaccelerated by any criminal act. Ordinarily, the medical evidence only shows that the death is *consistent* with the result of the criminal act; and, accordingly, in the Penge case, the medical witness for the defence was cross-examined as to whether the indications were not *consistent* with death from starvation, and admitted that they were. Whether, in fact, the death was caused by starvation depended on the whole of the evidence; unless, indeed, it was shewn by the medical evidence that the death was not so caused, which of course could not be shewn if, as admitted by the witness for the defence, the indications were *consistent* with death from starvation Hence it is shewn that the case, to be satisfactorily renewed, would have to be reconsidered as a whole; and *either* on the same evidence, *or* on that evidence and other evidence given under the same conditions openly, and subject to cross-examination. It may be laid down broadly that no opinions are worth anything which are not given subject to cross-examination. It is a common artifice of astute attorneys to *keep back* their evidence in a criminal case, suspecting it may break down on cross-examination; reserving it for subsequent appeals, when it cannot be so tested. There is a general feeling that this is very unsatisfactory. It is worse—it endangers the interests of justice. It would not be allowed in a civil case, and it is perilous to allow it in a criminal case. On an *appeal*, no additional evidence is allowable; and hence the Judicature Act provides that appeals should be by way of rehearing so as to *admit* additional evidence; but then it is at the discretion of the Court to admit it, and they do not admit it if it *could* have been given at the former hearing; and *if* they allow it, the evidence is given subject to cross examination. In a criminal case this is the more necessary because the case for the prosecution is known long before the trial; and thus in the Penge case the medical evidence was given at the inquest, and known to the prisoners, who had the trial postponed expressly to afford them the opportunity of meeting it. If, therefore, either an appeal or a new trial were allowable in a criminal case, it would not be available. And in the Penge case the mischief of allowing any force to *ex parte* statements after the trial was strongly illustrated. The medical men who wrote in the papers, having been present either at the *post-mortem* examination or at the trial, dealt only with a portion of the medical evidence, grossly misrepresented it, and never dealt with the strongest part of the evidence. It is satisfactory, at all events, that there has not been a *total* failure of justice.—*The Law Journal.*

CHATTEL MORTGAGES OF THINGS NOT IN ESSE.

The question whether a thing not *in esse*, such as an unplanted crop, may be the subject of a chattel mortgage, has been fruitful of much discussion, and there has been considerable contrariety of decision, the tendency of late being to sustain mortgages given upon such property, at least to the extent of a single crop. The case of *Dupree* v. *McClanahan*, recently decided by the Court of Appeals of Texas, involves the question, and the conclusion is in accordance with the tendency mentioned. In *Wyatt* v. *Watkins*, 16 Alb. L. J. 205, the same result is reached. Parsons, in his work on Contracts, states as a general principle (pp. 522, 523): "The existence of the thing sold, or the subject-matter of the contract, is essential to the validity of the contract," and, "a mere contingent possibility, not coupled with an interest, is no subject of sale, as all the wool one shall ever have, or the sheep which a lessee has covenanted to leave at the end of an existing time." But if "rights are vested, or possibilities are distinctly connected with interest or property, they may be sold." And it is said in Benjamin on Sales, p. 53: "Things not yet in existence, which may be sold, or those which are said to have a potential existence,

that is: things which are the natural product or expected increase of something already belonging to the vendor." In *Jones* v. *Richardson*, 10 Metc. 481, it is held that a mortgage upon goods which the mortgagor does not own at the time the mortgage is made, though he afterward acquire them, is void, the court saying that to be able to sell property, the vendor must have a vested right in it at the time of sale. See, to the same effect, *Rice* v. *Stone*, 1 Allen, 566; *Head* v. *Goodwin*, 37 Me. 181; *Low* v. *Pew*, 108 Mass. 347; 11 Am. Rep. 357, where a sale of fish, thereafter to be caught, was held to pass no title to the fish when caught. *Wilson* v. *Wilson*, 37 Md. 1; 11 Am. Rep. 518, where a sale, for a valuable consideration, of all the property the vendor then had and might thereafter acquire, was held to convey only such property as the vendor then possessed. See, also, *Moody* v. *Wright*, 13 Metc. 17; *Holroyd* v. *Marshall*, 10 H. of L. 191; *Brown* v. *Tanner*, L. R., 3 Ch. 59; *Pennock* v. *Coe*, 23 How. 177; *Galveston R. R. Co.* v. *Cowdy*, 11 Wall. 489; *Morrill* v. *Noyes*, 56 Me. 458; *Pierce* v. *Lang*, 32 N. H. 484; *Phelps* v. *Winslow*, 18 B. Monr. 431; *Arnoult* v. *Aimes*, 16 La. Ann. 225; and cases cited in *Wyatt* v. *Watkins*, *supra*.—*Albany Law Journal*.

CANADA REPORTS.

ONTARIO.

COMMON LAW CHAMBERS.

(Reported for the *Law Journal* by H. T. Beck, M.A., Student-at-Law.)

Bridges v. Douglas.

Prohibition—Division Court—Jurisdiction.

When the holder of a promissory note, payable to "A. B., or bearer," endorsed it over to a third party.

Held, that under C. S. U. C. cap. 19, sec. 71, an action might be brought against the maker and endorser in the Division Court for the division in which the endorser resided, and that in a motion for a writ of prohibition, the question, whether or not the endorsement was made for the purpose of giving jurisdiction cannot be enquired into.

[January 24.—Morrison, J.]

This was a summons calling upon the Judge of the County Court of the County of Bruce, *ex officio* Judge of the First Division Court of the said county, the clerk and bailiff of the said Division Court, and one George Bridges, plaintiff, in a suit in said Division Court, wherein said Bridges was plaintiff, and Alexander Douglas and Thomas Dixon were defendants to show cause why a writ of prohibition should not issue to prohibit said judge, clerk, bailiff and plaintiff from further proceedings in said suit upon the ground that the said Court had no jurisdiction to try the case; that the defendant Douglas did not reside within the said division, and that the cause of action against said Douglas, if any, did not arise within said division; and that said Douglas and Dixon were improperly joined as defendants in the same suit, and that the suit was substantially the suit of the defendant Dixon and not of the plaintiff; and that Dixon was not really a defendant in the suit, but the form of endorsing said note was gone through with to give the appearance of said Dixon being liable as a defendant, and to enable him to have the action brought against himself, and the substantial defendant in the division in which said Dixon resided, under C. S. U.C. cap. 19, sec. 71.

The Judge in the Division Court found that the endorser took the note *bonâ fide* before due, and that the endorsement to the plaintiff was also *bonâ fide*; stating further, that the question as to whether the endorser endorsed the note with a knowledge that he was giving a jurisdiction where none existed before was immaterial. He also held that the parties could be sued jointly, and therefore gave judgment for the plaintiff, upon which the defendant Douglas made this application.

A. Cassels, showed cause.

W. S. Smith, contra.

Morrison, J.—On this application I cannot consider the motion of the defendant Dixon, and in endorsing the note as endorser on the note, he was liable to be joined as a defendant in the suit, and that being the case, sec. 71 of the Division Court Act gives jurisdiction to the Division Court for the division in which either defendant resides to try the case. The summons must be discharged, but, under the circumstances, without costs.

CHANCERY CHAMBERS.

Re Jack, Jack v. Jack.

Administration.

Held, following *Re Shipman*, (*ante infra* p. 17), that an administratrix has no right to an administration order on merely showing that the intestate's liabilities are in excess of his personal estate, she having now a valid defence at laws to any action on the part of a creditor.

[November 5.—Proudfoot, V.C.]

This was a motion for an administration order on behalf of an administratrix, it being alleged that the personal property of the deceased was insufficient to satisfy the intestate's debts.

H. M. Howell, for the administratrix, submitted, that the decisions in *Swetnam* v. *Swetnam*, 9 C. L. J. 161, 10 Ib. 135, and *Re Ette*, 6 Prac. R. 159, were opposed to *Re Shipman*, ante, and that the latter case should not be followed. The case of *Doner* v. *Ross*, 19 Gr. 229, shows that the law was not altered by the A. J. Act, so as to affect the liability of an administratrix as stated in the reasoning given in the judgment in *Re Shipman*.

Hoskin, Q.C., for infants, relied on *Re Shipman*.

Proudfoot, V.C., thought that he could not review the decision of V. C. Blake, in the case cited; the only course was for the applicant to appeal if dissatisfied. The case was, however, allowed to stand over by consent in order that the application might be renewed on behalf of a creditor.

NOTES OF CASES.

IN THE ONTARIO COURTS, PUBLISHED IN ADVANCE, BY ORDER OF THE LAW SOCIETY.

QUEEN'S BENCH.

IN BANCO, June 30.

Boley v. McLean.

Consol. Stat. U. C. cap 93, secs. 6-8—Survey under.

A surveyor employed by the Government, under Consol. Stat. U. C. cap. 93, secs. 6-8, to survey a concession line alleged to have been run in the original survey, or to have been obliterated, instead of attempting to make a survey in accordance with those sections, satisfied himself that the original line could be found, and endeavoured to retrace it.

Held, following *Tanner* v. *Bissell*, 21 U. C. R. 553, that such survey was not binding under the statute; and the Court, on the evidence given at the trial, affirming the finding of the learned Judge, who tried the case without a jury, that the line so run was not in fact the same as the original line.

Semble, that in order to prove a survey which will be conclusive under the statute, the application by the County Council to the Government for such survey must be shewn.

Douglas, for plaintiff.

Robinson, Q.C., for defendant.

Thomson v. Feeley.

Agreement by secretary of proposed company—Personal liability—Equitable defence—Pleading.

The plaintiff sued defendant on an alleged agreement, that in consideration, that the plaintiff would make a promissory note, payable to the defendant's order, for $500, and delivered it to defendant to be negotiated, defendant promised that the plaintiff should, at any time before the maturity of the note, have the option of subscribing for one share of $500 in a company to be incorporated under "The Ontario Joint Stock Letters Patent Act, 1874," and called the Aldershott Match Company; and that, if the plaintiff should before such maturity decline to take said share, the said company would take up the note and indemnify the plaintiff against it. The declaration averred that the plaintiff delivered the note to defendant, who negotiated it, that before its maturity the plaintiff declined to take the share, and so notified defendant, but that neither the defendant nor the company took up the note, and the plaintiff had to pay it.

Defendant pleaded, on equitable grounds, that he was one of the projectors and secretary of said company, and as such before the issue of the Letters Patent applied to the plaintiff to take a share, which the plaintiff agreed to do on the terms of the following receipt then given by him to defendant:

"Hamilton, 13th April, 1876.

"Mr. Thomson has given me his note for $500 for one share in the Aldershott Match Company, which he has the privilege of declining at the expiry of the note; and, if so, this company will take up the note.

"C. Feeley, *Secretary*."

That defendant then gave his note accordingly: that afterwards the company was incorporated: that the defendant was a shareholder and the secretary, and in that capacity only endorsed the note to the company, which accepted it on the terms of the receipt and discounted it: that before its maturity the plaintiff notified the company that he declined to take the share, but afterwards withdrew such notice and paid the note at maturity, and was treated as a shareholder, and voted and acted as such at meetings of shareholders: that it was not the intention of either plaintiff or defendant that defendant should be personally bound by the receipt, or in respect of said note or share, but they both intended that the plaintiff should look only to

the company in his dealings under the receipt in respect of said share, and defendant was described in the receipt as secretary, in order to exempt him from personal liability, and he denied any fraud (which was charged in the second count) and denied that he contracted with the plaintiff as alleged.

Held, that the defendant was *prima facie* personally liable, there being at the time when he signed the receipt no company, and therefore no principals whom he could bind.

That part of the plea was proved, alleging the intention of the parties to have been that defendant should not be personally bound by the receipt, but that the plaintiff should look only to the company.

Semble, that this could form no defence, being in contradiction of the written agreement; but the parties having gone to trial on the plea, and there being a verdict for the plaintiff, the verdict was ordered to be entered for defendant on that branch of the plea, and the plaintiff left to move in arrest of judgment, unless defendant should elect to amend his plea.

Suggestions as to a form of plea which might shew a good defence.

Ferguson, Q.C., for plaintiff.

E. Martin, Q.C., for defendant.

Fenton v. McWain.

Tax sale—32 Vict. cap. 36, O.—Omission to return list under sec. 110—Effect of secs. 130, 155.

Land was sold in January, 1871, for an arrear of taxes assessed in 1867, under a warrant for sale, dated 20th August, 1870. The land was put on the non-resident in place of the resident roll, and the list of land liable to be sold, required by the 32 Vict. cap. 36, sec. 128, O., to be sealed with the corporate seal and signed by the warden, and to be returned to the treasurer with the warrant for sale annexed, was not so sealed, or signed, or annexed. *Held*, that the land could be sold under the 32 Vict. cap. 36, sec. 128, at any time after the taxes had been due for more than three years at the time of the warrant, as they were here; and that the placing the land on the wrong list, and the omission to authenticate and return the list, were defects cured by sec. 155—more than two years having elapsed before this suit since the execution of the tax deed.

No list was returned by the treasurer to the clerk of the land on which three years' taxes were in arrear, as required by sec. 110; and sec. 131 enacts that the treasurer shall not sell any lands which have not been included in such lists. *Held*, therefore, that the sale in this case was unauthorized, and that it was not made valid by secs. 130 or 155.

Robertson, Q.C., for plaintiff.

M. C. Cameron, Q.C., for defendant.

Writt v. Sharman et al.

Lease—Construction—Allowance out of rent.

The plaintiff leased a tavern to defendant for three years at a rent of $400 a year, payable quarterly, "the said lessor to allow the said lessee the amount he has to pay as license fees out of the first quarter's rent in each year." The license fee when the lease was executed, and for some years previously, was $85, but in the following year it was raised to $200. *Held*, that the lessee could claim no allowance beyond the first quarter's rent, the lessor being bound to allow the fee only, provided it did not exceed such rent.

Robinson, Q.C., for plaintiff.

M. C. Cameron, for defendant.

O'Callaghan v. Cowan et al.

Division Court executions—Interpleader—Insolvency proceedings—Priorities.

The bank, the three defendants C., and the defendant R., each had executions in the Division Court against one D., in the hands of defendant Cowan, as bailiff, who seized the goods in question in July, 1875, and advertised them for sale. One O'C. gave notice of claim, and there was an interpleader between him and the bank, on which judgment was given on 30th November, 1875, against the claimant.

On 15th November an attachment in insolvency issued against D., the execution debtor, and the official assignee gave notice thereof to the bailiff, defendant Cowan, who on the 4th December, being indemnified, sold the goods. The plaintiff claimed as a purchaser from O'C., who claimed under a chattel mortgage from D., dated 25th January, 1875, and obtained the goods on 27th November, 1875, from the official assignee, who knew nothing of the interpleader, and sold them to the plaintiff, from whom the bailiff took them.

Held, that as between the plaintiff and the execution creditors, the plaintiff by the interpleader judgment was postponed to them. And that while the plaintiff might rely upon the insolvency proceedings, and the claim of the assignee as superseding the executions, and re-establishing his own claim, the execution creditors, in support of their earlier profession, might set up the *jus tertii* and shew the mortgage to be void as against the official assignee.

Ferguson, Q.C., and *Norris*, for plaintiff.
S. Richards, Q.C., *Read*, Q.C., *Osler*, and *Wells*, for defendants.

KERR v. HASTINGS MUTUAL FIRE INS. CO.

Fire policy—Assignment after loss—Representation as to value and title.

An assignment of a claim to compensation under a fire policy, after the loss has occurred, is not a breach of the ordinary condition against assigning without license of the insurers; but the safer form of transfer is to assign only the money payable in respect of the loss, and not the policy, especially if the loss is partial only, and less than the sum insured.

The application for the policy described the stock in trade to be worth $5,000, and the ownership of the goods was stated to be in the two Messrs. R., whereas the value was only $3,500, and the stock only belonged to the two, the rest of the property belonged to them in separate portions, and part to the wife of one.

The statements in the application were declared by the insured to be "a just, full and true exposition of all the facts and circumstances in regard to the condition, situation, value and risk of the property to be insured, so far as the same are known to me and are material to the risk. And I hereby agree and consent that the same shall be held to form the basis of the liabilities of said company, and be binding upon me as material representations in reference to the insurance to be granted hereon." It was left to the jury to say whether the insured made any misrepresentation or misstatement in the application for insurance, or any fraudulent claim against the company, and they answered in the negative.

Held, that the whole declaration was qualified by the words "so far as the same are known to me and are material to the risk;" that the question asked of the jury was substantially a question whether the value was stated by the assured truly so far as known to him; and that on the evidence their finding could not be disturbed.

Held, also, that the words "in regard to the condition, situation, value and risk of the property to be insured" did not apply to the goods being joint or several property, and that it was not material to the risk. An allowance of $200 was made to the defendants under a condition that in case of the removal of property to save it the defendants would contribute rateably with the assured and other companies interested to the expenses of salvage, and the damage sustained by the removal.

E. Martin, Q.C., for plaintiff.
G. D. Dickson, for defendants.

EASTER TERM, June 30.

REGINA v. RODDY.

36 Vict. cap. 10, sec. 4, O.—What is a "crime."

An information under 37 Vict. cap. 32, sec. 28 and 34, O., for selling intoxicating liquor on Sunday, was held to be so far a charge of a criminal nature, that defendant could not be compelled to give evidence against himself under 36 Vict. cap. 10, sec. 4, which authorizes such evidence in a matter "not being a crime." The conviction in this case was quashed, because obtained on defendant's evidence.

36 Vict. cap. 10, sec. 4, is not repealed as to proceedings under the Tavern and Shop Licences Acts, by 37 Vict. cap. 32, O.

Grover, for the Crown.
Bethune, Q.C., and *Watson*, for defendant.

HICKEY v. FITZGERALD.

Action of assault—Evidence.

A number of people, including the plaintiff and defendant, had formed a ring for the purpose of witnessing an expected fight between two persons, one of whom was plaintiff's nephew. The plaintiff, when going towards the combatants, was assaulted by defendant, who got into a fight with him and bit his hand severely. Defendant's counsel proposed to ask the plaintiff on cross-examination as to a number of former fights in which he was said to have been concerned, but the learned Judge refused to allow this, the counsel being unable to state that it was intended for the purpose of testing the plaintiff's credibility. The evidence as to the defendant's purpose in interfering with the plaintiff was contradictory, and the jury were told that if defendant's object was only to prevent the plaintiff from interfering with the fight, and not to prevent a breach of the peace, he was a wrong doer.

Held, that the evidence was rightly rejected, and the direction right; and a verdict for the plaintiff was upheld.

The erroneous exercise of discretion in refusing to allow questions on cross-examination which are irrelevant to the issue, would be no ground for a new trial.

Lount, Q.C., for plaintiff.
McCarthy, Q.C., for defendant.

McDougall v. Campbell.

Counsel fees—Right of action for—Bill for divorce and alimony.

Held, (Harrison, C. J., dissenting), that counsel in this Province have the right to maintain an action for their fees.

Defendant having presented a bill to the Senate for a divorce from his wife, the plaintiff was retained by the wife as counsel before the committee of the Senate to oppose the bill. The defendant being informed that he must pay from day to day into the committee the costs of his wife's defence, promised the plaintiff that if plaintiff would not insist on defendant so paying these fees, he would pay them to the plaintiff when taxed. The committee having reported the preamble of the bill not proved, the wife applied to the Senate for a divorce and for maintenance, and retained the plaintiff to support such application.

Per Wilson, J.—(1.) The Senate could have no power to award alimony, and the plaintiff could not recover for his fees in promoting a bill for that purpose. (2.) If counsel fees could not be recovered by a counsel from his client, the plaintiff here could not recover upon this express contract. (3.) The Court upon such express agreement, set out in the judgment, sufficiently shewed a right of action in the plaintiff against the defendant.

Spencer, (*J. Macdougall* with him), for plaintiff.

Bethune, Q.C., contra.

EASTER VACATION.

Caspar v. Keachie.

Reviving judgment over 10 years old—Statute of Limitations.

Oct. 25.] [Wilson, J.

A judgment over 10 years old, which has not been acted on within that time, and on which no payments have been made, cannot be revived since the late Statute of Limitations of Ontario. In this case the defendant did not oppose a motion to revive in chambers, and took no steps to set the order aside for several months when execution was about to be enforced. The Judge refused to set the order to revive aside, owing to the conduct and delay of the defendant.

Nugent, for plaintiff.

G. B. Gordon, for defendant.

MICHAELMAS TERM, November 19.

Patterson v. Smith.

Lease—Estate for life—Denying lessor's title.

H., who had a life estate in certain lands, leased it for his life to defendant, one A. P., husband of plaintiff, claiming it as reversioner of H., sold the land and lease, etc., to one S., who sold to plaintiff. Plaintiff also bought the land at a sheriff's sale under an execution against A. P., at defendant's suit, in an action for 6 years rent. *Held*, that defendant might shew that his lessor's title ceased with his death, and that he was relieved from the estoppel which bound him during the lessor's life time.

Armour, Q.C., for plaintiff.

Robinson, Q.C., contra.

Marshall v. Jamieson.

Contract to deliver wheat—Failure to find cars.

Action for damages for non-delivery of wheat to plaintiff, purchased by him from defendant.

Held, that the letters and telegrams in this case shewed a completed contract.

Held, also, that the rule which applies to sales, f. o. b., on vessels, applies also to shipments, f. o. b., by rail, and that it is the duty of a vendee buying, f. o. b., to furnish the cars.

Held, also, in this case there was no sufficient evidence of a local custom making it the seller's duty to supply the cars; and

Quære, how far such a local custom would be allowed to prevail against the general rule.

Osler, for plaintiff.

C. Robinson, Q.C., for defendant.

Bartels v. Bartels.

Will, construction of—Estate for life.

J. B. devised his land, including the homestead, in fee to his sons, "subject to the following conditions, that my beloved daughters . . . shall have at all times a privilege of living on the homestead and maintained out of the proceeds of the said estate during their natural lives."

Held, that the words, "shall have at all times a privilege of living on the homestead," etc., gave the whole homestead to the daughters as a home during their lives; and that the words, "shall be maintained out of the *said* estate," meant all the estate, real and personal, mentioned in a former part of the will and not the homestead merely.

Reeve, for plaintiff.

Wallbridge, Q.C., for defendant.

Hughitt v. Saxton.

Foreign judgment—Proof of—Married woman.

A. and wife recovered a judgment for costs of defending a suit brought by defendant herein in the Supreme Court of New York to set aside a conveyance to the wife, A. being joined for conformity only.

Held, that the judgment was sufficiently proved by an exemplification certified by the clerk of the foreign court under its seal, it appearing by the certificate that the person signing was the proper clerk, and the seal was the proper seal.

A. and wife having assigned the judgment to plaintiff after A.'s assignment in insolvency, held a valid assignment for the judgment was in fact the wife's, and so was not affected by the husband's assignment in insolvency.

Reeve, for plaintiff.

Clute, for defendant.

Erb v. Great Western Railway.

Fraudulent bills of lading—Agency.

One C., general agent of defendants at Chatham, and partner of B. & Co., issued several bills of lading as follows: "Shipped by B. & Co., etc., 200 barrels flour to be delivered to " the plaintiffs at St. Johns, N. B. The bills of lading, shipping receipts with bills of exchange drawn by B. & Co. annexed, were discounted by B. & Co. at a bank, and the bank forwarded the bills of exchange for collection to plaintiff, who returned them. C. never, in fact, received any flour from B. & Co.

Held, (Harrison, C.J., dissenting), that defendants were not liable for C.'s acts, for they were not done in the course of his employment for them.

Per Harrison, C.J.—The plaintiff having acted in good faith with the person whom defendants appointed, and held out to the public as a proper person to deal with, should recover against the defendants.

The authorities as to the responsibilities of principals for the acts of agents collected and reviewed.

Bethune, Q.C., for plaintiff.

M. C. Cameron, Q.C., for defendants.

Clark v. Sarnia Street Railway Co.

Street railway—Contract not under seal—Ultra vires.

The plaintiff agreed with the defendants, a duly incorporated Street Railway Co., under a memorandum in writing, dated 18th April, 1875, not under seal but signed by the proper officers, to carry freight for defendants in his steam vessel along the line of their track—the railway not being completed till 5th July, 1875. Plaintiff carried freight during the season of 1875, and in the spring of 1876 demanded remuneration, when the manager repudiated all liability on behalf of defendants.

Held, that the company having reaped the benefit of the transaction would not be allowed to set up the want of the seal or of power in them to contract for the carriage of freight by water, and that the plaintiff was entitled to compensation for freights carried after 5th July, 1875.

J. K. Kerr, Q.C., for the defendants.

Mackenzie, (Sarnia), for plaintiff.

Beveridge v. Creelman.

Trespass to land—Dedication of highway.

In 1858, one G., a surveyor, under whom plaintiff claims, obtained a patent for the land in question, and which he had previously claimed to own. In 1857 he got up and presented to the Municipal Council a petition to open a road through his lot, as a continuation of R. street in Collingwood. The by-law was in November, 1857, and G. ran the line for the road, and the road was made. $200 being expended by the council, but not on G.'s land, where it was unnecessary. The road was used by the public as early as 1859 and 1860. G. never objected, though he placed a gate to keep cattle out of his fields, which were unfenced. Of subsequent owners of the land, some did not object to the use of the land, and others did, but none actively till the plaintiff. The road as used was not in one part of G.'s land in a line with R. street, owing to a ravine which the road followed round instead of crossing it.

Held, that G. had no power to dedicate before he obtained the grant, but that his acts subsequent thereto, did amount to a dedication.

Held, also, that the by-law established the road being passed at G.'s request.

Quære, if passed without that request, would it have done so.

J. K. Kerr, Q.C., for plaintiff.

McCarthy, Q.C., for defendant.

CHANCERY.

Attorney-General v. Walker.

V. C. B.] [Nov. 6.

Pleading—Practice—Jurisdiction—Rights of the Crown.

This was a suit instituted by the Attorney-General of the Dominion against the defendants

to enforce payment of the sum of $200,000 alleged to have been fraudulently retained by them, instead of having paid the same into the treasury of the Dominion for excise duties upon spirits manufactured by the defendants, and by them secretly disposed of. The defendants filed a demurrer for want of equity, contending that the proper Court for the Attorney-General to sue in was a Court of law, this being a legal demand, and there being no equitable circumstances connected with the claim in question requiring him to come into this Court.

Blake, V.C., before whom the demurrer was argued, held, however, that the Crown had a right to institute proceedings to enforce its claim in any of the Courts it might select, observing in his judgment that even "apart from the Administration of Justice Act I should be bound to hold, on authority, that the Crown is entitled in this Court to the relief it demands by the information filed in this cause." The 155 section of cap. 8, 31 Vict., provides that "all such duties and license fees shall be recoverable with full costs of suit, as a debt due to Her Majesty in any Court of competent civil jurisdiction." The Vice-Chancellor further observed that "under the section I think it is clear the Crown is entitled to call the defendants to an account, and that this may be done at any time after the duties ought to have been accounted for, whether the account has or has not been rendered—see *Regina* v. *Taylor*, 36 U. C. R. 1879. It is not necessary to consider whether the Crown can recover by the present proceeding all that is claimed or not. The House of Lords has laid down, in the case already referred to, *Corporation of London* v. *The Attorney-General*, that 'if there is any part of the case which would entitle the parties to a decree upon the facts stated the demurrer can not be supported. A demurrer to a bill on information, therefore, challenges the plaintiff to shew that he is entitled to some portion of the relief prayed according to the facts stated.' I think the demurrer should be allowed with costs."

REVIEWS.

Manual of Procedure in the Supreme and Exchequer Courts of Canada. By Robert Cassels, Jr., Advocate of the Province of Quebec, and Barrister of Osgoode Hall, and Registrar of the Courts. Toronto: R. Carswell, Law Publisher, 26 and 28 Adelaide Street.

This is a conveniently shaped little volume of good appearance, bound in red calf. There is an assumption about it, however, which leads to some disappointment on further investigation. It begins with a well written introduction which contains much information of interest to those who are not familiar with the history and scope of Exchequer jurisdiction and procedure in England, and then gives a resumé of the statutes and authorities on Exchequer jurisdiction and procedure in Canada, and a few observations as to Petitions of Right. The introduction, with a few unimportant notes and a full Index, is the only original matter in the volume. The various acts organizing and in any way affecting the Courts, beginning with the British North America Act, 1867, and ending with the Petition of Rights Act, 1876, are published *in extenso*. The price is $5.

Digest of Ontario Reports. By C. Robinson, Q.C., and F. J. Joseph. Part XII.

This part begins with the conclusion of the title "Mortgage," and carries on the titles to "Partition." The cases on municipal law of course appear in this number, and contain fifty pages of matter, an appalling evidence of the amount of litigation connected with this branch of law. The analysis of these cases, as shewn by the headings, is very complete. Another important title in this part gives the cases as to New Trials. Under the title "Parliament" appear the now numerous decisions on Election law, including the trial of controverted elections. Every number increases the reputation of this excellent Digest.

Elements of the Laws, or Outlines of the System of Civil and Criminal Law in force in the United States. By Thomas L. Smith, late one of the Judges of the Supreme Court of Indiana, U. S. Philadelphia: J. B. Lippincott & Co. 1878.

This is the age of Elementary treatises. There is a mania for "smattering"—a desire to know something of everything—no desire to do any single thing as well as possible, or possibly a desire to do everything to perfection, and therefore

doing all imperfectly. An age to be hereafter known as that of the Jacks-of-all-trades. The only use of this book, "designed as a text book and for general use," as the title page says, is as a school book, and in this way it will doubtless have a ready sale, especially in the country where it is published.

CORRESPONDENCE.

Supreme Court.

To the Editor of the Law Journal.

Sir,—I see by the papers that Mr. Justice Strong has been given six months leave of absence from his duties at the Supreme Court, Ottawa. Doubtless there was a good reason for this, and I only mention the matter because there are several important cases from Ontario in which judgments are to be given, and others set down to be heard next January, and though we have the utmost confidence in the opinion of the learned Chief Justice, suitors, or at least their counsel, will not have the same confidence in some other members of the Court, who are not familiar with our laws. And the absence of so able a lawyer as Mr. Strong will weaken the effect of the decisions. I must regret, therefore, the necessity which compels it at the period I refer to. Yours, &c.,

Barrister.

Township Clerks and the selection of jurors.

To the Editor of the Law Journal.

Sir,—It appears that there are township clerks who reside and have their offices in other municipalities than those with which they are officially connected; and that the business of such municipalities is more or less transacted outside of the limits prescribed by law. For instance, the selection of jurors must take place *within the municipality*, and if this important duty is performed by the selectors outside of their own municipality, their whole proceeding is illegal, and the jurors so selected cannot be compelled to attend. This is one of the evils attending *absentee* officials for a township; they should be required to reside and have their office *within* the municipality, and the clerk (being a permanent officer, and reasonably paid) should be compelled to reside within a mile or two of the centre of the township, that all might have access to him on official business with as little inconvenience to the public as possible. It is not reasonable that rate-payers residing in the front concession of a township shall be compelled to travel between ten and twelve miles to the rear of the municipality to transact business with the clerk, and perhaps find his office locked and the officer away—thus necessitating another journey. A remedy should be at once found for this state of things, or confusion may arise in jury panels.

Yours, X.

TO CORRESPONDENTS.

We have received two letters from Equity men in answer to the communication signed "Q.C.," but they are too late for this issue. They will appear next month.

FLOTSAM AND JETSAM.

"Judge not, that ye be not Judged."—In the year 1683, as Jeffreys was making his northern circuit, he came to Newcastle-upon-Tyne. Here he was informed that some twenty young men of the town had formed themselves into a society, and met weekly for prayer and religious conversation. Jeffreys at once saw in these youths so many rebels and fanatics, and he ordered them to be apprehended. The young men were brought before his tribunal. A book of rules which they had drawn out for the regulation of their society was also produced, and was held by the judge as sufficient proof that they were a club of plotters. Fixing his contemptuous glance on one of them, whose looks and dress were somewhat meaner than the others, and judging him the most illiterate, he resolved

to expose his ignorance, and hold him up as a fair sample of the rest. His name was Thomas Verner. "Can you read, sirrah?" said the judge. "Yes, my lord," answered Mr. Verner. "Reach him the book," said Jeffreys. The clerk of the court put his Latin Testament in the hand of the prisoner. The young man opened the book, and read the first verse his eye lighted upon. It was Matt. vii. 1, 2: "*Ne Judicate, ne judicemini*," &c. "Construe it, sirrah," roared the judge. The prisoner did so: "Judge not, that ye be not judged; for with what judgment ye judge, ye shall be judged." Even Jeffreys changed countenance, and sat a few minutes in a muse; but instantly recovering himself, he sent the young men to prison, where they lay a year, and would without doubt have been brought to the scaffold, had not the death of the king, which occurred in the meantime, led to their release.—*From the "History of Protestantism," by the Rev. Dr. Wylie*, for October.

A VERY singular case was brought to the attention of a Probate Court in Massachusetts recently. A man died leaving a will which divided his property equally between his wife, his child, and a child then unborn. The unborn party proved to be twins, and the executor is sorely perplexed as to whether he shall give each of the twins one-sixth of the estate, or whether he shall carry out the testator's purpose to serve all the children alike, by giving them and the widow each one-fourth, or whether, again, he shall give the widow her third, and divide the other two-thirds among the three children. The case being wholly without precedent in this State, the court gave the executor no advice, and the conundrum is to be brought before the Supreme Court.—*Albany Law Journal.*

IF police justices have not a reputation for childlike innocence in American cities, it is certain that some of them in England deserve to have such reputation. At the Salford Police Court, one Cunningham was charged with gambling on the race-course. Detective-Sergeant Eyre stated that he saw prisoner and other men playing what was known as the "three-card trick" with playing-cards on the race-course. Mr. Bennet, counsel for the defense, contended that the "three-card trick" was a game of skill and not a game of chance, because if the eye was sufficiently educated to follow the player's hand the selected card could be detected. Cases of this kind had been brought before Sir J. I. Mantell, who considered that the game was one of skill, and dismissed the prisoners. Some years ago he (Mr. Bennet) defended a person who was charged with a similar offense before Sir J. I. Mantell. At his (Mr. Bennet's) request the prisoner was brought out of the dock, placed near Inspector Lythgoe, and allowed to manipulate the cards. On three different occasions the inspector detected the "marked" card. It was, therefore, decided by the stipendiary that the game was one of skill, and he dismissed the case. Mr. Radford said that in the face of recent decisions he should follow the course adopted by the stipendiary. He thought, however, that gambling ought to be better defined, so that the law might reach cases of this description. The case was therefore dismissed.

I doubt if anybody in the world except a British country magistrate would have thought such a test of the innocence of the "three-card trick" satisfactory.—*Albany Law Journal.*

CLERICAL justices have not, as a rule, proved a success, but the Rev. Sydney Smith was an exception, according to the following sketch which we find in the *Washington Law Reporter*: "He set vigorously to work to study Blackstone, and made himself master of as much law as possible, instead of blundering on as many of his neighbors were content to do. Partly by this knowledge, partly by his good humor, he gained a considerable influence in the *quorum*, which used to meet once a fortnight at the little inn, called the Lobster House; and the people used to say they were "going to get a little of Mr. Smith's lobster sauce." By dint of his powerful voice and a little wooden hammer, he prevailed on "Bob" and "Betsy" to speak one at a time; he always tried, and often succeeded in turning foes into friends. Having a horror of the game laws, then in full force, and knowing, as he states in his speech on the reform bill, that for every ten pheasants which fluttered in the wood one English peasant was rotting in jail, he was always secretly on the side of the poacher (much to the indignation of his fellow magistrates, who in a poacher saw a monster of iniquity), and always contrived, if possible, to let him escape rather than commit him to jail, with a certainty of his returning to the world an accomplished villain. He endeavored to avoid exercising his function as a magistrate in his own village, when possible, as he wished to be at peace with all his parishioners. Young delinquents he could

never bear to commit; but read them a severe lecture, and in extreme cases called out, "John, bring me my *private gallows!*" which infallibly brought the little urchins weeping on their knees, and "Oh! for God's sake, your honor, pray forgive us!" and his honor used graciously to pardon them for this time, and delay the arrival of the private gallows, and seldom had occasion to repeat the threat.—*The Irish Law Times.*

The authorship of the phrase *Fiat justitia, ruat cœlum*, has been the subject of much controversy. It is supposed to have been first used by Lord Chief Justice Mansfield when he gave judgment reversing the outlawry of Wilkes. We have recently come across what we believe to be the earliest, if not the first use of these memorable words in a pamphlet published in 1647, entitled "The Simple Cobbler of Aggawam, in America," where it is said at p. 13, "It is less to say *Statuatur veritas, ruat regnum*, than *Fiat justitia, ruat cœlum.*"—*Athenæum.*

The Law of Nations.—The recent meeting of the Association for the Reform and Codification of the Law of Nations, at Antwerp, was, notwithstanding the troubled condition of Europe by reason of the war between Russia and Turkey, in every sense of the word, a successful one. The opening address was delivered by Lord O'Hagan, who gave an interesting summary of the progress of the movement inaugurated by the society, and spoke flatteringly of the condition of the society and its future prospects. As the Association is of American origin, we feel in this country a very deep interest in its well being, and the statements made by Lord O'Hagan will be carefully read with pleasure by every one of us. It will be remembered that the idea of the Association was suggested by the Washington Treaty and the Geneva Arbitration; that, in consequence of the favour with which it was received by leading men in this country, Dr. Miles went to Europe to submit the project for such an association, and communicated with persons of learning, ability and position in various countries, who received him with respect, and advised an attempt at permanent organization. It was proposed to hold the first meeting in New York, but, as many who had actively favored the plan could not take a journey to that place, it was ultimately resolved that such meeting should be convened at Brussels, where it was held October 10, 1873. Four annual meetings have been since held, one at Geneva, one at The Hague, one at Bremen, and the recent one at Antwerp. The growing strength of the Association is indicated by an increase in membership from ninety, when the meeting at The Hague was held in 1875, to five hundred and thirty at the time of the last gathering. These members are, as a rule, representative men of established reputation as jurists and politicians in the various civilized nations of the world. The attendance of Americans at the Antwerp conference was not as large as usual, which is perhaps not to be regretted. The representation of the English-speaking people has been heretofore disproportionately great. While it is true that Great Britain and the United States are at present more concerned than any other nation in the settlement of many international questions, the continental nations have also large interests in the matter, and should be allowed to take a more prominent part than they hitherto have in the direction and the discussions of a society that is designed for the benefit of the whole world.—*Albany Law Journal.*

RECENT JUDICIAL APPOINTMENTS.

As we go to press we learn that Mr. Justice Moss has been placed at the head of the Court of Appeal, Mr. Justice Morrison taking the vacant seat in that Court. Mr. J. D. Armour, Q.C., has been made a puisnè judge of the Court of Queen's Bench. It is a serious question whether it was desirable to place so young a man and a judge of such recent date as Mr. Moss, in the position rendered vacant by the death of Chief Justice Draper. It was thought by many, and we confess we inclined to that opinion, that for reasons which we have not space to enlarge upon, the appointment of the Chancellor might have been preferable; whilst the Court would undoubtedly have been much strengthened by the appointment of Mr. Hagarty as Chief, Mr. Moss retaining his present position. But of Mr. Moss's abilities there have never been two opinions, and in common with his many friends, we congratulate him upon the high position he has obtained. Mr. Armour is not so well known, but his legal acquirements and mental capacity are of a very high order, and his appointment is an excellent one.

LAW SOCIETY OF UPPER CANADA.

Osgoode Hall, Trinity Term, 41st Victoria.

DURING this Term, the following gentlemen were called to the Bar:—

James Vernal Teetzel.
Lyman Davis Treple.
Alfred H. T. Marsh.
Thomas Gibbs Blackstock.
Duncan Byron McTavish.
J. Wilmot Gordon.
Erastus Blair Stone.
James Henry Madden.
John Crerar.
J. Alexander McGillivray.
Wm. Seton Gordon.
Frederick Montye Morson.
Charles Wesley Peterson.
Henry Auber Mackelcan.
Edward H. Tiffany.
T. Mercer Morton.
Charles Stephen Jones.
Elias Talbot Malone.
David Steele.
Philip Sanford Martin.
John Secord.
J Melbourne Kilbourne.

The following gentlemen, members of the English Bar, were admitted and called.

Richard Willis Jameson.
Isidore F Hellmuth.

The following gentlemen received Certificates of Fitness:

Duncan B. McTavish.
J. Alexander McGillivray.
Alfred H. Marsh.
Lyman Davis Treple.
Charles Wesley Peterson.
Peter Clark McNee.
Wm. Seton Gordon.
Charles Stayner Wallis.
Luther Kendal Murton.
John McSweyn.
Daniel Spencer McMillan.
David Steele.
Robert Shaw.
Thomas William Howard.
E. D. McMillan.
John Hind Hegler.
James Crowther, Jr.
John William Hector.
Henry Mortimer East.

And the following gentlemen were admitted into the Society as Students-at-Law:

Graduates:

Walter Taylor Briggs, B.A., Trinity College.
Richardd Wornall Wilson, B.A., Victoria College.
George Beavers, B.A., Victoria College.
Edward Addison Emmett Bowes, B.A., University of Toronto.
Edward Betley Brown, B.A., University of Toronto.
Jacob Edward Lees, B.A., University of Toronto.
William Nesbitt Ponton, B.A., University of Toronto.
Paulus Æmilius Irving, B.A., Trinity College.
Alexander McBeth Sutherland, B.A., University of Toronto.

Matriculants:

Ernest Edward Kitson, University of Toronto.
James Martin Ashton, Albert College.
David Barker Stevenson Crothers, Albert College.

Junior Class:

Charles Oliver.
Arthur Virgil Lee.
Wm. Frederick Williams.
Charles Joseph Leonard.
Walter Allan Geddes.
Collin Gregor O'Brien.
Augustine Foy.
John Christie
William Bannerman.
Patrick Sarsfield Carroll.
Alexander Armstrong Hughson.
Robert McGhee Flood.
Wm. Evans Scott.
Frank Howard King.
J. Johnston Anderson Weir.
Loftus Edwin Dancey.
Samuel E. T. English.
Edward Arthur Lancaster.
Robert Alexander Porteous.
Francis Patrick Ford.
J. Rymal Taylor.
George Taylor Ware.
Robert George Barrett.

Ordered, That a graduate in the Faculty of Arts in any University in Her Majesty's Dominions, empowered to grant such degrees, shall be entitled to admission upon giving six weeks' notice in accordance with the existing rules and paying the prescribed fees, and presenting to Convocation his diploma or a proper certificate of his having received his degree.

That all other candidates for admission as Students-at-Law shall give six weeks' notice, pay the prescribed fees, and pass a satisfactory examination upon the following subjects:—

CLASSICS.

Xenophon Anabasis, B. I.; Homer, Iliad, B. I. Cicero, for the Manilian Law; Ovid, Fasti. B. I., vv. 1 300; Virgil, Æneid, B. II., vv. 1-317, Translations from English into Latin; Paper on Latin Grammar.

MATHEMATICS.

Arithmetic; Algebra, to the end of quadratic equations; Euclid, Bb. I., II., III.

ENGLISH.

A paper on English Grammar; Composition; An examination upon "The Lady of the Lake," with special reference to Cantos v. and vi.

HISTORY AND GEOGRAPHY.

English History, from Queen Anne to George III., inclusive. Roman History, from the commencement of the second Punic war to the death of Augustus. Greek History, from the Persian to the Peloponnesian wars, both inclusive. Ancient Geography: Greece, Italy, and Asia Minor. Modern Geography: North America and Europe.

Optional subjects instead of Greek:

FRENCH.

A paper on Grammar. Translation of simple sentences into French prose. Corneille, Horace, Acts I. and II.

or GERMAN.

A paper on Grammar. Musaeus, Stumme Liebe Schiller. Lied von der Glocke.

Candidates for admission as Articled Clerks (except graduates of Universities and Students-at-Law), are required to pass a satisfactory examination in the following subjects:—

Ovid, Fasti, B. I., vv. 1-300,—or
Virgil, Æneid, B. II., vv. 1-317.
Arithmetic.
Euclid, Bb. I., II. and III.
English Grammar and Composition.
English History—Queen Anne to George III.
Modern Geography—North America and Europe.
Elements of Book-keeping.

A Student of any University in this Province who shall present a certificate of having passed, within four years of his application, an examination in the subjects above prescribed, shall be entitled to admission as a Student-at-Law or Articled Clerk (as the case may be) upon giving the prescribed notice and paying the prescribed fee.

All examinations of Students-at-Law or Articled Clerks shall be conducted before the Committee on Legal Education, or before a Special Committee appointed by Convocation.

INDEX.