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DIARY FOR JUNE.

2. SUN... 1st *Sunday after Ascension.*
3. Mon... Last day for notice of trial for County Court. Recorder's Court sits.
6. Thurs. Chancery Re-hearing Term begins.
8. Sat. ... Easter Term ends.
9. SUN... *Whit Sunday.*
11. Tues... *St. Barnabas.* Quarter Sessions and County Court Sittings in each County.
16. SUN... *Trinity Sunday.*
20. Thurs. Accession of Queen Victoria, 1837.
21. Friday Longest day.
23. SUN... 1st *Sunday after Trinity.*
24. Mon... *St. John Baptist.*
26. Wed... Appeals from Chancery Chambers.
29. Sat. ... *St. Peter and St. Paul.*
30. SUN... 2nd *Sunday after Trinity.* Half-yearly School return to be made. Deputy Registrar in Chancery to make returns and pay over fees.

THE

Upper Canada Law Journal.

JUNE, 1867.

FEES ON REFERENCES.

A question arose a short time ago in Chambers, before Mr. Justice Adam Wilson, as to whether the fees payable for references, &c., to the Clerks of the Crown and their deputies belong to them, and should be paid in money, or should be paid in Consolidated Revenue Fund Stamps.

Some at least of the Deputy Clerks of the Crown have been in the habit of receiving the money, under the impression, doubtless, that they were authorised in so doing. Mr. Justice Adam Wilson, however, has expressed his opinion to the contrary:

By Rule 170 of Trinity Term 1856, it is provided that "the costs set down in the Schedule annexed, marked B., shall be those allowed in taxation."

And on referring to the Schedule, we find under the heading, "fees to be taken and received by the Clerks of the Crown and Pleas, or their Deputies, or by the Clerk of the Process," the following items:

Every reference, inquiry, examination, or other special matter referred to the Master, for every meeting not exceeding an hour.....	0 5 0
For every additional hour, or less	0 5 0

The Con. Stat. for U. C. ch. 10 sec. 27, provides for the salaries of the Clerks of the Courts, and of the Deputy Clerks of the Crown; and sec. 29 enacts that unless specially authorised, neither the clerks nor the deputies "shall take for his own use or benefit, directly or indirectly, any fee or emolument whatever, save the salary aforesaid. And all the fees, dues and profits received by, or on account of the Clerks of the Crown, and their Deputies shall form part of the Consolidated Revenue Fund of this Province."

In the case which incidentally led to the decision referred to, *Jordan* v. *Gildersleeve*, an application had been made for an order to commit the defendant for unsatisfactory answers on an examination before the Deputy Clerk of the Crown and Pleas at Kingston. The examination papers produced on the application were not stamped, the fees having been paid to the Deputy Clerk of the Crown, in money. His Lordship, however, refused to read these papers until the necessary stamps were affixed, being of opinion "that the Deputy Clerk of the Crown had no right to retain the fees for examination to his own use, because he is not specially authorised so to do. And that the examination taken must bear the necessary stamps for the necessary amount chargeable upon the same under the tariff."

TAXATION OF COSTS.

A certain looseness in matters of practice is often observed in the conduct of suits in outer counties. This is natural enough, and not as a general rule found very hurtful so long as it does not go beyond what might be termed "easy practice," as between professional gentlemen, where the consequences are not injurious to clients; but when it goes beyond this, and particularly where there is laxness in the mode of conducting business by officials, the evil becomes pressing.

There is such a thing as a public official being an obstructionist; but that is a species of annoyance to which we are not much subject in this country,—the evil lies rather in the other extreme.

The particular matter which induces these remarks is a decision lately given in Chambers, by Mr. Justice Morrison, in a case of *Wilson* v. *Moulds*, referring to the revision of taxation of a bill of costs from an outer county.

A bill had been taxed by a Deputy-Clerk, and possibly correctly taxed, but the papers produced before him to authorise certain items in the bill were not filed as they should have been, and as he, as taxing officer, should have

insisted upon. A revision of the taxation was had before the Master at Toronto, when that officer—and very properly as we think—refused to tax any items for which no voucher appeared as having been filed upon the original taxation; and refused to file or to allow any such vouchers to be read before him.

This rule, as laid down by the Master, was affirmed by the learned Judge, though, owing to the circumstances of this particular case, and as the practice in the different outer counties had not been uniform, he allowed the items in question to be substantiated by the production of the missing vouchers; "but in future,"—as he warned all concerned,—"Deputy Clerks of the Crown and the attorneys must see that all necessary vouchers are filed in the first instance."

EXHIBITS.

The Court of Queen's Bench remarked, in the course of a case before it this Term, upon the carelessness which is often evinced on the part of Clerks of Assize, at Nisi Prius, as to the custody of exhibits. So long as persons (not imbued with a high sense of duty, doing duty for the sake of doing it), receive so much a day for doing certain things, it is not human nature to expect that they will take the same trouble as if they received a special remuneration for each particular service rendered, as, *e. g.*, in cases of this kind, if the clerks were paid so much a piece for each exhibit filed in court, there would probably be more care taken of them. The greatest inconvenience is often experienced from want of due care of papers filed, and any thing that would tend to lessen the evil would be welcomed by the judges and by the profession.

In connection with this subject, the learned Chief Justice spoke of the effect of putting in papers as exhibits at Nisi Prius without perfecting the proceeding by reading them. He said it was a common mistake for counsel to suppose that all that was required was to "put in" a document, and then suppose that it could be referred to as an exhibit, though in fact it does not become an exhibit until read; and he referred to the particularity observed as to this in England.

Judges are almost proverbially careful in the expression of their opinions, it is therefore occasionally rather refreshing to hear an eminent Judge having a good "fling" at something which excites his wrath.

In a case of *Rex* v. *Wildey*, 1 M. & S. 188, in which the sufficiency of a plea of *autrefoit acquit* was in question, a form in Rastal's Precedents was cited, whereupon Lord Ellenborough, after consideration, expressed himself thus,—"I find the precedent there stated is as full of faults as can be. Indeed I can hardly conceive anything more faulty: it is even worse than the plea which is the subject of our consideration, which, however, is perfectly vicious for not setting out the record, &c. . . . The precedent in Rastal, therefore, is one of the most vicious precedents that I ever contemplated."

JUDGMENTS.

QUEEN'S BENCH.

Present:—Draper, C. J.; Hagarty, J.; Morrison, J.

June 8, 1867.

In re Moorman and Farmer.—Appeal from the County Court of the County of Hastings allowed, and rule nisi in court below made absolute.

Coleman v. *Kerr.*—Appeal from the County Court of the County of Hastings allowed, and the court below to make absolute the rule to enter the verdict for the plaintiff.

Miller v. *Corbett.*—Judgment for defendants.

Barretto v. *Pirie.*—Judgment for plaintiff on demurrer, the justification being too general and not setting out any specific cases of misconduct on part of plaintiff. Leave given to defendant to apply to judge in Chambers to amend within within one month.

AUTUMN CIRCUITS, 1867.

Eastern Circuit.

The Hon. Mr. Justice Hagarty.

Pembroke	Wednesday..	Sept. 18
Ottawa	Monday.....	Sept. 23.
L'Orignal	Monday.....	Sept. 30.
Cornwall	Thursday ...	Oct. 3.
Brockville	Wednesday..	Oct. 9.
Perth	Monday.....	Oct. 14
Kingston	Wednesday..	Oct. 23.

Midland Circuit.

The Hon. the Chief Justice of the Common Pleas.

Peterborough	Monday.....	Sept. 16
Lindsay	Thursday ...	Sept. 19.
Whitby	Wednesday..	Sept. 25.
Napanee	Monday.....	Sept. 30.
Picton	Thursday ...	Oct. 3.
Belleville	Tuesday	Oct. 8.
Cobourg	Tuesday	Oct. 15.

Niagara Circuit.

The Hon. Mr. Justice J. Wilson.

Milton	Wednesday..	Sept. 25.
Owen Sound	Tuesday	Oct. 1.
Barrie	Monday	Oct. 7.
Hamilton	Monday	Oct. 14.
Welland	Thursday	Oct. 24.
St Catharines	Tuesday	Oct. 29.

Oxford Circuit.

The Hon. the Chief Justice of Upper Canada.

Simcoe	Tuesday	Sept. 10
Brantford	Monday	Sept. 16.
Cayuga	Monday	Sept. 23.
Guelph	Monday	Sept. 30.
Berlin	Monday	Oct. 7.
Stratford	Monday	Oct. 14.
Woodstock	Monday	Oct. 21.

Western Circuit.

The Hon. Mr. Justice Morrison.

Walkerton	Thursday	Sept. 19.
Goderich	Monday	Sept. 23.
London	Monday	Sept 30.
St Thomas	Wednesday..	Oct. 16.
Chatham	Monday	Oct. 21.
Sarnia	Monday	Oct. 28.
Sandwich	Monday	Nov. 4.

Home Circuit.

The Hon. Mr. Justice A. Wilson.

Brampton	Monday	Sept. 23.
City of Toronto	Monday	Sept. 30.
County of York	Thursday	Oct. 10.

SELECTIONS.

THE ENGLISH BAR.

While it is our principal object to direct attention to the present position and future prospects of the English Bar, we shall endeavour also to throw some light upon the constitution and government of that learned corporation—a subject little understood beyond the limits of the legal world. Most persons of education, indeed, comprehend the distinction between their respective functions; but even of these, few are able to appreciate the meaning and relative dignity of the several denominations and grades of which the Bar consists; fewer still are conversant with its rules of practice and discipline. Latterly, however, the fame, good or evil, of certain legal personages, has aroused a more lively interest in barristers and their fortunes. Of some lawyers at the present time practising at the bar, of some who still adorn or who lately adorned the bench, all men say all good things; unhappily also, the misdoings of some eminent advocates of high forensic and in some cases of senatorial position, with their sudden collapse in utter ruin alike of character and fortune, were not long ago the subject of general marvel and discussion. In truth, society at large is deeply concerned in the honour and integrity of the bar, inasmuch as in the discharge of their duties barristers are closely connected with the highest of human interests — the administration of justice.

"They are entrusted with interests, and privileges, and powers almost to an unlimited degree. Their clients must trust to them at times for fortune, and character, and life.

"The law entrusts them with a privilege in respect of liberty of speech, which is in practice bounded only by their own sense of duty, and they may have to speak upon subjects concerning the deepest interests of social life, and the innermost feelings of the human soul. The law also entrusts them with the power of insisting upon answers to the most painful questioning; and this power again is, in practice, only controlled by their own view of the interests of truth.

"It is of the last importance that their sense of duty should be in active energy proportioned to the magnitude of these interests."

We have here borrowed the language of Lord Chief Justice Erle, from the judgment delivered by him in the case of *Kennedy* v. *Brown and wife*, which is to be found in the 13th volume of the Common Bench, and the 32nd volume of the Law Journal Reports; language having the greater weight, inasmuch as it fell from the lips of that high-minded judge. In this passage, in our opinion, he has nobly and truly expressed the grave responsibilities and duties which rest upon advocates. Men's dearest interests must at need be confided to them, and high qualifications, as well of honor as of ability, are demanded from them. Although, therefore, we regret that some scandalous offendings have stained the fair fame of that noble and useful calling; we believe that both society and the profession will gain by their exposure.

For many years to come, at all events, we need not fear a repetition of the career of Mr. Edwin James. The most reckless adventurer will probably esteem the position once held by him, even at the moment of its fairest promise, dearly purchased by the risk of similar disgrace. Impecuniosity and impudence will, for a while at least, we hope, cease to recommend lawyers of dubious character to the confidence of constituents of any shade of politics. The governing bodies of the bar, aroused to greater vigilance over those amenable to their authority, will surely avail themselves of the earliest opportunity to effect much-needed reforms in their own tribunals.

The bar of England may be divided into two main branches, namely, the Equity and the Common Law bar. The former confines itself to practice in the Court of Chancery, which, with a single exception—the Chancery Court of the Duchy of Lancaster—are permanently seated in the metropolis. The members of the latter, by means of the circuits travelled by the judges, and the more popular nature of their business, are better known to the general

public than their brethren of the Equity bar. Before the judges of the Common Law courts comes all the more serious criminal business of the country. Members of this section of the bar, as successful advocates on the criminal side on their several circuits, not unfrequently achieve a reputation for acuteness and eloquence, leading to success also in the higher walks of the profession.

Skill in addressing a jury, though perhaps not the highest, is still a very high qualification for successful advocacy. It is very difficult to describe exactly the qualities essential for its acquirement. An easy flow of language is doubtless indispensable to the success of every public speaker; but he who seeks to gain verdicts has need of many qualities besides fluency of utterance, to win the attention and captivate the judgment of a jury. To this end, mere volubility is of little avail. The talent perhaps most essential is tact, for without this useful gift, even great oratorical power fails in the arduous contests of the courts; while by its aid, as by a beacon's light, the cautious advocate perceives and shuns dangers unheeded by a perhaps more brilliant but less subtle antagonist. The battle once begun, an advocate should be prompt to decide upon his line of action, and strenuous in its maintenance when determined; moreover, let him appear to be in earnest in his contention, as though impressed with the truth and justice of his cause.

The whole end and object of the art of advocacy being to win the sympathy and convince the judgment of those addressed, a speaker should, on all occasions, adapt his discourse to the feelings and understandings of those whom he strives to persuade. Finally, with force and clearness must now be united brevity of speech: of all errors, prolixity is the least tolerated; and very rare, at the present day, are the cases in which a lengthy oration is necessary or even permissible.

Such a combination of qualities procures their fortunate possessor not only ample employment, but also a wider fame than higher mental endowments without such gifts generally earn. Of the laurels gained in this branch of legal practice, the members of the Equity bar have hitherto had no share. In those courts, until very lately, a jury was unknown; and even now the intervention of that tribunal is of rare occurrence: there, the courts themselves—courts, with one exception, consisting of a single judge—decide almost all questions upon evidence not given orally before them. Thus, without witnesses to examine and to test, or a jury to address and persuade, counsel could but scantly exercise or display either their astuteness or their eloquence. It follows, then, that advocates eminent in the Common Law courts enjoy a wider if not a higher reputation than the leaders of the courts of Equity. Upon the several circuits, the public—especially its fairer portion—throng the assize courts, and listen in admiring wonder as the favourite orator of the day appeals by turns to the passions, the prejudices, the sympathies or the reason of the jury. The audience carry away from these scenes vivid and perhaps exaggerated impressions of the skill and eloquence of the speaker, and thus his fame is noised abroad and quickly spreads beyond the narrow circles of the profession.

We have before observed that, without its own limits, little is known of the internal institutions of the forensic body, and the rules and system of its government. The different denominations and grades into which it is divided—Queen's counsel learned in the law, serjeants-at-law, doctors of law, masters of the bench of the several Inns of Court—these all seem a complete mystery to the majority even of the educated public.

Barristers consist of three grades or ranks, namely, Queen's counsel, serjeants-at-law, and outer or utter barristers—the rank and file of the profession: to these may be added the advocates of the ecclesiastical courts, who are now entitled to practice as counsel in any of Her Majesty's courts of law and equity, as if they had been duly called to the degree of barrister-at-law. In olden times, the degree of serjeant-at-law (*serviens ad legem*) was the most honourable known in the legal profession. Even to the present day the custom continues of admitting into this venerable order the judges of the three Common Law courts upon their advancement to the bench. Hence, a serjeant is in court always addressed from the bench as "brother;" this barren distinction, however, being almost all that is left to them of their ancient privileges. The rank is in little request in these days, being reckoned of but secondary value without the precedence necessary to place its bearer upon an equality with a Queen's counsel. It is, however, occasionally sought by those who, though they may have arrived at a certain standing and enjoy a moderate practice, nevertheless see no prospect of being included in the list of Her Majesty's counsel. Upon attaining to this degree, a barrister leaves the Inn of Court to which he has previously belonged, and becomes a member of Serjeant's Inn. The serjeants, therefore, with the fifteen judges, form, as the members of this society, a body of themselves, apart from the rest of the profession.

At present the leaders of the English bar are, for the most part, to be found among Her Majesty's counsel, the Attorney-General being the recognized head of the whole body. To become one of Her Majesty's counsel is the object, at some period of his career, of every barrister who aspires to play a leading part in the superior courts of law or equity. We may observe that the patent of a Queen's counsel is, with few exceptions, conferred only upon those who, as juniors, have enjoyed considerable business at the bar; these exceptions having been generally made in favour of men of some political or literary eminence.

Barristers obtain us; the patent of a Queen's counsel are, thereupon, in most cases, elected Masters of the Bench or Benchers of their Inn. The electors to this dignity are the benchers themselves of the respective Inns, and a very small proportion of dissentient votes excludes a candidate. There is, therefore, good security that no individual will be elected a bencher unless his professional and private character are alike without a stain.

There are four Inns of Court, each having the privilege of "calling to the bar," namely, Lincoln's Inn, the Inns of the Middle and Inner Temple, and Gray's Inn.

In each Inn, besides the

> "Most potent, grave and reverend signiors,
> The very noble and approved good masters"

of the bench or benchers of the Inn, there are two other grades—barristers-at-law and students-at-law. The benchers constitute the governing body of each inn; they administer its affairs, manage its property, and call its students in due course to the degree of barrister-at-law. The power, moreover, which makes, can also unmake: the bench which confers the privileges of the forensic toga, can also unfrock the wearer who bears himself unworthily. The importance of the trust thus confided to the benchers in the exercise of these powers, can scarcely be exaggerated; since, in fact, they hold in their keeping the credit and good fame of a profession whose utility to society is measured by the honour and integrity, as well as by the ability and learning, of its members. Should a barrister feel aggrieved by the decision of the bench of his Inn, he may appeal to the fifteen judges, whose verdict is final. The disbarment, but a few years ago, of an eminent advocate, and the revelations of a trial still fresh in the minds both of the profession and the public, have given a general insight into the exercise of their powers by the benchers.

That some control and supervision over the conduct of barristers ought to exist, and ought to be such as can be practically enforced against delinquents, cannot be doubted. Nor will it be denied that a tribunal within the profession, possessed of full powers to judge and to punish offenders against professional usage, or the general laws of honour and honesty, is required not only for the correction of delinquent barristers, but also for the protection of suitors in our courts. But it is submitted that some alteration is needed in the mode in which the existing tribunal of the Bench carries on its proceedings. While the benchers have ample powers over any member of their Inn whose offences are brought before them, their authority over the instruments of evidence upon which to form their judgments, is very limited. Some of the most valuable prerogatives of a court of justice are wanting to the courts of the Bench. They have, in fact, no power to enforce the attendance of any witness, or to compel the production of any document. The tribunal itself is unmanageable from its numbers, and from its very constitution is liable to variation from day to day as an inquiry proceeds.

The unsatisfactory action of the court or parliament of the Bench, as at present constituted, was not long ago manifested in a too notorious case—an investigation marvellously protracted came after all to an abortive result, a conclusion mainly due to the defective machinery of the court itself.

It is true that in another *instance* a great offender was convicted and expelled from the profession he had disgraced. But these are not, unhappily, the only examples of scandals touching members of the bar. Other cases have occurred, which even more strongly prove the necessity for an accessible and effective tribunal to take cognizance of professional misdemeanors.

If we examine the elements of which that confessedly learned and honourable body, the English bar, is now composed, we may perhaps find some explanation of the comparative frequency in these latter years of malpractices amongst its members. The four Inns of Court receive their recruits from every rank and degree of educated men. The younger sons of our noble families come to the bar with an eye perhaps to some moderate and early provision; or, more ambitious, looking upon it as one of the recognised avenues to distinction and wealth. Country gentlemen send their elder sons to study and practice in the law for a while, to qualify them thereby for fulfilling with larger usefulness the duties of the magistracy and the legislature; young men of every class, at the close of their university career, have for the most part to elect between three roads in life—the Church, the bar, the public service. Large numbers of these youths throng the halls of the Inns of Court, and form in after life the most valuable addition to the legal ranks.

Some few, leaving the lower branches of the profession, come in middle life to try their fortune at the bar. These bring with them experience and habits of industry, and rarely fail to achieve moderate success, though seldom attaining the highest posts; others again turning with disappointment from widely differing walks of life—as from a naval or military career—assume the uniform of the law, to find too often that their previous training and habits have unfitted them for its labours. There are certainly several instances of the highest legal eminence having been attained by men who in early life have served in the army or the navy. Still, as a rule, the law is a jealous mistress; one who, to be won, must be early wooed, and with the earnest devotion of a first passion. The orators of the platform, whatever their original calling may have been, not uncommonly seek to repair, by forensic practice, fortunes for which their reputed powers of oratory have previously done but little; often also the legal and

parliamentary reporters for the public press quit their humbler occupation for the more exalted honours of the bar.

Here and there in the crowd we mark, with pity for his too certain fate, the careworn face of some self-educated peasant. The ambition which has inspired his toil in the unwonted fields of legal labour is doomed to inevitable blight. He may have assiduously sown, but to him the harvest-time comes not, and at length, with broken heart, and perhaps, alas! in the bitterness of poverty, he learns how fallacious have been his hopes—how fatal his mistake.

From this sad but faithful picture we turn to some with brighter promise in the future, who await only their call to the bar to bid their native land a long farewell. These are students training for the Colonial Law Courts, and we are happy to believe that in most instances these learned exiles reap an abundant harvest in the far-off fields of their labour; success thus compensating their banishment. Finally, the students from the sister kingdom, destined for the Irish Bar, contribute to fill the dining halls of our inns. But they, with the class lastly before named, have no actual place among the Bar of England, the subject of our present consideration.

We find, then, that the gates of the inns of court are open to all comers. In the forensic republic they know at the outset of each man's career no distinction of rank or degree. Every combatant in the arena has his reputation in his own hands, to make or to mar; as he uses his weapons so will he be regarded by his competitors, and by the measure of their goodwill will he be esteemed beyond their circle.

Of those who pursue the profession, some succeed in obtaining business, many fail. It should, however, be observed that failure in this respect does not by any means imply the absence of the qualities essential to forensic success. A barrister may be fully competent, he may have done his utmost to merit, but he may not solicit, and without legal connection he cannot command employment. Years roll on: circuit succeeds circuit; his contemporaries leave him behind; his juniors pass him by; but the golden opportunity may never come to him; and men grow grey as—

"They learn to labour and to wait."

None but those who have experienced the "heart-sickness of hope deferred" can tell the utter weariness of these mens' lives, as, with hope extinct, they pursue the tedious routine of terms and circuits. They have our warmest sympathy; but their successful rivals, the men who transact the business of the courts, who fill the public eye, who must in course of time occupy the judicial seats at home and in our colonies, claim our present attention. These drawers of the prizes of the profession may be divided into those who obtain and conduct their buisness fairly and honestly as regards both their brethren and the public, and those who court employment by practices which honour condemns. This latter class is, we fear, more numerous than beyond the legal words is commonly believed; we must explain, however, for the benefit of the general reader, in what this censurable malpractice consists. Many acts are in violation of the rules of the bar, which are not in the ordinary sense of the word dishonest; but surely all the members of a profession are morally bound to observe its laws, and to break them for selfish objects is certainly unfair, not to use a stronger term, towards those who observe them.

A few words upon the general laws which govern the practice of the bar will serve to elucidate our meaning.

One rule of the profession is that in no case can a barrister receive any instructions or fee excepting through an attorney. To this rule there is but one exception: in the case of a prisoner in the dock awaiting his trial. Such a prisoner is entitled, upon tendering the lowest fee which a barrister can accept, to instruct personally any counsel there practising to defend him. This is a privilege belonging to the accused, and not a right appertaining to the bar. It should be added that it is the duty of the barrister, whom a prisoner under such circumstances selects, to undertake his defence. The general rule being as above stated, it is manifest that the amount of a barrister's business in his early days must depend upon the favour which he finds in the eyes of the other branch of the profession. Hence the temptation to attract that all-important good-will by means other than the fair display of ability and knowledge, proves too strong for men whose need or whose ambition overpowers their sense of honour. Among the lowest sort of attorneys, these arts are, we regret to say, only too successful; but we imagine that even while they continue to employ such men, their patrons view with disgust and repay with contempt the simulated friendship and ready subservience of these forensic toadies. Another rule recognised by both branches of the profession is that of a barrister may not solicit business or in any direct way advertise his desire for employment. Upon his call to the bar, the aspirant for business takes some suitable chambers in one of the inns of court, and instals therein a youth dignified by the title of clerk to answer for his master whilst he attends the Courts of Common Law or Equity, according to the side of the law he has adopted.

If of the common law, the young barrister joins some circuit and usually selects for attendance some sessions upon that circuit. Should he be fortunate enough, however, to have any connection or prospect of employment in town, he probably neglects sessions and disdains criminal practice, looking for business in the civil courts only.

In these early years, before clients come to himself, the tyro perhaps "devils" for some fortunate brother blessed with a surplus of

work, or he enrols himself amongst the reporters for some legal periodical. If laborious as well as ambitious, perchance he writes or edits a new work on some legal subject, thus combining profitable study with a legitimate advertisement. But such a task must not be rashly undertaken, for should the work prove worthless, the advertisement will be something worse than fruitless. All or any of these courses may be fairly taken to show the desire and capability for work, but a barrister, honestly intending to observe the rules of conduct, allegiance to which, on his call, he tacitly owns, cannot actually solicit the employment he covets.

The position is a peculiar one. Beneath an appearance of indifference, the nice observer of professional etiquette has to conceal real anxiety and often urgent necessity for business. He must also, in pursuance of the same honourable course, maintain a strict reserve in his intercourse with those who practically are the arbiters of his fate. We know upright and learned men who, even under the pressure of great need, have nevertheless acted up to this rule in its fullest integrity, despite the prevalence of contrary example and the promotings of poverty. We must not by any means be understood to approve of an assumption of superiority by the barrister towards his client; any such pretence must be always a breach of good manners, often untterly misplaced.

The great majority of either branch of the legal profession, being gentlemen by both education and position, are as such upon a footing of entire equality; but custom and convenience have imposed certain restrictions upon the intercourse between them. There is a wide distance, and surely some golden mean, between assumption of imaginary superiority and degrading subservience — the former a dire offence against good breeding, the latter fatal to independence and self-respect.

It is, moreover, a rule, not only of the profession but of law, that barristers cannot maintain an action at law to recover their fees; that is, they have no legal claim for compensation in respect of their professional services. The rule is thus laid down in Mr. Serjeant Stephen's edition of *Blackstone's Commentaries*:—"A counsel can maintain no action for his fees, which are given, not as *locatio vel conductio*, but as *quiddam honorarium*—not as a salary or hire, but as a mere gratuity."

There is also a solemn decision to the same effect in the case before referred to—*Kennedy v. Brown and wife.* Much laxity as to payment of counsel's fees prevails—we quote a very general rumour—among practitioners of a certain class. Some attorneys, so long as they can find advocates willing to take their briefs without payment of fees, unless in case of success, gladly employ them upon that understanding. So also, it is said, there are members of the bar too eager for business to be scrupulous as to the terms on which it is given; any such bargain between advocates and their employers is, in our opinion, injurious to the public interests as well as discreditable to those concerned. It is held to be essential to the pure administration of justice, that counsel should not have any pecuniary stake in the issue of their cases, and this exclusion of personal profit is, we think, right; for, were it otherwise, we fear that a direct and selfish interest in their client's success would too strongly tempt many advocates to exceed the powers and abuse the privileges entrusted to them.

So great, indeed, are these privileges, that a strict sense of duty should ever be on the watch, lest in the ardour of forensic strife their rightful limits should be overstepped. An advocate should never forget that the power to blast a name or to blight a career, when placed in his hands, is entrusted to him solely in the interests of justice and for the vindication of truth. This high standard of conduct is not, however, always maintained; from time to time, no doubt, men of lax principles and practice creep into employment and even hold an extensive business for a while—such men as those referred to by the learned judge already quoted, as "bad men, taking the wages of evil, and therewith also for the most part the early blight which awaits the servants of evil."

For it is worthy of remark how brief usually is the career, how transient the prosperity, of these professional sinners, and how surely the inevitable Nemesis of dishonour pursues and strikes them down. In some rare instances, however, men of evil repute in the profession gain the front rank and attain to all but the highest prizes. In these cases there must be more than ordinary ability; with such a man, business leads to business—superior skill is gained by experience, and the well-won verdicts tell their own tale at last. Success now brings an abundant harvest, clients who heretofore shunned now eagerly seek him; the great houses of attorneyship retain his services, thence weightier causes and therein more creditable victories ensue. Soon, then, our triumphant advocate, elbowing his way before his shrinking rivals, wrings from its reluctant dispensers the rank which should be also an honour, unblushingly parades his silken robe as conclusive proof of his own purity and of the malice of his detractors. When opportunity offers he seeks a seat in Parliament, as a stepping-stone to yet higher advancement, and by aid of extravagant promises and impossible pledges perhaps he also gains this object of his ambition. His career is onward still; some minor judicial post probably rewards his ready bluster and faithful vote, but promotion halts there; his antecedents bar his further rise; moreover, the "House" mislikes the fluent adventurer, and presently rating him at his real value listens coldly to his frequent orations. This is no overdrawn picture of legal and political

advancement; such men have in our times so risen, and, as close observers of the profession will admit, such men may so rise in future. We may nevertheless hope that in future their success may, as heretofore halt midway, nor ever reach the higher gaols of forensic ambition.

Hitherto we have assumed the unscrupulous practitioner to pursue his career with no fouler stain upon his robe than a well-founded imputation of unprofessional conduct and reckless advocacy. We have also assumed him to have escaped any official censure, and that therefore possibly the charges against him and the social slights of his brethren are by the outer world ascribed to a mean jealously of his fame. The existing impunity of professional misconduct from official censure and correction is perilous to the social position of the bar, no less than to its utility as an institution; in their own interest, then, as well as in that of the public, whose servants they are, the honour of its members cannot be too jealously guarded. Daily the ranks of the bar become more thronged, but the increased numbers bring no corresponding elevation in the qualities which alone can win public confidence and respect. The spread of late years brought many men of lower rank into the liberal professions; the law having its full share of this new element. Thus the bar no longer consists of a comparatively few highly educated men, nearly equal in social position, but of a numerous body, drawn, as we have said, from every grade of life, and embracing every shade of thought and feeling. No spirit of caste can animate or govern natures so diverse, nor can unity of action spring from elements so discordant.

Formerly none ventured to assume the forensic garb unless endowed with means sufficient to enable them to wait with outward patience the coming of their opportunity But too many now throng the courts who must speedily succeed or shortly starve. Hence of late has sprung up in the junior ranks a disregard for the traditionary rules of their profession, with a lower tone of bearing, and unseemly intimacy with those whose patronage is a vital necessity. Hence there arises the spirit of advertisement, which in various shapes animates barristers of this class. They have resort to the lecture-room, and, we blush as we write it, even to the pulpit itself, for the purpose of attracting attention and employment to the eloquent lecturer or preacher; while others take to the platform, and lose no opportunity of declaiming on the well-worn topics of political reform or the social and moral improvement of mankind. Fluent speech and pertinacious advocacy are usually the chief, if not the only, qualifications of these gentlemen; by which, nevertheless, they attract a large share of the business of the inferior courts.

Without doubt, a reputation for sound learning, and a character of stainless honour, do eventually contribute to the attainment of the highest positions; but those who dispense the minor business of the law do not sufficiently regard as a disqualification the absence, or even the reverse, of that repute. The character and ability of the advocates who actually do the work of the forum are of deep concern to the public, for it is with the affairs of that public, with their individual rights and wrongs, fortunes, liberties, and even lives, that the courts are daily occupied. If, then, it would be injurious to them that unprincipled or unlearned lawyers should fill the foremost places at the bar, clearly a graver evil would arise were such an one to gain the bench, inasmuch as a judge is more potent for mischief than an advocate. We do not believe that in any instance in modern times the English Bench has been so disgraced; but it cannot be denied that at no distant time such an event appeared only too probable.

A bad man, of pre-eminent ability as an advocate, seemed to have within his grasp a high political office, bringing, in almost certain reversion, a seat upon the bench. Happily, however, the threatened degradation was averted. Occurrences without the profession brought to an abrupt termination his political career. Official inquiry thereupon ensued, and finally the damning disclosures thereby elicited stripped the great offender of his forensic robe. The very risk, so narrowly escaped, of the elevation of such a man should warn the public not to bestow uncautiously their honours and their confidence. Nor is, we regret to say, the personage alluded to a solitary example. Other members of the bar have, since the extinction of Mr. Edwin James, achieved an equal notoriety, and brought upon their calling nearly equal reproach. In one instance, a protracted inquiry before the benchers of the offender's Inn painfully exhibited the weakness and inefficiency of that tribunal. Since that abortive investigation, a considerable period has now elapsed, yet the Masters of the Bench have taken no steps to render their courts more effective, nor has any sign been hitherto given that the much-needed reform is to come from within.

For this neglect grave reproach rests, in our opinion, upon the governing bodies of the several Inns of Court. Containing as they do many members of the legislature, including the law officers of the Crown — the recognized leaders of the bar—as well as also many distinguished men of judicial experience, a measure for reconstituting their internal courts, and for establishing an efficient control over the conduct of their members, would have emanated with greater authority and propriety from this than from any other source.

Legislative interference on the part of the Imperial Government would, no doubt, be felt by the profession as an encroachment on their privileges; and action taken by an individual member of Parliament to reform the internal tribunals of the bar is, perhaps, equally liable

to be viewed with jealousy by those whose exercise of their authority is thus called in question. We regret, therefore, the inaction of the Masters of the Bench in this respect, as being likely to defeat or impair the utility of any such measure of reform introduced without their sanction.

We do not, however, when suffering from grievous sickness, reject a sovereign remedy merely because the inventor cannot produce his diploma; so, in the absence of any action on the part of the authorities of the Inns of Court, we hailed with satisfaction the appearance in the last session of Parliament of Sir George Bowyer's bill to enable the benchers of the Inns of Court to appoint judicial committees in certain cases, and to give the necessary powers to such committees. The merits of Sir G Bowyer's measure we do not propose now to discuss; in the presence of the absorbing question of last year, it failed to obtain the consideration of the House, such failure being due not to any demerits of the measure itself, but to the pressure of other more urgent matters. The same great question again thrusts aside all minor reforms, and we fear that if again brought forward in the present session, Sir Geo. Bowyer's measure will meet a similar fate But we trust that, during the present year, we may see the settlement of the now urgent if not actually dangerous question of poutical reform. Then we hope that the Masters of the Bench will not refuse to avail themselves of any opportunity which may offer itself to obtain from Parliament the powers now wanting to give them an effective control over the delinquent members of their Inns.

But increased powers in the hands of the governing body of the bar will do little to prevent the irregular practices to which we have adverted, unless aided by the expressed disapprobation of the bar itself. Persistent offenders against its laws and its usage must be taught that, even if they escape official censure, they will not be tolerated as associates by their worthier brethren. In their efforts to purify their ranks, the public opinion of society may greatly aid the action of the bar.

If the stigma of malpractices extends beyond the limits of the profession, and operates as a social disqualification, there will be greater anxiety to avoid the discreditable imputation. The man who cheats at play is, by common consent, driven from society. The dirty practitioner of the courts is also a sort of sharper, and we see but little difference between them. Both abuse the confidence which their position inspires, and, enjoying all its privileges, break for their own profit the rules of the society to which they belong. We would, therefore, award to each the same penalty, namely, the loss of their social position.

In the absence of any formal promulgation of a code of laws, the judges of the land, the benchers of the Inns of Court, the courts of the several circuits, every counsel of eminence, may, in their respective spheres, do much towards the better governing of the bar. Allusion has been made to the courts of the several circuits; these might, perhaps, without much difficulty, be made more effective in maintaining discipline than they are at present. We should mention that these associations are confined to those barristers who attend circuit, the Equity bar having no similar institution. All the members of a circuit are, upon due election thereto, entitled to belong to the bar mess, and, upon certain occasions during each circuit, *the members* of the mess resolve themselves into a court for the transaction of business. At these courts the officers of the circuit are elected, and there taxes are imposed to defray the corporate expenditure of the circuit. There, too, are offences against its laws investigated and punished. For minor transgressions a fine is imposed; graver misdoings expose the culprit to expulsion, the heaviest penalty which the court can inflict. This is a purely social deprivation, excluding from the bar table, but not affecting the right to practice upon the circuit. But though expulsion from the circuit mess may be said to touch only social position, that disgrace has, without doubt, a serious effect also upon professional advancement. It is, in fact, a public declaration that the offender is a black sheep, whom his brethren have cast out from amongst them. Thus, then, the circuit courts would seem to offer a convenient machinery for controlling the conduct of those amenable to their jurisdiction. But, in practice, their more serious functions are seldom exercised; no individual likes to come forward as prosecutor; and even when charges are brought forward, too often they are allowed to drop; or, if proved, a mistaken pity forbears to enforce the merited penalty. The leaders and officers of the several circuits would do good service in the best interests of the bar, by stimulating their courts to greater activity in the investigation and punishment of professional misdemeanors. Let this vigilance be aided by the manifest disapprobation of the authorities, and by the social ostracism of the culprit. Those with evil proclivities will then discover that their interest, as well as their duty, lies in the faithful observance of rules and laws binding upon their honour. Finally, we call upon the public, as being most deeply interested, to second the efforts of those who strive to wipe away the reproach which stains the good name and diminishes the utility of a noble calling.

We have endeavoured, in penning these remarks, not to overstate the case as to the present condition of the English bar; and we are willing to believe that the causes of corruption and decay, to which we have adverted, have not as yet affected the purity and high feeling of the profession as a body; but they exist at its core, and, unless speedily checked, they will deteriorate the whole system.

We also admit that at the present day the judicial body stands deservedly as high in the public estimation as at any period of our his-

tory. Never have the true ends of justice been more fairly carried out than by the existing administration of our tribunals. At no previous period have so many eloquent and learned men adorned the courts of equity as may now be found therein; men who are distinguished not only as advocates and lawyers, but also as scholars and politicians. Westminster Hall, at the present moment, boasts no orator as eloquent as the accomplished judge who presides over its highest court, but it possesses a body of advocates whose learning and integrity are justly the pride of the country. We freely admit that upright and able men are abundant throughout all grades of lawyers. Why, then, it will be asked, do we forebode a deterioration of the character and standing of the bar, and consequently of the efficiency and dignity of the bench?

We reply, that the semblance of vigour and of health is often seen in the human frame, where decay has already made fearful progress; but the physician marks the fatal signs, and to him they are eloquent of the canker within.

Any one who has thoroughly examined the human elements of which the bar of England is composed, must be sensible that of late years there has been an increase rather in numbers than in quality.

Once more, then, we repeat that there are many already in the legal ranks—and the number is yearly augmented—who cannot be restrained by the discipline of the profession as at present enforced, from a laxity of practice closely akin to dishonesty. In conclusion, we confidently affirm that the ancient independent spirit and keen sense of honour of the bar mainly contributed to form the trustworthy and upright judges of whom our history boasts.

We perceive, therefore, with deep regret, the prevalence of a lower tone both of manners and conduct, and we exhort the several grades of the profession to unite in a common effort to check its further decline, and to regain its just position in public estimation. Lastly, we call upon the benchers of the several Inns, as the legitimate guardians of the honour of the bar, not to neglect the earliest opportunity of obtaining more effective powers for maintaining unsullied their precious trust.—*Law Magazine.*

IMPLIED COVENANT FOR TITLE BY LESSOR.

Stranks v. *St. John*, C. P., 15 W. R. 678.

In the recent case of *Stranks* v. *St. John*, the Court of Common Pleas has cleared up a point of law which was involved in some obscurity, but yet must have been of almost every day occurrence.

The declaration was on an agreement, not under seal, by which the defendant was to let, and the plaintiff to take, a farm of the defendant, for a term of seven years, to commence *in futuro*, and the breach laid was "that the defendant never had any right or title to let the said farm to the plaintiff for the said term."

To this breach there was a demurrer, which raised the important question whether on a parol agreement to grant a lease the intended lessor impliedly stipulates for title. The agreement not being under seal was void as a lease by the operation of 8 & 9 Vict. c. 106, s. 3. but it might still enure as an agreement: *Tidey* v. *Mollett*, 12 W. R. 802, 16 C. B. N. S. 298. The defendant contended that on such an agreement the plaintiff could only sue for not granting the lease, and that if damages could be recovered against him for not having title to lease for seven years, it would in effect be treating the parol agreement as a lease, and so rendering nugatory the provisions of the statute. On the other hand it was argued that on a contract for the sale of an existing lease there was an implied stipulation for title, *Souter* v. *Drake*, 5 B. & Ad. 992; and that there was no difference in principle between the two cases. The real question was, as put by Mr. Justice Willes, whether the agreement was to execute what purported to be a lease, or to grant a good and valid lease, and we cannot doubt that common sense, with which the law should, as far as possible, accord, would lead the unprofessional mind to the latter conclusion. The case of *Gwillim* v. *Stone*, 3 Taunt. 433, says his Lordship, by no means bears out the marginal note, which would seem an express authority against the plaintiff, for Lord Mansfield in that case only decided that the plaintiff could not recover the money he had spent in building operations on the defendants land by his permission before the lease was granted; and the *dictum* of Mr. Justice Lawrence, that in purchases of land the rule is *caveat emptor*, was an error of the reporter. Then, as now, judges sometimes uttered hasty and inaccurate *dicta*, and it is no doubt an obvious course when such inaccuracies are subsequently brought to light, to make a scapegoat of the reporter, and say that he must have misreported the case. In most instances we believe the fault of the reporter would turn out to be this; not that he inaccurateley recorded what fell from the lips of the judge, but that he has given permanence and publicity to loose and ill-considered observations that were never meant to be so embalmed, and that he has not, before committing them to print, ascertained that they were not in conflict with the known law. In the present case, however, the *dictum* of Lawrence, J., occurs in the course of his judgement, and it is certainly a fair criticism on Mr. Taunton that his marginal note is not borne out by his report. *Gwillim* v. *Stone* was decided in 1811, and four years later the Court of King's Bench, in *Temple* v. *Brown*, 6 Taunt. 60, expressly left undecided "the momentous question" whether there is an implied stipulation for title in an agreement for a lease, thereby cleary showing that *Gwillim* v. *Stone* was not considered to

have decided the point. The passages cited by Mr. Justice Willes from Sugden's Vendors and Purchasers, are not to be found in the recent and more compendious editions of that work, but are taken from the 11th ed. vol. 1, pp. 488, *et. seq.* They show clearly that in the opinion of Lord St. Leonards a contract to sell a lease and a contract to grant a lease are on the same footing, and that *Souter* v. *Drake* established that in the former case there was a stipulation for title. Mr. Justice Willes intimated that if the point had not been involved in previous authorities, the Court (himself and Keating, J.)would have taken time to consider its judgment; the word "involved" was well chosen, for though it cannot be said that the present establishes any really new point of law, it does disentangle a point of constant occurrence and of great importance, and places it on a clear and intelligible footing.—*Solicitors' Journal.*

UPPER CANADA REPORTS.

PRACTICE COURT.

(Reported by Henry O'Brien, Esq., *Barrister-at-Law, Reporter in Practice Court and Chambers.)*

In re McKinnon, one, &c.

Attorney and client—Application to pay over—Liability.

On an application against an attorney to pay over money collected for a client, it appeared that the latter took from the attorney his note, indorsed by another, who turned out to be insolvent. It was also a question whether this note had been sold or only given as security by the applicant for a debt.

Held 1. That the note was only assigned collaterally, not absolutely in payment.

2. That the client had not lost his remedy by taking the note.

Remarks upon the impropriety of agreements by an attorney with his client (otherwise unadvised) which may tend to curtail the rights of the latter, and upon the necessity for a summary remedy against attorneys in such cases.

[P. C., H. T., and Chambers, May 22, 1867.]

This was a rule nisi enlarged by consent into Chambers.

It was an application against an attorney to compel the payment of a sum of money collected for the applicant, one Ker. The receipt of the money was admitted, a[illegible]so its nonpayment.

The order was resisted on the ground that the applicant took a note from the attorney for the amount, at nine months date, in which a brother of the latter joined as his surety. The note was dishonoured, and it was sworn that the surety was insolvent.

The attorney and his brother-in-law, one Kirkpatrick, swore that Ker took this note on the distinct understanding that he thereby waived all right of applying to this court as he does now. Ker denied this positively, admitting that he agreed to waive such right, but only while the note was current. But great doubt was, in the opinion of the learned judge, thrown on Kirkpatrick's testimony on this point by the evidence of Ker and one Phillips as to what took place with him, when Ker spoke to him about his having made this statement.

It was also objected that Ker had parted with his interest in this note to certain parties in New York, who notified the makers that they were the holders.

Ker, however, swore that he only gave it to them in security for a smaller debt that he owed them, and in trust as to the surplus, if collected, for himself, and that he did not sell or discount the note to them, and that the application was made *bonâ fide* in his interest, as well as in theirs, and that the note is in the hands of Messrs. Martin & Bruce, the solicitors making the application, who are authorised by Ker and the parties to whom he was so indebted, and that such parties were still his creditors, and his debt not discharged in any way by the note.

Spencer shewed cause.

S. Richards, Q. C., supported the application.

Hagarty, J.—I am of opinion that the applicant has not lost his right of applying to the court by any disposition which he has made of the claim. A man may have a claim in the hands of an attorney for collection, and may give it to his creditor as collateral security for his debt, remaining still liable to the latter. If he absolutely parted with all interest in the claim, I think it would be different. The assignee and not the client would then be the real applicant for the court's interference. I do not think the facts before me would warrant a refusal to interfere on that branch of the case.

The chief difficulty that I felt during the argument was as to the effect of the note given by the attorney and his brother: whether that should so alter the position of the parties as to put an end to all remedy as between attorney and client.

I have been somewhat surprised to find no case in point, so far as I have searched. The books of practice, and several works on attornies, and the digests for some years past have been consulted without effect.

I was pressed on the argument with the assertion of the attorney and Kirkpatrick, as to Ker's taking the note and agreeing to waive all right to this summary proceeding.

Even if this were proved beyond question, I think the court must look with great suspicion on any such agreement alleged to have been obtained from a client by his attorney; the client not being provided with any independent legal adviser to explain his rights to him.

Agreements not to insist on legal rights—not to go to law—are not looked on with favour; still less so when urged by the professional adviser against the client, who is in his hands and who has no other person to advise with.

There is nothing in the attorney's affidavits to shew that his position has been in any way altered or prejudiced by his getting his brother to join in this note, or that any consideration was given to him for so doing.

As I do not find any authority in point, I must treat this as a case of the first impression, and

have come to the conclusion that, under the circumstances in evidence before me, I ought not to hold that the applicant has lost his right to ask the interference of the court. An apparently worthless note has been given to him; he has waited during its currency and until its dishonour. Whatever he has done has been done at the instance of the attorney; the latter has had the full benefit of the time given; and I am not now prepared to hold that he is exonerated from the consequences of his misconduct in appropriating his client's money to his own use.

If he be excused by what has taken place, then the case will assume this shape—He owed a large sum of money to his client, which the latter could compel him to pay by application to this court on peril of forfeiting his professional position. He bargains as he alleges with his client to forego this advantage on condition of receiving a worthless promissory note; the client being without any legal adviser to protect his interests in the matter.

It is an old and most salutary rule, that whenever an attorney purchases from a client the whole burden of proof is cast on the former, to show that the interest of the client was fully protected, and that he was fully apprised of his legal rights; that in fact the sale was as advantageous to the client as it would have been if the solicitor had used his utmost endeavours to sell the property to a stranger: *Spencer* v. *Topham*, 22 Beav. 573. It is not easy to see why a somewhat analogous rule should not apply to the case of the solicitor bargaining with a client (otherwise unadvised) about a debt due by him to the client.

There is no suggestion here that this money was not received by defendant as an attorney, nor did he in any of the earlier proceedings assert that he had any claim for costs. In one of his affidavits he says that, if the acceptance of the note be not sufficient to relieve him from this application, he asks the right of setting off against the claim "such costs and charges as I have against the said J. B. Kerr." I can hardly accept this as any positive proof, after all that has taken place, of a *bonâ fide* claim for costs.

On the general question, I am of opinion that I ought not to do any thing to narrow or weaken the most wholesome jurisdiction of the courts in giving a summary remedy to clients who are so unfortunate in the selection of their attornies as this applicant has been. I think such a jurisdiction is absolutely necessary, and ought not, except on clear authority, to be narrowed.

The rule must be made absolute, the applicant bringing the note into court to be delivered up to the attorney.

Rule absolute.

Since giving this judgment, I have found the case of *In re Davis, one, &c.*, 15 L. T. N. S. Ex. 161. On an application to pay over, it was shown that the applicant had recovered judgment for the claim against the attorney, the court refused to interfere, saying that he had changed the debt into a judgment, on which the attorney could be taken in execution. Nothing was suggested either in argument or judgment against the right of an applicant on the facts before me.

COMMON LAW CHAMBERS.

(Reported by Henry O'Brien, *Esq., Barrister-at-Law and Reporter in Practice Court and Chambers.)*

Heaslip v. Clark et al.

Reference for trial to County Court Judge—Separation of Toronto from York and Peel.

An action for unliquidated damages for breach of contract will not be referred under 23 Vic. ch. 42, sec. 4.

Where the action is commenced and the venue laid in the city of Toronto, a reference cannot be had for the trial of a cause at the County Court for the United Counties of York and Peel.

[Chambers, Nov. 29, 1866.]

The plaintiff obtained a summons to shew cause why the issues joined should not be tried before the judge of the County Court of the United Counties of York and Peel.

The declaration contained a special count upon a contract for the delivery of 300 cords of wood, and it was stated on affidavit that the action was brought to recover damages for the non-delivery of such wood. The venue was laid in the county of the city of Toronto, the process having issued from the office there.

Beaty shewed cause.

This is not an action coming within the 4th sec. of ch. 42, 23 Vic., and it appears that the venue is laid in the County of the city of Toronto.

——— contra.

Morrison, J.—I am of opinion that on both grounds the summons must be discharged.

The 4th sec. of ch. 42 only authorises a judge to order the trial of actions depending in one of the Superior Courts in the County Court in which the action was commenced, in cases where the amount of the demand is ascertained by the signature of the defendant, or in any action for any debt, &c.

This action is neither for a demand ascertained by the defendant's signature, or for any debt It is brought to recover unliquidated damages arising out of a breach of a special contract.

As to the second objection, that the venue is laid in the county of the city of Toronto, 24 Vic ch. 53, separates for judicial purposes the city of Toronto from the United Counties of York and Peel, and the 1st sec. establishes separate sittings of the County Court in the city and the United Counties. The 8th sec. enacts that the city of Toronto shall be deemed a county for all matters and purposes, &c.; and by the 2nd sec the venue may be as the plaintiff may elect and the same being entered on the margin of the declaration shall be deemed an election of the venue. As the process for both counties issues at the head office in Toronto, and the plaintiff having made his election of the county of the city of Toronto, it is only reasonable to assume for the purposes of the 4th sec. of ch. 42 23 Vic. that the place of venue is the county where the action was commenced; and in that case it could only be tried in the County Court of that county, viz., in the county court of the county of the city of Toronto, and not in that for the United Counties, as asked for in this summons.

Summons discharged.

In re Smith, an Insolvent.

Insolvent Act—Jurisdiction, if no estate—Fraud.

Held, on the facts set out below, that the insolvent had an estate to be administered under the Insolvent Act.

Quære, whether, if there had been no estate, proceedings could have been taken by the debtor.

Held that the facts set forth below, though unfavorable to the insolvent, were distinguishable from acts or other misconduct constituting fraud, and that, unless the latter be shewn, the insolvent is entitled to the benefit of the statute.

[Chambers, March 18, 1867.]

This was an appeal from the decision of the Judge of the County Court of the County of Hastings, by Wm. Darling, of the City of Montreal, merchant, a creditor of the insolvent.

The Judge of the County Court granted a discharge to the insolvent, and the creditor petitioned against this decision because, as was alleged:

1. The insolvent was guilty of fraud within the meaning of the Insolvent Act.

By having given a fraudulent preference.

By purchasing goods and obtaining credit, and contracting debts while he was insolvent and unable to meet his engagements; and fraudulently concealing his insolvency and representing himself to be solvent.

By reckless and improvident waste of his estate, in fraud of his creditors.

By evasion and prevarication on his examination as to his estate.

By fraudulent sale and disposal of his estate; and

By not keeping books of account.; and

2. Because the insolvent had no estate at the time of his making an assignment under the Insolvent Act, by reason of his fraudulent disposal of his estate prior to his making an assignment, and is not therefore entitled to any relief under the said act.

The questions under discussion were—

1. Was there fraud in fact, within the meaning of the statute, on the part of the insolvent?

2. If there was such fraud in fact, could that fraud prevent the discharge being given to the insolvent, when he was guilty of it (if at all) before the passing of the statute?

3. Had the insolvent an estate to be administered under the statute, at the time he took proceedings in insolvency?

4. If he had no estate at that time, was he entitled to take proceedings as an insolvent under the act?

The facts of the case were—The insolvent commenced business in the year 1855, in Belleville; in the fall of 1857, he bought goods from different persons to the extent of about $6,000; his purchase at that time from Darling & Co. was about $1,600. He was insolvent then, but he did not know it. In the spring of 1858, he took stock and found he was insolvent. His stock then amounted to $3,225, which, in March, 1858, he sold to his brother, A. L. Smith, for fifteen shillings in the pound, and took his notes for the amount. These notes were sent to the creditors, and the insolvent believes they have been paid. Darling & Co. received in this way $413 on account. The insolvent ran away to the United States immediately after he sold out to his brother; he returned to this country in 1862. He then assigned to his brother his accounts and notes, amounting to $2,697; they were for debts contracted between 1852 and 1858. Nothing was given by his brother for this assignment of debts; it was for the benefit of his estate. He does not now think the debts were worth any thing, and he does not know if any of them have been collected.

S. Richards, Q. C., for the insolvent.

As to fraud or alleged fraud being within the act, Insolvent Act of 1864, sec. 8, sub-secs. 3-7; sec. 9, sub-sec. 6.

As to fraudulent preference, sec. 8, sub-sec. 4; sec. 9, sub-sec. 6.

As to obtaining goods and representing himself to be solvent, sec. 8, sub-sec. 7.

As to evasion and prevarication on his examination, sec. 9, sub-sec. 6.

As to the other grounds of fraud, they are not within the act.

As to the insolvent being within the act, even although he had no estate, sec. 1, which extends the act to all persons.

Robt. A. Harrison contra.

There was fraud clearly established against the debtor, sec. 9, sub-secs. 6-11. If he were within the act, to take the benefit of its advantages, he must be subjected to its conditions and disabilities; but as he had no estate to be administered, he was not within the provisions of the act at all. —*Ex parte Morrison*, 10 Jur. N. S. 787; *Re Dennis*, 6 L. T. N.S. 755.

The preamble of the act shows this also, because it recites that it is desirable to provide for the settlement of the *estates* of insolvent debtors, and where there is no estate there is no jurisdiction.

Adam Wilson, J.—The first question is whether C. F. Smith had or had not an estate to be administered in insolvency when proceedings were begun there? If he had, the question whether a person without an estate is within the operation of the statute will not arise.

I think the facts shew that there was an estate, perhaps not of much worth, but still an estate to be administered for creditors; and therefore I am not obliged to consider the case whether, if there had been no estate, the proceedings could have been taken by the debtor under the statute. What conclusion I might have formed if I had been obliged to consider it I am not prepared to say. The case of *Ex parte Mitchell*, 1 D. & G. 257, in addition to those cited in the argument, may be referred to.

As to whether there was fraud or not on the part of the insolvent depends principally upon the circumstances before stated—the purchasing goods in the fall of 1857, to the amount of about $6,000, at a time when the debtor did not know how his affairs really stood; and the making an assignment, in the spring of 1858, for so small a sum as $3,225 (including some hundreds of dollars of old stock), without very satisfactorily accounting for the difference, excepting that it was applied to the payment of old debts.

I do not think the facts show that the debtor purchased these goods on credit, knowing or believing himself to be unable to meet his engagements, and concealed the fact from the persons who became his creditors with intent to defraud them, under sec. 8, sub-sec. 7; nor do I see any fraud under sec. 9, sub-sec. 6; and therefore it

is not necessary to consider whether the acts of fraud charged, and which are said to have been committed before the passing of the Insolvent Act, are or are not within the provisions of the statute.

There is much, as the learned judge in the court below manifestly felt, in the conduct and proceedings of the debtor, which were not very favorable to him, but which must nevertheless be distinguished from acts or other misconduct constituting fraud; for unless the debtor be amenable for this graver conduct, he is entitled to receive the benefit of the statute; and creditors must only be more careful than they have heretofore been whom it is they trust with such very extensive stocks of goods.

I think I must dismiss the appeal, but it must be without costs.

Appeal dismissed.

CHANCERY CHAMBERS.

(Reported for the Upper Canada Law Journal.)

Grange v. Barber.

Sale by puisne incumbrancer—Rights as to costs when proceeds insufficient to pay all.

Bill for sale by puisne incumbrancer. Prior mortgagees and incumbrancers were made parties in Master's office, and decree made on further directions for payment of incumbrances according to priority. Part of the property was sold, and proceeds paid into court, but did not realize enough to satisfy the first incumbrance. An application by the plaintiff that his costs of suit and of conducting the sale might be paid out of the fund in court, as a charge prior to that of the first incumbrance, was refused.

In this case the bill was filed by a puisne incumbrancer for a sale of the premises. The defendants, Hurd and others, being prior mortgagees, and the first incumbrancers, were made parties in the Master's office, and proved their claim there, not insisting on being redeemed. The Master by his report settled the priorities between the incumbrancers, finding that Hurd and others are the first, and he taxed them their costs.

By the decree on further directions, the court found due to Hurd and others for principal money, interest and costs, the sum of £159 6s.; and found also the amount due to the plaintiff and another party, subsequent incumbrancers; and directed these amounts to be paid by a certain day, otherwise sale, and that the purchase money be paid into court "and applied to pay the said incumbrances according to their priorities, as in the Master's report of the 2nd day of July last set forth, any of the parties being at liberty to apply as occasion shall require."

The money not having been paid, a portion of the property was sold under the decree, and the proceeds paid into court, the amount not being sufficient to satisfy the claim of the first incumbrancer.

The plaintiff now applied that his costs of suit and of conducting the sale may be paid out of the fund in court as a charge thereon, prior to that of the first incumbrancer; on the ground that the sale was for the benefit of all the incumbrancers, they having by becoming parties to the suit availed themselves of it; and that the first incumbrancers, having waived their right to be redeemed, must be considered as treating the suit and sale to be for their advantage, and he relied in support of it on *White* v. *Peterson*, Jacobs, 402; *Kimbel* v. *Scrafton*, 13 Vesey, 370; *Buyer* v. *M—w*, Moseley, 50; *Wright* v. *Kerby*, 23 Beaven, 456; *Fair* v. *Chesterfield*, 21 Beaven, 456.

The Chancellor.—In examining the above cases, it will be found that when the court has ordered the plaintiff's costs of the suit to be first paid out of the fund in court, it has done so either because the suit has been treated specially for the benefit of all parties who ought thereupon to contribute to the expense of it, or that the plaintiff has by his efforts secured for all, something which was of doubtful recovery, and but for those efforts would not have been obtained, or where the suit has been an ordinary suit for the administration of an estate in which some privileged or secured debt has been proved. In this case however there is nothing special,—nothing to take it out of the ordinary rule, the right of the first incumbrancer to have his lien on the estate first discharged. The plaintiff not choosing to redeem him, files a bill for a sale, and makes him to become a party to the suit in the Master's office and prove his claim there, that the property may be sold free from his charge upon it. He does so; and now it is ordered that, instead of having the money realized from the sale paid in discharge of so much of his debt, it shall *pro tanto* go to pay the plaintiff's costs. The plaintiff instituted the suit at his own risk and for his own purposes, not for the benefit of the other incumbrancers. It is an ordinary suit, in which he was entitled to sale or foreclosure, the prior incumbrancer not objecting. Why then should that prior incumbrancer lose his priority on the fund to any extent for costs or otherwise? I do not see why he should.—*Tipping* v. *Power*, 1 Hare, 405; *Hepworth* v. *Heslop*, 3 Hare, 485; *Wilde* v *Lockhart*, 10 Beav. 320; *Aldridge* v. *Westbrook*, 5 Beav. 188; *Mason* v. *Buff*, 2 M. & C. 448; *Warburton* v. *Wright*, 2 Sim. 543; *Upperton* v. *Harrison*, 7 Sim. 444; *Turnall* v. *Going*, 1 Moll, 528; *Egan* v. *Baldwin*, 1 Moll, 540; Seton on Decrees, 97.

I think, however, the question is concluded by the decree on further directions, which, in the language quoted, directs how the fund is to be distributed.

The plaintiff should have obtained a special direction on the decree as to his costs, if he was entitled to priority in respect of them.—*Barnes* v. *Baister*, 1 Y. & C. 401.

The application is refused with costs, unless both parties consent to an order for payment of money in court to the first incumbrancer.

ENGLISH REPORTS.

Walker v. The Great Western Railway Company.

Principal and agent—Railway Company—Authority of general manager.

The general manager of a railway has authority to pledge the company's credit for medical attendance upon a person injured by an accident on the line.

[Ex. April 18, 1867].

This was an action to recover remuneration for medical attendance. The defendants denied their liability. The case was tried before Pigott, B., at the last Worcester Assizes, and the facts were as follows:—The plaintiff was a surgeon, exercising his profession near the Brettle Lane Station, upon the defendant's line. An accident occurred upon the line near that station, by which one Jones, a servant of the company, was injured. The station-master at Brettle Lane telegraphed to the company's general manager informing him of the accident. He telegraphed back, directing the station-master to secure medical attendance. The plaintiff was accordingly called in by the station-master to attend Jones. Upon this evidence it was objected for the defendants that there was no evidence to charge the defendants, the general manager having no sufficient authority for this purpose. A verdict was found for the defendant for the amount claimed, with leave for the defendants to move to enter a non-suit.

Huddleston, Q. C., now moved accordingly.—A general manager has no authority to pledge the company's credit by employing a surgeon on their behalf. This was held in the case of a station-master in *Cox* v. *The Midland Railway Company*, 3 Ex. 268. And the employment of a general manager is of the same character, though his duties are more extensive.

The Court refused a rule.

Rule refused *

—*Weekly Reporter*

DIGEST.

DIGEST OF ENGLISH LAW REPORTS.

FOR THE MONTHS OF JULY, AUGUST, SEPTEMBER, AND OCTOBER, 1866.

(*Continued from page* 138.)

Husband and Wife.

In an action for necessaries supplied to the defendant's wife while living apart, it is no defence that the wife has been found guilty of adultery in the divorce court, if the defendant also has been found guilty of adultery, and therefore no divorce has been decreed.—*Needham* v. *Bremner*, Law Rep. 1 C. P. 582.

See Executor, 1, 2; Guardian; Power, 3; Separate Estate, 1; Will, 4, 18.

Implied Trust.—*See* Trust.

Income.—*See* Partnership, 2.

Indictment.—*See* Larceny.

Infant.—*See* Guardian; Will, 13.

Injunction.

The owner of land agreed to demise to A. the minerals under it to the west of a certain "fault," supposed to run through the land in the direction indicated on a plan, the land being described as supposed to be eighty-three acres or thereabouts. The owner made a like agreement with B. as to the minerals under the land to the east of the fault, supposed to contain ninety-eight acres or thereabouts. The fault was afterwards found to run so as to leave on the west eight acres only. *Held*, on a bill by B. to restrain A. from working to the east of the fault, that as the court would not, in a suit by B. for specific performance against the owner, have decreed a demise of all the minerals to the east of the fault, he could not be deemed in constructive possession so as to maintain his suit against A.—*Davis* v. *Shepherd*, Law Rep. 1 Ch. 410.

See Carrier, 2; Lease, 2; Light; Nuisance; Patent, 1; Trust.

Insurance.

1. The defendant assigned machinery to secure advances by the plaintiff. The deed contained a covenant to insure, but no provision for the application of the policy moneys, in case of fire, in liquidation of the debt. The machinery was burnt, and the defendants became bankrupts. *Held*, that the plaintiff had no claim to the benefit of the policy as against the defendants.—*Lees* v. *Whiteley*, Law Rep. 2 Eq. 143.

2. Under an insurance policy on goods from L. to M., "including all risk to and from the ship," the policy to endure till the goods should be safely landed at M., there is no implied warranty of seaworthiness of lighters, not belonging to the ship, and used for landing the goods at M.—*Lane* v. *Nixon*, Law Rep. 1 C. P. 412.

3. A ship was chartered for a voyage, at a freight payable on arrival at the port of discharge. The owners insured the freight by a policy containing the usual suing and laboring clause, and also the following clause, "warranted free from particular average, also from jettison, unless the ship be stranded, sunk or burnt." In the course of the voyage, the vessel put into a port of distress, so damaged by perils of the sea as to be not worth repairing, and she was sold. The cargo having been landed and warehoused, the master procured another vessel, the Caprice, to carry it on for an agreed freight, which the owners paid, receiving from the owners of the cargo the full charter-freight. *Held*, (1) that the owners could recover from the insurers, under the suing and laboring clause, the freight of the Caprice, and the expenses of conveying the cargo to her from the warehouses, although

* Since the above was in type we have received the last number of the Law Reports, 2 Ex. 228, where a fuller report of the argument is given, to which the reader is referred.—Ens. L. J.

there had been no abandonment; and (2) that the application of the suing and laboring clause was not excluded by the warranty against particular average. *Semble*, that evidence would be admissible to prove that by the usage among underwriters, the term "particular average" does not include expenses necessarily incurred in order to save the subject-matter of insurance from a loss for which the insurers would have been liable.—*Kidston* v. *Empire Insurance Co.*, Law Rep. 1 C. P. 535.

4. A ship under insurance was submerged; there was a common peril of destruction imminent over ship and cargo as they lay submerged; the most convenient mode of raising either or both was by raising them together; the cargo would be liable to a general average contribution for the cost of the raising, and the ship-owner would have a lien on the cargo to secure payment of that general average. *Held*, that the cost of raising the ship must be reduced by the amount of the general average contributed by the cargo, in determining whether the ship was a constructive total loss.—*Kemp* v. *Halliday*, Law Rep. 1 Q. B. 520.

See Principal and Agent, 1.

Interest.—*See* Partnership, 2; Vendor and Purchaser, 6.

Interpleader.

A. sued the defendants, to whom he had intrusted a policy for certain purposes and declared in trover, in detinue, and specially on the contract. B., who had pledged the policy with A., then sued the same defendants to recover the policy. *Held*, that an interpleader order, under 23 & 24 Vict. c. 126, § 12, directing proceedings in the first action to be stayed till further order, and also directing that A should be at liberty to defend the second action, indemnifying the defendants, and that B. should give the defendants security for costs, was rightly made.—*Tanner* v. *European Bank*, Law Rep. 1 Ex. 261.

Interrogatories.

1. Interrogatories will be allowed to be administered to a defendant, if they are put *bonâ fide*, though they may tend to criminate.—*Bickford* v. *Darcy*, Law Rep. 1 Ex. 354.

2. In an action of slander, it appeared from affidavits, that the defendant had made imputations against the plaintiff, to the effect that he had committed forgery, but that persons in whose presence they were made refused to give the plaintiff any further particulars: interrogatories were allowed to be put to the defendant as to the precise words used.—*Atkinson* v. *Fosbroke*, Law Rep. 1 Q. B. 628.

3. In a suit relating to real and personal estate, in which, after interrogatories filed, but before answer, the sole plaintiff had died, the court, on the application of the heir and executor of the plaintiff, made an order to revive; and as the time for answering had expired, ordered the defendant to answer the interrogatories within twenty-eight days.—*Earl Beauchamp* v. *Winn*, Law Rep. 2 Eq. 302.

See Commission to Examine Witnesses.

Jurisdiction.

1. In 19 & 20 Vic. c. 108, sec. 24, giving the county court jurisdiction of an action in which the debt consists of a balance not exceeding £50, after an admitted set-off, "an admitted set-off" means one admitted before action brought. — *Walesby* v. *Goulston*, Law Rep. 1 C. P. 567.

2. On the hearing of an information for removing cattle without a license, the justices have no jurisdiction to inquire into the sufficiency of the evidence on which the license was granted.—*Stanhope* v. *Thorsby*, Law Rep. 1 C.P. 423.

Landlord and Tenant.—*See* Lease.

Larceny.

The prisoner was sent by his fellow-workmen to their common employer for the wages due them all. He received the money in one sum wrapped in paper, with the names of the men and the sum due each written inside. *Held*, that he received the money as the men's agent, and not as the employer's servant; and that, in an indictment against him for larceny, the money was wrongfully described as property of the employer. —*The Queen* v. *Barnes*, Law Rep. 1 C. C. R. 45.

Lease.

1. In an action for breach of a covenant for quiet enjoyment in a lease, void for want of authority in the lessor to demise, the lessee can recover as damages the amount of premium paid for the lease, and also the difference between the value of the term professed to have been granted to him by the lease, and that of a shorter term which he obtained from the true owner of the premises. — *Lock* v. *Furze*, Law Rep. 1 C. P. 441.

2. A. sold an estate to B., who covenanted that no building to be erected thereon should be used as a beer-shop. B. erected a building thereon, and sold the estate to C., who sold to D., who let the premises to E., as tenant from year to year, without express notice of the covenant: it did not appear whether the deeds to C. and D. disclosed the covenant. *Held*, that the rule, that a purchaser, who does not inquire

into his vendor's title, is affected with notice of what appears on it, applies to a tenant from year to year, and that E. should be enjoined from using the premises as a beer-shop. *Semble*, that, if D. had told E. that there was no restriction on the premises, the covenant could not have been enforced in equity against E.—*Wilson* v. *Hart*, Law Rep. 1 Ch. 463.

See Injunction; Power, 1.

Legacy.—*See* Power, 2; Vested Interest, 2, 3; Will.

Legatee.—*See* Will.

Legitimacy.—*See* Descent, 1; Legacy, 9.

Libel.

Proceedings held in gaol before a registrar, in bankruptcy, on the examination of a debtor in custody, are judicial, and in a public court; and a fair report of them is protected, though they reflect on a third person.—*Ryalls* v. *Leader*, Law Rep. 1 Ex. 296.

See Interrogatories, 2.

License.—*See* Jurisdiction, 2.

Light.

1. A bill for an injunction to restrain the erection of a building as obstructing the plaintiff's light will be dismissed, unless the plaintiff shows that he will sustain material damage; but it will be dismissed without prejudice to an action at law.—*Robson* v. *Whittingham*, Law Rep. 1 Ch. 442.

2. An injunction will be granted to restrain obstructions of light and air, in town or country, where there is such interference with comfort and carrying on business, that substantial damages would be given at law: and it is no defence that as much light remains as other persons find sufficient for the same purposes, or that the plaintiffs might make larger windows, or that they have put up Venetian blinds, or that their premises are not good for the purpose for which they are used, or that the defendant offers to use glazed tiles; and, in deciding whether sufficient damage is proved to sustain an injunction, the court is not bound by the finding of an appeal court on like facts as it would be bound by a decision on a point of law.—*Dent* v. *Auction Mart Co.*, Law Rep. 2 Eq. 238.

3. If half of the sky area, which has been previously open to a certain window of a town house, used by the plaintiff as a shop, is shut out by the defendant's new building, and the plaintiff is obliged, in consequence, to remove his workmen to another part of the house, he is entitled to relief; and, if a mandatory injunction is not prayed, an inquiry will be directed as to the amount of damage.—*Martin* v. *Headon*, Law Rep. 2 Eq. 425.

Limitations, Statute of.

A letter by a debtor to his creditor, written before the debt was barred by the Statute of Limitations, and saying, "I will try to pay you a little at a time, if you will let me. I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week," *held* (by Bramwell and Channell, B.B., Martin, B., *dissenting*), a sufficient acknowledgment within 9 Geo. IV. c. 14, sec. 1, to take the case out of the statute.—*Lee* v. *Wilmot*, Law Rep. 1 Ex. 364.

See Administration, 2; Contributory, 1; Will, 12.

Marriage.—*See* Descent; Legacy, 9.

Married Woman.—*See* Husband and Wife; Separate Estate.

Marshalling of Assets.

A mortgagee who is made executor and legatee of his mortgagor is not bound to satisfy the mortgage out of the first sufficient sum of personal assets that comes to his hands; for, if he were, he could come against the real estate to the extent to which his legacy remained unsatisfied.—*Binns* v. *Nichols*, Law Rep. 2 Eq. 256.

Master and Servant.

A. hired Indians, the heads of gangs of laborers, to clear his lands of brush-wood, at a job price to be paid their gangs. Through the negligence of the persons employed, sparks a fire on A.'s land set fire to a neighboring house of B. A. interfered with the work, and directed the Indians where to work. *Held*, that A. was a "*Commettant*," and the laborers "*Préposés*," within the meaning of the *Code Civil* of Mauritius; and that A. was liable to B. for the damage caused.—*Sérandat* v. *Säisse*, Law Rep. 1 P. C. 152.

See Corporation, 3; Embezzlement; Negligence, 4.

Mines.—*See* Company, 4; Injunction; Power, 1; Watercourse, 1.

Misrepresentation. — *See* Corporation, 4, 5; Damages, 1; Pleading, 2; Vendor and Purchaser, 3.

Mistake.—*See* Will, 1.

Mortgage.—*See* Insurance, 1; Marshalling of Assets; Production of Documents, 1.

Necessaries.—*See* Husband and Wife.

Negligence.

1. If one would be liable for injury occasioned by a cause of mischief, of whose existence he has knowledge, he will be equally liable, if he is negligently ignorant of its existence.—*Merscy Docks Trustees* v. *Gibbs*, Law Rep. 1 H. L. 93.

2. If, in an action on a bill of lading for loss of goods, a replication has alleged that the collision by which the goods were lost occurred through the "gross negligence" of the defendants, it is not a misdirection to leave it to the jury to say whether the defendants exercised "due care and skill."—*Grill* v. *General Iron Screw Collier Co.*, Law Rep. 1 C. P. 600.

3. A sheriff is liable to an execution debtor for his officer's negligence in not properly lotting at a sale the goods seized under a *fi. fa.*, though the debtor has persuaded the officer not to advertise the sale, has induced him to postpone the sale to a later hour, and has directed him to sell also for a writ lodged with him on that day, under which he could not otherwise have them sold.—*Wright* v. *Child*, Law Rep. 1 Ex. 358.

4. The plaintiff having suffered injury from the negligence of persons in charge of a ship laid up in a public dock, under the care of a ship-keeper, sued the defendant. At the trial it did not appear by whom the ship-keeper was appointed. *Held* (Mellor, J., *dissenting*), that the jury might, in the absence of other evidence, infer from the ship's register, on which the defendant's name appeared as owner, that the persons in charge of the ship were employed by the defendant.—*Hibbs* v. *Ross*, Law Rep. 1 Q. B. 534.

See Corporation, 3; Damages, 2.

Nuisance.

A highway board will be enjoined from allowing any fresh communications to be made with a sewer constructed by their predecessors, which occasions a nuisance to the inhabitants of an adjoining parish, though, from the limited nature of the powers of the board, no order can be made against them which will compel them to close the sewer altogether.—*Attorney-General* v. *Richmond*, Law Rep. 2 Eq. 306.

Parol Evidence.—*See* Will, 1.

Partnership.

1. C. agreed with R. that R. should buy and sell goods on C.'s behalf, the business to be carried on as R. & Co., and R. to receive a salary, and a percentage on profits. R. managed the business, but C. had bought goods for it. Each become bankrupt. *Held*, that the book debts and stock in trade of R. & Co. were joint estate.—*In re Rowland*, Law Rep. 1 Ch. 421.

2. Partnership articles between A. and B. provided that they should carry on business "for the mutual and common benefit of the partners, and risk of profit and loss in equal shares." A.'s capital to be £750, B.'s £1,500; the capital of each to carry interest at £5 per cent., to be allowed yearly, before making up accounts. Sums brought in by either, above those amounts, to bear interest at the same rate, payable before any other interest, and to be withdrawable at three months' notice. The partners were to be at liberty to draw certain sums on account of their shares of profits; the remainder of each partner's share of profits to be added to his capital, and bear interest at £5 per cent., to be paid before division of net profits. On dissolution, after payment of debts, "the remaining capital, stock, moneys and credits belonging to the partnership, shall be divided, or received, or taken by the partners according to their respective shares or interests therein." On dissolution, the capital standing to A.'s credit was not much increased; that of B. greatly so, partly by accumulation of profits, and partly by cash brought in by him. After paying debts, the assets were insufficient to replace the capitals in full. *Held*, that B. should be repaid with interest the additional capital brought in by him in cash, and the residue should be divided between the partners in proportion to their capital.—*Wood* v. *Scholes*, Law Rep. 1 Ch. 369.

Patent.

1. The defendant, in a suit to restrain the infringement of a patent, may dispute its validity, though the plaintiff has obtained a judgment against another person establishing its validity; but, till he has proved its invalidity, he will be restrained from infringing it.—*Bovill* v. *Goodier* (2), Law Rep. 2 Eq. 195.

2. The plaintiff, in a suit to restrain an infringement of a patent, contested on the ground of anticipation by prior user, is not entitled to discovery in answer to a general interrogatory as to the instances of prior user on which he relies.—*Bovill* v. *Smith*, Law Rep. 2 Eq. 459.

3. On the trial of issues in a patent case, the plaintiff may call evidence in reply to rebut a case of prior user set up by the defendant. But, after the defendant's evidence has been summed up, the defendant cannot adduce further evidence in answer to that given by the plaintiff in reply.—*Penn* v. *Jack*, Law Rep. 2 Eq. 314.

4. An objection to the validity of a patent, on the ground that a foreign patent for the same invention has expired, cannot be taken at the hearing of a suit to restrain infringement, unless raised by the answer.—*Bovill* v. *Goodier* (2), Law Rep. 2 Eq. 195.

Pleading.

1. A plea to the further maintenance of an action needs no formal commencement, if it dis-

close on its face matter which arose since the commencement of the action.—*Brooks* v *Jennings*, Law Rep. 1 C. P. 476.

2. To a declaration for false representation, whereby the plaintiff was induced to pay £2,000 and "sustained loss, and was adjudicated bankrupt, and suffered personal annoyance, and was put to trouble and injured in character and credit," the defendant, except as to the claim in respect of the adjudication in bankruptcy, and the remainder of the personal damage alleged, pleaded that, before action, the plaintiff had been adjudicated bankrupt, that the loss sustained was pecuniary, and that the right to sue for it passed to the assignees. *Held*, that the plea was a good answer to the whole declaration, and might so have been pleaded.—*Hodgson* v. *Sidney*, Law Rep. 1 Ex. 313.

See BILLS AND NOTES, 2.

POWER.

1. Under a conveyance to trustees of land, together with the mines thereunder (the land containing both opened and unopened mines), and a power to grant leases for fourteen years without mentioning mines, none of the leases to be made dispunishable of waste, the trustees have no power to grant leases of unopened mines.—*Clegg* v. *Rowland*, Law Rep. 2 Eq. 160.

2. A. gave personal estate to trustees, on on trust for L. for life, and, on her death, for the benefit of the heirs of the body of L., to educate the said heirs, and to pay to the said heirs said estate at their respective ages of twenty-one, in such proportions as L. might by deed or will appoint. *Held*, that the objects of the power were such of the statutory next of kin of L. as were descended from her.

L. by will appointed £100 to a stranger to the power, and the balance of the fund (after payment of legacies to objects of the power), amounting to £260, to pay her debts; and "should any surplus remain," she gave it to E., an object of the power. *Held*, that the £100 was unappointed, and did not pass to E., but that the £260 went to E., free from the charge of debts, which was invalid.—*Jeaffreson's Trusts*, Law Rep. 2 Eq. 276.

3. When the court of probate is satisfied that a *bona fide* question, whether a married woman's will is an execution of a power, is intended to be raised, it will grant limited probate of such a will, to enable the question to be determined in chancery.—*Paglar* v. *Tongue*, Law Rep. 1 P. & D. 158.

See SEPARATE ESTATE, 1; TRUST; WILL, 18.

PRACTICE (AT LAW).

1. The venue of an information filed by the attorney-general to the Prince of Wales, to recover dues payable in Devon to the Prince as Duke of Cornwall, was laid in Middlesex. It appeared that all the witnesses to facts resided in Devon; but that, as the defendant disputed the Prince's right to the dues, the records of the Duchy in London would have to be produced at the trial; on these facts, and on the ground that the Crown could allege an interest and claim a trial at bar, an application by the defendant to change the venue to Devon was refused.—*Attorney-General to the Prince of Wales* v. *Crossman*, Law Rep. 1 Ex. 381.

2. If a defendant has a day's time to plead after an event, and the event happens on Friday, he can plead at any time before the opening of the judgment office on Monday; the rule ordering that service of pleadings, made after 2 P.M. on Saturday, shall be deemed made on Monday, not being intended to affect the rights of parties, but only to relieve the clerks.—*Connelly* v. *Bremner*, Law Rep. 1 C. P. 557.

3. The court will not, on the motion of the defendant, interfere with the discretion of a judge at chambers, who, on a summons to set aside an execution for irregularity, with costs has made the order as prayed, on condition that the defendant bring no action.—*Bartlett* v. *Stinson*, Law Rep. 1 C. P. 483.

See APPEAL; AWARD; INTERPLEADER; INTERROGATORIES.

PRACTICE IN EQUITY.—*See* EQUITY PRACTICE.

PRESCRIPTION.—*See* WATERCOURSE, 1.

PRINCIPAL AND AGENT.

1. The defendant authorized an insurance broker at L. to underwrite policies in his name, not exceeding £100 on any one risk. The broker, without defendant's knowledge, underwrote a policy for the plaintiff for £150. The plaintiff did not know the limitation on the broker's authority; but it is notorious in L. that there is, in nearly all cases, a limit of some sort imposed on brokers which is not disclosed to third persons. In an action on the policy, *held*, that the defendant was not liable even to the extent of £100.—*Baines* v. *Ewing*, Law Rep. 1 Ex. 320.

2. A trader doing business as M. & Co. ordered goods of the plaintiff, and before their delivery executed a composition deed, of which the defendants were inspectors. The plaintiff afterwards wrote to the debtor, informing him that the goods were ready for delivery; and the defendants replied, requesting him to send the goods, and signing for M. & Co. The goods were sent, but not paid for. The deed allowed

the debtor to carry on his business for six months, under control of the inspectors, who had power to put an end to the deed, and who were to receive all the proceeds, pay current expenses, and out of the surplus pay dividends to the creditors, but who had no share in the profits, and no power to manage the business to the exclusion of the debtor. *Held*, that the defendants were not liable as principals, and that the plaintiff must look for payment to the firm of M. & Co., and to the trust in the deed for payment of current expenses.—*Redpath* v. *Whig*, Law Rep. 1 Ex. 335.

See Larceny; Master and Servant.

Production of Documents.

1. The creditor of a debtor who had made a registered deed, not passing any property, but containing a covenant to pay debts by instalments, is entitled to an order for another creditor to produce a mortgage deed which he holds on property of the debtor.—*In re Marks' Trust Deed*, Law Rep. 1 Ch. 429.

2. To an order for production of documents, directors are bound to give all information in their power as to documents in the possession of their company, though not in their own exclusive possession.—*Clinch* v. *Financial Corporation*, Law Rep. 2 Eq. 271.

3. The state of the originals of engineering plans being material in a cause, and the defendant deposing that he had no engineering knowledge, and that an inspection of the plans would be useless to him without the aid of an engineer, the order for their production was extended to the defendant's surveyor.—*Swansea Vale Railway Co.* v. *Budd*, Law Rep. 2 Eq. 274.

Proximate Cause.

On the trial of an action for a reward offered by the defendant "to any person who will give such information as shall lead to the apprehension and conviction of the thieves" who had stolen watches and jewellery from his shop, it appeared that about a week after the theft, R. having brought one of the stolen watches to the plaintiff's shop, the plaintiff gave information, and R. was apprehended the same day; that after two or three days, R., being in custody, told where some of the thieves would be found; that there they were apprehended a week afterwards; that they were subsequently convicted of the theft, and that R. was convicted as receiver. *Held* (by Mellor and Shee, JJ.; Blackburn, J., *doubting*), that the judge had properly left the evidence to the jury, pointing out the remoteness of the information; and that a verdict for the plaintiff ought not to be set aside.—*Turner* v. *Walker*, Law Rep. 1 Q. B. 641.

Quo Warranto.

A person is disqualified from being relator of a *quo warranto* against one who has been elected to an office on the ground that, the voting papers being blank, the election was void, if said person has himself voted with a blank voting paper at the election in question, and also at previous elections, and has been himself previously so elected.—*The Queen* v. *Lofthouse*, Law Rep. 1 Q. B. 433.

Railway.—*See* Bills and Notes, 2; Carrier; Contract, 3.

Revocation of Will.—*See* Will.

Sale of Goods.

If, after delivery, but while the purchaser is in default, the vendor takes the property from the purchaser's possession, and resells it, the purchaser may maintain trover, but cannot regard the contract as rescinded, so as to recover back a deposit, or resist paying any balance still due.—*Page* v. *Cowasjee Eduljee*, Law Rep. 1 P. C. 127.

Separate Estate.

1. Property settled to the separate use of a married woman for life, with a power to appoint the reversion by deed or will, which she exercises by will, is not liable after her death to the payment of her debts.

Semble, the separate property of a married woman is not liable after her death to her general engagements.—*Shattock* v. *Shattock*, Law Rep. 2 Eq. 182.

2. A testator seized of trust estate, after reciting that he was or might be seized or entitled to real and personal estate, devised all his said real and personal estate to H. (a *feme sole*), her heirs, executors, administrators and assigns, for her and their own sole and absolute use and benefit. *Held*, that the devise to H. included the trust estate, but that it was not made separate estate; and that on her marriage her husband became trustee.—*Lewis* v. *Mathews*, Law Rep. 2 Eq. 177.

Servant.—*See* Master and Servant.

Service of Process.

The court of chancery has, under general orders, jurisdiction to order service of process abroad.—*Drummond* v. *Drummond*, Law Rep. 2 Eq. 335.

Sheriff.—*See* Escape; Negligence, 3.

Ship.—*See* Negligence; Collision; Freight; Insurance, 2–4.

Slander.—*See* Interrogatories, 2; Libel.

Solicitor.

1. If the partner of a bankrupt trading firm was also one of a firm of solicitors, whom the

trading firm had employed in the conduct of suits pending at the time of bankruptcy, the assignees in bankruptcy are not entitled to a delivery up to them of the papers in the solicitor's possession, subject to their existing lien.—*In re Moss*, Law Rep. 2 Eq. 345.

2. The 23 & 24 Vict. c. 127, § 10, provides, that no one articled to an attorney shall hold any office, or engage in any employment whatever, other than the employment of clerk to such attorney. *Held*, that an articled clerk had not violated this provision by having been steward of a manor in which his family and himself were interested, the duties being performed by a deputy (with whom he divided the fees), and the clerk having thrice only, during two or three years, with his principal's consent, absented himself to hold courts.—*In re Peppercorn*, Law Rep. 1 C. P. 473.

See Vendor and Purchaser, 2.

Specific Performance.—*See* Damages, 3; Injunction; Vendor and Purchaser, 3-5.

Statute of Frauds.—*See* Frauds, Statute of.

Statute of Limitations.—*See* Limitations, Statute of.

Stoppage in Transitu.

On July 12th, W. sold P. eleven skips of cotton twist, then lying at the defendants' station at S., to be delivered for P. at B. station. Three of the skips were delivered on July 22nd, but P., objecting to the weight and quality, declined to take any more. On August 17th, four more were sent to B. station, and an invoice of the eight sent to P., with word that four had been forwarded, and that the other four were at S. station, waiting his orders. P. immediately returned the invoice, and wrote to W. declining to take any more. On September 1st, W. sent an order to S. station, for the defendants to deliver the remaining four skips to P. These were accordingly forwarded to B. station, and taken by P.'s carman to his mill, but were immediately returned by P.'s orders, and the whole eight sent back by him to S. station, to the order of W. They were again returned by W. to B. station; but, P. refusing to have anything to do with them, they remained there till P.'s bankruptcy on October 19th, when W. claimed them. *Held*, on a special case, stated in an action of trover by P.'s assignee against the defendants, in which the court were to draw inferences of fact, that W. had a right of stoppage *in transitu*.—*Bolton* v. *Lancashire and Yorkshire Railway Co.*, Law Rep. 1 C. P. 431.

Support.—*See* Easement.

Surety—*See* Bond.

Survivorship.

The word "survive," in a will, imports that the person who is to survive must be living at the time of the event he is to survive. Therefore, a gift over in default of children, or remoter issue of A., who should survive A., is not void for remoteness.—*Gee* v. *Liddell*, Law Rep. 2 Eq. 341.

See Will, 6.

Taxes.

The exemption in 38 Geo. III., c. 5, § 25, rendered perpetual by 38 Geo. III., c. 60, § 1), from land tax of "any hospital," applies only to institutions existing when the act was made perpetual; and land previously chargeable is not exempted by becoming crown property.—*Colchester* v. *Kewney*, Law Rep. 1 Ex. 368.

Tenant in Tail.—*See* Devise, 3.

Tender.

An offer to pay under protest is a good tender.—*Scott* v. *Uxbridge & Rickmansworth Railway Co.*, Law Rep. 1 C. P. 596.

See Detinue.

Trusts and Trustees.

1. By a post-nuptial settlement, land was conveyed to trustees on trust to pay the rents to W. and his wife during their lives, and, on the death of the survivor, to sell and divide the proceeds amongst all and every the children of W., in such shares and proportions as he should by will appoint. There were seven children living at the date of the settlement, one of whom died before W., who died without executing the power. *Held*, that the property was vested in all the children liable to be divested by the execution of the power, and that the representatives of the deceased child were entitled to his share.—*Lambert* v. *Thwaites*, Law Rep. 2 Eq. 151.

2. An order by the master of the rolls, appointing as trustee, under a will, a person of unexceptionable capacity and character, was discharged on the ground that his appointment would be contrary to the wishes of the testator as deduced from the will, and that he was proposed for and has accepted the office with a view of acting in the interests of some only of the objects of the trust, and not as an independent trustee for the benefit of them all; and the purchase of such proposal and acceptance of the trust may be proved by facts which have occurred since the date of the order.—*In re Tempest*, Law Rep. 1 Ch. 485.

See Separate Estate, 2; Vendor and Purchaser, 2.

Turnpike.

A., a contractor for supplying forage to the army, delivered to B. hay to be carried to a government store, in performance of A.'s contract, by the terms of which the commissary had a right to reject it on its arrival, if of inferior quality. *Held*, that the waggon in which B. conveyed the hay was within 3 Geo. IV. c. 126, § 32, exempting from toll any waggon conveying commissariat stores for the use of the army.—*London & S. W. Railway Co.* v. *Reeves*, Law Rep. 1 C. P. 580.

Vendor and Purchaser.

1. On a sale by the court of real estate vested in trustees, whose receipt was declared to be a good discharge, in order to divide the proceeds among the beneficiaries, the beneficiaries are not bound to covenant for title.—*Cottrell* v. *Cottrell*, Law Rep. 2 Eq. 330.

2. A., one of three trustees, assigned leasehold property held jointly by them to a purchaser, forging the signatures of his co-trustees. A. was a solicitor, and acted for the purchaser. *Held*, that circumstances affected the purchaser with notice of some trust, and also that he had constructive notice through the knowledge of A.; and further, that he had the legal interest in one-third, but no beneficial interest, and a re-conveyance was ordered.—*Boursot* v. *Savage*, Law Rep. 2 Eq. 134.

3. The mere assertion by the vendor that he has a good title, on the faith of which the purchaser relies, is not necessarily such a misrepresentation as precludes the vendor's enforcing the contract.—*Hume* v. *Pocock*, Law Rep. 1 Ch. 379.

4. The plaintiff agreed to sell the defendant all his estate, right and interest in certain lands, the plaintiff to produce a title from B. (the last owner) to himself. The defendant knew that B. was one of four supposed owners, and was anxious to buy his title, in order to get rid of his opposition to a bill in Parliament. *Held*, that the defendant could not show, *aliunde*, that B. had no title, and that specific performance should be decreed.—*Hume* v. *Pocock*, Law Rep. 1 Ch. 379.

5. A woman, entitled in fee to a mortgaged estate, proposed to her nephew that she should live with him, and that he should move to a larger house for the purpose, she contributing a yearly sum towards the housekeeping. The nephew agreed, if she would settle the estate, limiting it to him after her death. She agreed, and a settlement was accordingly made, by which the nephew covenanted to indemnify her from all liability under the mortgage, except the payment of interest during her life. He moved to a larger house, and they lived together for some time. She afterwards ceased to live with him, and agreed to sell the estate to a purchaser, who filed a bill against aunt and nephew for specific performance. *Held*, that the nephew's covenant and his expenses incurred on the faith of the settlement were severally sufficient to support the settlement as made for value, and not voluntary. *Semble*, that, had the settlement been voluntary, and so void against a purchaser, the nephew would have been a proper party, but could have made out no claim to the purchase-money.—*Townsend* v. *Toker*, Law Rep. 1 Ch. 446.

6. A purchaser of land contracted to pay interest on the purchase-money at four per cent. from the time of taking possession till the day appointed for the payment; after that day at five per cent., if the money should not then be paid; and after six months from that day at eight per cent., with a proviso that this should not give the purchaser the right to delay payment on paying such higher interest. The purchaser took possession, but the purchase was not completed for several years, though the delay was not caused by misconduct or negligence of the vendor. *Held*, that the stipulation for paying higher interest was not a penalty to secure punctual payment, but a separate and distinct contract, which the purchaser was bound to perform.—*Herbert* v. *Salisbury & Yeovil Railway Co.*, Law Rep. 2 Eq. 221.

See Contract, 1.

Venue, Change of.—*See* Practice, 1.

Vested Interest.

1. The testator devised real estate to his widow for life, and after her death directed the executors to sell, and divide the proceeds equally between his children, the shares of his sons to be vested in them respectively when they attained twenty-one, and the shares of the daughters to be vested interests when they attained twenty-one or were married. During the minorities of the children, their shares were to be invested and applied for their maintenance. If one or more of the children should die, leaving issue, "before the share of each child or children shall become due and payable," the share was to be equally divided "amongst all the issue of such child or children, when such issue shall attain twenty-one," the interest of such child's share to be applied for the maintenance of such issue during minority. A daughter of the testator married and died in the widow's lifetime, leaving an infant child and having assigned her share. *Held*, that the

words "due and payable" did not postpone the vesting of the share till the widow's death; and that the daughter's assignee, and not her child, was entitled.—*Mendham* v. *Williams*, Law Rep. 2 Eq. 396.

2. Testator made a bequest in trust to pay the proceeds to his widow for life, and after her death to divide the capital between A., B., C. and D.; and, in case any of them should die in his lifetime, *and* before they should have received any benefit from the aforesaid bequest, the share of the one so dying should be divided among his children. A. survived the testator, but died in the lifetime of the widow. *Held*, that "and" could not be read "or," and that A.'s share was vested and passed under his will.—*Kirkbride's Trusts*, Law Rep. 2 Eq. 400.

3. Legacy to A., and in case of his death before the same shall be actually paid or payable to him, then to trustees for his children at twenty-one; and in case no child of A. should acquire a vested interest, then over. Testator appointed his widow and A. executors, and both proved; but A. died three months after testator, before the legacy was paid, leaving a child who died an infant. *Held*, that the gift over took effect.—*Whitman* v. *Aitken*, Law Rep. 2 Eq 414.

Voluntary Conveyance.—*See* Vendor and Purchaser, 5.

Warranty.

The following warranty, "June 5, Mr. C. bought of G. G. a horse for £90, warranted sound. G. G." "Warranted sound for one month. G. G." continues in force only one month; and the purchaser must complain of unsoundness within a month of the sale.—*Chapman* v. *Gwyther*, Law Rep. 1 Q. B. 463.

See Frauds, Statute of; Negligence, 3; Stoppage in Transitu.

Watercourse.

1. A mine had, from before the time of living memory, been worked by tin-bounders, according to the custom of Cornwall, which enables any one to mark out a piece of waste ground, the owner of which does not choose to work the mines under it, and work them without the owner's consent, yielding to him a share of the proceeds. The bounders had, from before the time of living memory, used for their works the water of an artificial watercourse arising on the land of another person. The bounders abandoned the mine in 1856, since which the owners had been in possession. *Held*, on a bill by the owners, that the diversion of the watercourse by the owner of the land in which it rose ought to be restrained, though there was no privity of estate between the owners and the bounders; for that it ought to be presumed that a right to use the water had been acquired by arrangement with the owners of the mine, as well as with the bounders.—*Ivimey* v. *Stocker*, Law Rep. 1 Ch. 396.

2. In Scotland, an encroachment by a building on the bed of a running stream may be enjoined at the suit of the opposite riparian proprietor, without his proving that he has sustained or is likely to sustain damage.—*Bickett* v. *Morris*, Law Rep. 1 H. L. Sc. 47.

Will.

1. Two wills being propounded, one dated 1855, and one dated 1858, neither being ambiguous on its face, parol evidence was admitted to prove that the former was really executed in 1865.—*Reffell* v. *Reffell*, Law Rep. 1 P. & D. 139.

2. The witnesses to a will saw the testator writing something on the will before they signed, but did not see what he wrote, and did not know it was a will. When they signed, they did not see the attestation clause, which contained the testator's signature, or any of the writing on the will, as the testator concealed it by holding a piece of paper over it. There was a full attestation clause in the testator's handwriting. *Held*, that, as the witnesses had seen the testator write what the court presumed to be his signature, the attestation was sufficient.—*Smith* v. *Smith*, Law Rep. 1 P. & D. 143.

3. A will contained a reference to executors "hereinafter named," but did not appoint executors. A clause appointing executors was written immediately under the testator's signature. *Held*, that this reference was not such a reference to the clause appointing executors as to incorporate it, or to justify the admission of parol evidence, that it was written before the will was signed.—*Goods of Dallow*, Law Rep. 1 P. & D. 189.

4. A testator gave the income of property to "my wife A.," and the residue to "my step daughter S.," A.'s daughter. A. had a husband living at the time of the marriage ceremony with the testator, as she then knew, and also at the time of the testator's death. *Held*, that the gift to A. was void, but the gift to S. was valid.—*Wilkinson* v. *Joughin*, Law Rep. 2 Eq. 319.

5. Testator gave his residue among his nephews and nieces living at his death, and by a codicil gave £100 to a grandnephew (his executor), whom he called his nephew. By a second codicil, he declared that the £100 was given him in addition to the share of residue given him by the will, and that he should first receive the £100, and then the share of residue.

Held, that all grandnephews and grandnieces living at testator's death were included in the gift.—*Weeds* v. *Bristow*, Law Rep. 2 Eq. 333.

6. Testator gave a fund of realty and personalty, after provision made for debts, testamentary and funeral expenses, and the legacies and annuities before directed, on trust, to divide the same equally between his nephews. He then directed that the property given to his nephews should, on their decease, severally, be divided equally between such of their children as might survive them; and added, "and if either or any of my nephews die before me, or before they shall have actually received what is to go to them under this will, their share shall be divided equally between their children, and, in default of children, equally between my surviving nephews. *Held*, that all nephews who survived the testator took absolutely, and that the limitation over on death, before actually receiving, was inoperative in law, but might be used to explain the testator's intention.—*Martin* v. *Martin*, Law Rep. 2 Eq. 404.

7. One who had bought a leasehold interest, which was assigned to him, and afterwards the reversion in fee, which was conveyed to a trustee for himself, subject to the lease, made the following will: "I appoint my wife my administrator; I give and bequeath to my said wife the whole of my personal property, estate and effects, of every and whatsoever kind they may be." *Held*, that the term passed under the will as a term in gross, and not attendant on the inheritance, but that the reversion did not pass. —*Belaney* v. *Belaney*, Law Rep. 2 Eq. 210.

8. A. bequeathed farming stock which should be in his possession at his death. He became insane, and so remained till he died. Two years before his death, the legatee and his mother, who were named executor and executrix, converted the stock into money, which they deposited in their own and a third person's name at a bank, where it remained till after A.'s death. *Held*, that there had been no ademption, and the specific legatee was entitled.—*Jenkins* v. *Jones*, Law Rep. 2 Eq. 323.

9. Bequest by a single woman, who had gone through the ceremony of marriage with her deceased sister's husband, to her children, "legitimate or otherwise." One child was born before the date of the will, and several after. *Held*, that the child born before the date of the will took the whole bequest, to the exclusion of those born after.—*Howarth* v. *Mills*, Law Rep. 2 Eq. 389.

10. Devise of real estate "to my friends," A., B. and C., on certain trusts. Bequest of stock to A., B. and C., "my executors herein after named," in trust for M. for life, and then to A., B. and C. in equal shares, "for their own respective absolute use and benefit." Further legacy of £200 "to each of my executors," as an additional acknowledgment" of trouble in execution of will. Appointment of A., B. and C. executors. *Held*, that A., who had never acted as executor and trustee, was not entitled to share in the bequest of stock.—*Slaney* v. *Watney* Law Rep. 2 Eq. 418.

11. Testator bequeathed life annuities and legacies of money and stock to persons, and legacies of stock to charities, and directed the residue, after payment of debts, annuities, and the pecuniary legacies thereinbefore given, to be accumulated for a certain term, and then divided among the several persons taking pecuniary legacies (including legacies of stock under his will, or any codicil thereto, in proportion to their original legacies, the legacies of stock being for that purpose estimated at par. He also directed, that, as part of his estate might not be legally applicable to satisfy bequests to charities, the assets should be marshalled, so that such of the legacies thereby bequeathed as were given to charities might be paid exclusively out of funds legally so applicable.

The will contained a clause excluding annuities from participation: this clause was struck through with a pen, and the cancellation attested by a codicil in the margin, in ordinary testamentary form.

Held, that, though the ordinary rule is, in the absence of evidence of contrary intention, to include annuities in "legacies," yet that here was sufficient evidence of intention to exclude annuities, and that the cancellation of the above-mentioned clause did not point to any alteration of intention, or admit the operation of the ordinary rule; and *held*, further, that the marshalling in favor of charities should be extended to the gifts of residue as well as to the original legacies.—*Gaskin* v. *Rogers*, Law Rep. 2 Eq. 284.

12. If the person liable to pay a legacy is the person entitled to receive it, no question can arise under the Statute of Limitation.—*Bird* v. *Nicols*. Law Rep. 2 Eq. 256.

13. A legacy to an infant domiciled abroad may be paid when the infant comes of age by the law of England, or of the domicil, whichever first happens. In the mean time, it must be dealt with in the usual way, as an infant's legacy; though, by the law of the domicil, the infant's guardian is entitled to receive it.—*Hellmann's Will*, Law Rep. 2 Eq. 363.

14. A testator owned two manufactories, one on the west, and another (worth half as much) on the east side of H. street, which had been for the thirty years previous to his death jointly occupied and used by his tenants at a single rent for the same manufacture, but which, with certain alterations, could be used separately. By will he devised all his real estate to trustees for sale, and by codicil devised his "messuages, manufactory, &c., on the west side of H. street, in the occupation of R. and A. and others, together with all rights and appurtenances to them belonging," to A. and W. R. and A. then occupied both manufactories. *Held*, that the manufactory on the east side did not pass under the devise.—*Smith* v. *Ridgway*, Law Rep. 1 Ex. 331.

15. A will made before the Wills Act was to this effect: "As touching my worldly estate, I give and bequeath to my wife, who I likewise make sole executrix, all my lands and tenements, by her freely to be possessed and enjoyed, together with all my houses and household goods, deeds and moveable effects; all my children to be educated and settled in business according to my wife's discretion." *Held*, that the wife took the fee of the real estate.—*Lloyd* v. *Jackson*, Law Rep. 1 Q. B. 571.

16. A testator devised real estate "to A., and after his death to his sons in tail; and in the event of his or their death without sons, then I leave the said estates to B., and, after his death, to his sons, beginning with the elder." On the prayer of the guardians of the two infant sons of A., asking directions concerning the application of the rents, *held*, that the two sons took estates in tail male in remainder. *Quære*, whether they took as joint tenants for life, with several limitations in tail, or as tenants in common.—*De Windt* v. *De Windt*, L. Rep. 1 H. L. 87.

17. Testatrix, being joint heiress with her two sisters of certain tithes, gave to her sisters her third part, to be equally divided between them, and to be held by and subject to the same conditions by which they held the other two parts. At the date of the will, both sisters were married, and the shares of the tithes of each had been put into their marriage settlements. *Held*, that the sisters were entitled to a moiety of the third on the trusts declared by their respective marriage settlements of their original shares.—*Ord* v. *Ord*, Law Rep. 2 Eq. 393.

18. A will made by a woman previous to her second marriage, under a power contained in a settlement made in contemplation of her first marriage, may be revoked by another will during her second marriage, though no power of revocation was reserved by the settlement, and no settlement was made on the second marriage.—*Hawksley* v. *Barrow*, Law Rep. 1 P. & D. 147.

19. A clause in a will, excluding representatives of legatees who might die before the period of distribution, was struck through with a pen, and the cancellation attested by a codicil in the margin, in ordinary testamentary form. *Held*, that the representatives of a legatee, who had attested the cancellation, and had died before the period of distribution, were excluded, under 1 Vict. c. 26, § 15.—*Gaskin* v. *Rogers*, Law Rep. 2 Eq. 284.

See Administration; Executor; Power, 2, 3; Separate Estate, 2; Survivorship; Vested Interest.

Witness.

Opposite the seal of a company, attached to a bill of sale, were the names of two of the directors, purporting to sign as such. The secretary gave evidence that "it was usual to affix the seal in the presence of the board, and for two directors to attest it." *Held*, that the directors were not "attesting witnesses," within the 17 & 18 Vict. c. 36, and that, therefore, their residences and description need not be stated in the affidavit accompanying the bill of sale.—*Shears* v. *Jacob*, Law Rep. 1 C. P. 513.

See Com. to Examine Witnesses; Will, 2, 19.

Words, Construction of.

"*And.*"—See Vested Interest, 2.

"*Due and payable.*"—See Vested Interest, 1.

"*Estate.*"—See Will, 7, 15.

"*Heirs of the body.*"—See Power, 2.

"*Nephew.*"—See Will, 5.

"*Particular average.*"—See Insurance, 3.

"*Step-daughter.*"—See Will, 4.

"*Survive.*"—See Survivorship, 1.

"*Wife.*"—See Will, 4.

GENERAL CORRESPONDENCE.

Evidence of wife against husband.

To the Editors of the Law Journal.

Gentlemen,—There have been some conflicting decisions by the judges of the Superior Courts at Nisi Prius, respecting the *competency* of a wife to give evidence against her husband. Referring you to the 5th section of chapter 32 of 22 Victoria, Con. Stat. U. C., page 402, I request you to mark the wording. It enacts that "This act shall not render *competent*, or *authorise* or *permit* any party to any suit, &c., or the husband or *wife* of such party, to be called as a witness on behalf of *such party*;

but *such party* may, in any civil proceeding, be called and examined as a witness in any suit or action at the instance of the *opposite party: Provided* always, that the *wife* of the party to any suit or proceeding named in the record, shall not be *liable* to be examined as a witness at the instance of the *opposite party*."

The question is, can a brother, who has supported a wife and her child, who have been inhumanly driven by her husband from his home, when only a few days out of her confinement, call upon the wife to prove the board, lodging, necessaries, &c., furnished to her during a period of two years, in which her husband has deserted her by removing to a foreign country? The late Chief Justice McLean held that she was competent, *if so disposed;* that she was not *liable* to be examined, if she objected. There has been a contrary decision given since then. Pray which decision is right? I have only to remark that the wife *may be* the *only* person able to prove the expulsion from her husband's house, and the amount furnished her. Being married, she cannot bind *herself* (she may bind her husband) for necessaries. She is not named in the record; she cannot be said to be "a person" in whose immediate or individual behalf the action is brought. It is brought in behalf of her brother, to whom she is in no way legally liable. I am, &c.,

Questioner.

[We touched upon this subject in the last number of the *Local Courts Gazette;* but as the views of the learned gentleman who writes are not, we understand, entirely in accordance with views we have expressed, we shall endeavour to return to the subject next month.—Eds. L. J.

REVIEW.

On Parliamentary Government in England; its origin, development, and practical operation. By Alpheus Todd, Librarian of the Legislative Assembly of Canada. In two volumes. Vol. I. London: Longmans, Green & Co., 1867. $4 50.

The Dominion of Canada is, we all hope and most of us think, "equal to the occasion." She possesses eminent statesmen, at whose head, it may not be going out of our way to boast, is one of our cloth. Judges we have had and still have, whose industry, talents and unblemished integrity, are an omen of good for the future. Others we have, who in various ways have, and yet will leave a worthy name on the page of history. But in a country whose existence as a nation can scarcely even yet be said to have commenced, and where life is so active, with so few opportunities for men, even with a taste for letters, to follow the bent of their talent or inclinations, it might naturally be thought that it would be difficult to find a person who could attain to eminence in the study of such a profound subject as that treated of in the volume before us.

Many men might in the position of Mr. Todd as Librarian of the Legislative Assembly of Canada, be as courteous and as attentive to his duties as he is (though even this may be questioned), but few, we venture to say, would improve the occasion with his diligence and devotion, and fewer still could with equal talent give to the world the result of such research and thought as he has displayed.

In the preface, the author gives an explanation of the "attempt by a resident in a distant colony to expound the system of parliamentary government as administered in the mother country." An explanation only useful, we should imagine, for the purpose of disarming that very liberal portion of the British public who think that nothing is good that is not English.

More than twenty-five years ago, prior to the appearance of May's "Usages of Parliament," Mr. Todd published a manual of parliamentary practice for the use of the Legislature, which was received with much favour by the Canadian Parliament, and was formally adopted for the use of members, and the cost of its production defrayed out of the public funds. In the same year, the principle of responsible government was first applied to our colonial constitution.

Being frequently applied to by those engaged in carrying out this new and then untried scheme, as well as by his own addiction to parliamentary studies, he acquired a mass of information which proved of much utility in the settlement of many points arising out of responsible government; this moreover was not of a merely local or temporary character, but capable of general application. This led him eventually to write a treatise on the parliamentary government of Great Britain —which, as he says, whilst trenching as little as possible on ground occupied by former writers, might supply information upon branches of constitutional knowledge hitherto overlooked, and give some account of the growth, development and present functions of the Cabinet Council, and the practical treatment of the questions involved in the relations of the Crown and Parliament.

Our author is eminently conservative (using the word, of course, in its original and not in its political acceptation) in his views on these subjects, claiming that "the great and increasing defect in all parliamentary governments,

whether provincial or imperial, is the weakness of executive authority," and that "any political system which is based upon the monarchical principle, must concede to the chief ruler something more than mere ceremonial functions." An attentive perusal of that part of the work devoted to the royal prerogative, will go far to convince the most skeptical that the sovereign is really more than an ornamental appendage to the state, and that the functions of the Crown have their appropriate sphere. These functions "are the more apt to be unappreciated because their most beneficial operations are those which, whilst strictly constitutional, are hidden from the public eye."

The first volume, which alone has yet been published, is complete in itself, and is divided into five chapters:

Chap. I.—A general introduction.

Chap. II.—Historical introduction, giving a review of the origin and progress of Parliamentary Government.

Chap. III.—The constitutional annals of the administrations of England from 1782 to 1866, with a tabular statement of the Ministries during the same period, their appointment, retirement, &c.

Chap. IV. is devoted to the discussion of the constitutional position, powers, privileges and duties of the sovereign, with a sketch of the character and public conduct of the four Georges, William IV., Queen Victoria and the late Prince Consort.

Chap. V. treats of the Royal Prerogative in connection with Parliament.

It is impossible more than thus to give a faint outline of the subjects treated of in this volume. Let it suffice to say that they are of the most interesting nature, and that a variety of information is [illegible] which can no where else be found collected and arranged in an analytical and methodical shape. References are given to the writings and speeches of the most eminent statesmen, historians, and writers on constitutional law, to establish the various views and propositions laid down by the author.

We take at random some extracts from the volume, to show the style of the writer. In speaking of the constitutional position of the sovereign, he says:—

"We have already seen that, in a system of parliamentary government, as it is administered in England, the personal will of the monarch can only find public expression through official channels, or in the performance of acts of state which have been advised or agreed to by responsible ministers; and that the responsible servants of the crown are entitled to advise the sovereign in every instance wherein the royal authority is to be exercised. In other words, the public authority of the crown in England is exercised only in acts of representation, or through the medium of ministers, who are responsible to Parliament for every public act of their sovereign, as well as for the general policy of the government which they have been called upon to administer. This has been termed the theory of Royal Impersonality. But the impersonality of the crown only extends to direct acts of government. The sovereign retains full discretionary powers for deliberating and determining upon every recommendation which is tendered for the royal sanction by the ministers of the crown; and, as every important act of administration must be submitted for the approval of the crown, the sovereign, in criticising, confirming, or disallowing the same, is enabled to exercise an active and intelligent control over the government of the country.

"In the fulfilment of the functions of royalty, much must always depend upon the capacity and personal character of the reigning monarch. It has been well observed, by a sagacious political writer, that 'a wise and able sovereign can exercise in the councils which he necessarily shares whatever authority belongs to his character, to his judgment, and, in the course of years, to his unequalled experience. A lifelong tenure of office ensuring an uninterupted familiarity with public business, gives a king considerable advantage over even veteran ministers; and the undefinable influence of supreme rank is in itself a substantial basis of power.* But in order to discharge his functions aright, it is indispensable that the sovereign should be ready and willing to labour zealously and unremittingly, in his high vocation; otherwise he will be unable to cope with the multifarious and perplexing details of government, or to exercise that controlling power over state affairs which properly appertains to the crown. On the other hand, a sovereign who, from whatever cause, is indifferent to the exercise of his kingly functions, may neglect the administrative part of his duties, and, if he be served by competent ministers, the commonwealth will suffer no immediate damage. But, in such a case, the legitimate influence of the monarchical element in the constitution is impaired, and is rendered liable to permanent deprivation.† Moreover, while a sovereign may forego the active control of the affairs of state without apparent public loss, provided his ministers are able and patriotic, the moment political power falls into the hands of self-seeking and unscrupulous men, the nation is deprived of the check which a vigilant monarch alone can maintain—a check no less valuable because unseen, but which may suffice, upon an emergency, to save the country from the effects of misgovernment. For the sovereign can always dismiss a ministry, and summon another to his councils, provided he does so, not for mere personal considerations, but for reasons of state policy, which the incoming administration can explain and justify to the satisfaction of Parliament. This branch of the royal prerogative will hereafter engage our attention more fully."

Our author thus concludes his first volume:

"We have now passed under review the principal prerogatives of the British crown, and have endeavoured to point out, in the light of precedent, and with the help of recognized authority

* *Saturday Review*, Nov. 9, 1862. And see some weighty remarks in the same journal, for June 4, 1864, in an article on "Foreign Influence." See also, on the advantages derivable from the experience of a sagacious king: Bagehot, on the English Constitution, in the Fortnightly Review for October 15, 1865, pp. 605-609.

† See Bagehot's paper, above cited, pp. 610-612.

in the interpretation of constitutional questions, the proper functions of Parliament in relation thereto. We have shewn that the exercise of these prerogatives have been entrusted, by the usages of the Constitution, to the responsible ministers of the crown, to be wielded in the king's name and behalf, for the interests of the state; subject always to the royal approval, and to the general sanction and control of Parliament. Parliament itself, we have seen, is one of the councils of the crown, but a council of deliberation and advice, not a council of administration. Into the details of administration a parliamentary assembly is, essentially, unfit to enter; and any attempt to discharge such functions, under the specious pretext of reforming abuses, or of rectifying corrupt influences, would only lead to greater evils, and must inevitably result in the sway of a tyrannical and irresponsible democracy. 'Instead of the function of governing, for which,' says Mill,‡ 'such an assembly is radically unfit, its proper office is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which any one considers questionable, to censure them if found to merit condemnation; and if the men who compose the government abuse their trust, or fulfil it in a manner which conflicts with the deliberate sense of the nation, to expel them from office'—or, rather, compel them to retire, by an unmistakable expression of the will of Parliament. Instead of attempting to decide upon matters of administration by its own vote, the proper duty of a representative assembly is 'to take care that the persons who have to decide them are the proper persons,' 'to see that those persons are honestly and intelligently chosen, and to interfere no further with them; except by unlimited latitude of suggestion and criticism, and by applying or withholding the final seal of national assent.‖"

The second volume will be composed, we are told, of four chapters, as follows:—I. The Cabinet Council; its origin, modern development and present position in the English constitution. II. The several members of the Administration; their relative position and political functions. III. The Administration in Parliament; their conduct in public business, &c. IV. Proceedings in Parliament against Judges for misconduct in office. We can well imagine, judging from the contents of the first volume, how interesting and instructive the second will be, and we look forward to its perusal with pleasure. It will not, however, as we are informed, be published this year, as the announcement at the end of the first volume would seem to indicate.

A glance at the apparently very complete Index, at the end of the first volume, shows a vast store of interesting topics discussed by the learned and pains-taking author. The paper and printing are of the best description, from the celebrated house of Longmans, Green & Co.

We may mention that this work has had a very flattering reception from the press in England. The London *Globe*, the London *Canadian News*, and that most hard-to-please periodical, the *Saturday Review*, all notice the volume most favorably.

To conclude. Coming as it does at this particular juncture, the crisis of Canadian history, when parliamentary government must necessarily become of more importance than it has hitherto been, the information to be derived from this book, and the sober-minded, sound and thoroughly British views held and so well expressed by the author, will be of the greatest service; and we doubt not that it will command a very extensive sale, not only amongst those intimately connected with the machinery of government and legislation, but amongst all who have any desire, as all should have, to understand the theory and practice of that admirable form of government which we have inherited from our forefathers, and which we all hope to perpetuate in this Canada of ours.

APPOINTMENTS TO OFFICE.

NOTARIES PUBLIC.

CYRUS CARROLL, of the village of Wroxeter, Esq., to be a Notary Public for Upper Canada. (Gazetted May, 11, 1867.)

ROBERT MITCHELL, of Guelph, Esq., Attorney-at-Law, (of the firm of McCarry & Mitchell of that place,) to be a Notary Public for Upper Canada. (Gazetted May 11, 1867.)

DAVID WILSON, of Farmersville, Esq., to be a Notary Public for Upper Canada. (Gazetted May 25, 1867.)

CORONERS.

WILLIAM J. ROE, of Bothwell, Esq., M.D., to be an Associate Coroner for the County of Kent. (Gazetted May 25, 1867.)

TO CORRESPONDENTS.

"Questioner"—under "General Correspondence."

How to Arrive at a Verdict.—Colonel Myddelton Biddulph, M.P., and the trustees of the Wem and Bronygarth-road not being able to settle the amount of compensation for land amicably, the matter has been settled by a jury. And it would appear that the 12 gentlemen who composed the conclave were much divided in their notions of the value of the colonel's land, some considering that £75 was sufficient compensation, and others holding the opinion that £450 was not to much. After nearly two hours "deliberation," the knotty point was decided by a stroke of genius on the part of the foreman, who suggested that each should put down on a slip of paper the amount he considered a just satisfaction to the claim, and when they had done so he would add up the twelve sums and the division of the total by twelve should be the amount awarded. This proposal was heralded with delight, every one would be represented in the decision, the idea was carried out, and Colonel Myddelton Biddulph was awarded £165.—From the *Oswestry Advertiser*.

‡ Mill, Rep. Govt. p. 104.

‖ Mill, Rep. Govt. pp. 94, 106. The whole chapter 'On the Proper Functions of Representative Bodies,' is deserving of a careful study.